DA 19-0014

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 255

ERNIE WATTERS, et al., and all others similarly situated,

Plaintiffs and Appellants,

v.

CITY OF BILLINGS,

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 09-43
Honorable Olivia C. Rieger, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

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For Appellee:

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Decided: October 29, 2019

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Plaintiffs, current and retired City of Billings police officers ("Officers"), sued the City of Billings ("City") to recover unpaid wages, including longevity pay and other employment benefits, under § 39-3-206, MCA, of Montana's Wage Protection Act ("MWPA"). The parties dispute the meaning of certain provisions in three successive Collective Bargaining Agreements ("CBAs") between the City and the Montana Public Employees Association-Billings Police (the Officers' "Union"). In a prior appeal, we held the language ambiguous and remanded for the District Court to determine whether the City owes the Officers unpaid longevity and other wages, penalties, costs, and attorney fees. The Thirteenth Judicial District Court granted summary judgment to the City. Finding the longevity issue dispositive, the court did not address the remaining claims. The Officers appeal. We restate the dispositive issues as follows:

1. *Did the District Court properly consider and apply the extrinsic evidence to determine that the City did not owe unpaid longevity to the Officers?*

2. *Did the District Court err in dismissing the Officers' non-longevity claims for unpaid straight-time, overtime, and retirement contributions on annual bonus pay?*

3. *What statute governs the limitations and "look-back" periods for the Officers' claims?*

4. *Are the Officers entitled to penalties, attorney fees, or costs?*

We affirm the District Court's longevity determination and remand for further consideration of the non-longevity claims applying the appropriate limitations and look-back periods. Consequently, we also remand the issue of fees, costs, and penalties for the District Court to consider after resolving the non-longevity claims.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 The case returns to this Court for a second time on appeal. *See Watters v. City of Billings*, 2017 MT 211, 388 Mont. 376, 404 P.3d 379 ("*Watters I*"). We restate the facts applicable to the issues presented.

¶3 The City negotiated with the Union the CBAs at issue that govern the terms of the Officers' employment. The three disputed contracts are those in effect from July 1, 2000–July 1, 2003, July 1, 2003–July 1, 2006, and July 1, 2006–July 1, 2009. In 2009, the Officers sued the City, alleging it had miscalculated and underpaid longevity and other wages under the CBAs in violation of the MWPA, § 39-3-206, MCA. The parties advanced competing interpretations of the CBAs. Specifically, they disputed the meaning of the provisions addressing longevity pay. These provisions state as follows:

> CBA I (effective July 1, 2000–July 1, 2003): Longevity shall be added to each officer's hourly rate based upon the following formula: .45 x .01 x the hourly rate of an officer at the beginning of year 1 x years of service.
>
> CBA II (effective July 1, 2003–July 1, 2006): Beginning July 1, 2003, longevity shall be added to each officer's hourly rate based upon the following formula: 45 x .01 x the hourly rate of an officer from year 1 to 15 years of service. .50 x .01 x the hourly rate of an officer after year 15.
>
> CBA III (effective July 1, 2006–July 1, 2009): Same as CBA II.[1]

¶4 The Officers contended that the longevity provisions were unambiguous, obviating the need to consider extrinsic evidence, and that "years of service" should be measured

[1] The City neglected to update the effective dates in CBA III, but this error is immaterial to the issues presented. In addition, CBAs II and III omit the "years of service" multiplier contained at the end of the formula set forth in CBA I. The parties agreed that the omission was inadvertent and that the City intended this language would carry forward to CBAs II and III.

from the effective date of each CBA. The City insisted that the longevity provisions were ambiguous, requiring extrinsic evidence to prove that the parties' intent at the time of contracting was for "years of service" to include only completed years.

¶5 The District Court held that the longevity provisions were unambiguous and that the City had failed to calculate longevity in accordance with the plain language of the CBAs, "at the beginning of year one." It ordered the City to pay the Officers past due longevity, wages, and benefits; imposed a 110% penalty; and awarded the Officers attorney fees and costs.

¶6 The City appealed. We reversed the District Court's determination, ruling that both parties presented reasonable interpretations of the longevity provisions, "thus creating a legal ambiguity." *Watters I*, ¶ 17. We remanded for consideration of extrinsic evidence of the parties' intent, including the parties' history and practice under the CBAs. *Watters I*, ¶¶ 17, 21. We declined to address additional issues presented in that appeal. *Watters I*, ¶ 1.

¶7 Based upon the extrinsic evidence, the District Court held on remand that "the City of Billings intended that the 'years of service' multiplier would be utilized after completion of the first year of service and was intended to incorporate the multiplier language from 2003–2009. The Union agreed to the calculation, even though the language was inadvertently omitted." Finding this issue dispositive, the court declined to address the Officers' other claims for wages and benefits unrelated to longevity, as well as penalties, costs, and attorney fees, and granted summary judgment to the City.

STANDARDS OF REVIEW

¶8 We review a district court's grant of summary judgment de novo, applying the criteria of M. R. Civ. P. 56. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 17, 338 Mont. 41, 164 P.3d 851. Summary judgment is appropriate where, based on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Mary J. Baker Revocable Trust*, ¶ 17. We review a district court's conclusions of law de novo to determine whether they are correct. *Kuhr v. City of Billings*, 2007 MT 201, ¶ 13, 338 Mont. 402, 168 P.3d 615.

DISCUSSION

¶9 *1. Did the District Court properly consider and apply the extrinsic evidence to determine that the City did not owe unpaid longevity to the Officers?*

¶10 The Officers assert that the City owes them unpaid longevity because the CBAs make longevity payable at the beginning of each contract year. The City maintains it did not miscalculate the Officers' longevity and urges this Court to affirm.

¶11 The construction and interpretation of a contract, including a collective bargaining agreement, are questions of law. *Kuhr*, ¶ 18; *Mary J. Baker Revocable Trust*, ¶ 19. Whether an ambiguity exists in a contract also is a question of law. *Mary J. Baker Revocable Trust*, ¶ 19. An ambiguity exists where the language of the contract as a whole reasonably could be susceptible to two different meanings. *Kuhr*, ¶ 18. If the language is ambiguous, interpretation of the language requires resolving a question of fact regarding

the intent of the parties to the contract. *Kuhr*, ¶ 18. The mutual intent of the parties is to be ascertained from the writing if possible. *Mary J. Baker Revocable Trust*, ¶ 21 (quoting § 28-3-303, MCA). The parties' course of conduct is entitled to great, if not controlling, influence in ascertaining what they understood by its terms. *Ophus v. Fritz*, 2000 MT 251, ¶ 29, 301 Mont. 447, 11 P.3d 1192.

¶12 We held in *Watters I* that the longevity provisions reasonably are susceptible to more than one interpretation and therefore ambiguous. *Watters I*, ¶ 21. We explained that, under the Officers' interpretation, the phrase "at the beginning of year 1" in CBA I means that "longevity is to be *paid* from the beginning of the first year of employment[.]" *Watters I*, ¶ 17. In contrast, the City's interpretation would read this phrase as "part of the complete phrase set between two multiplication signs, 'the hourly rate of an officer at the beginning of year 1,' to mean that the rate of longevity pay is calculated based upon what Officers *earned* at the beginning of the first year of employment." *Watters I*, ¶ 17. We tasked the District Court with discerning the Union's and the City's intent with respect to the "years of service" multiplier after considering the parties' extrinsic evidence. *Watters I*, ¶ 21.

¶13 Before the District Court and on appeal, the Officers argue that the following considerations determine the parties' intent:

1. The express language in the CBAs;
2. Other provisions in the CBAs that separately identify beginning dates for other types of compensation, such as Certification Pay, Pay for Performance, and Cost of Living Adjustments;
3. The contemporaneous CBA the City negotiated with its firefighters, which expressly provides for longevity based on completed years of service; and

4. The 2009–2012 CBA the City negotiated with the Union, which modified the longevity pay formula to measure "*completed* years of service."

¶14 The City responds that this Court already determined that the "express language" of the longevity provisions is ambiguous; that the other CBA provisions the Officers cite involve wage items that do not by their nature require a period of employment before they take effect; that the language of the firefighters' CBA is not determinative, and the Officers did not present evidence to show the context or negotiations surrounding it; and that the parties modified the 2009–2012 CBA in response to this lawsuit.

¶15 The City argues that the parties' course of conduct enjoys controlling influence in ascertaining the intent underlying the CBAs. Here, it contends, the parties' course of conduct has been to calculate longevity based on completed years of service. What is more, based on the testimony of the contracting parties—the Union and the City—it is clear that both intended to measure longevity by completed years of service.[2]

¶16 The City adds that the Officers failed to produce a single witness to support their position that "years of service" includes uncompleted years. In fact, the lead plaintiff, Ernest Watters, conceded this fact in his deposition:

[2] We agree with the City that, because the CBAs are a contract between the City and the Union that negotiated them, the intent of the Union representatives is an appropriate consideration. *See* § 39-31-205, MCA ("Labor organizations . . . are responsible for representing the interest of all employees in the exclusive bargaining unit without discrimination for the purposes of collective bargaining with respect to rates of pay, hours, fringe benefits, and other conditions of employment."); § 39-31-305(1) ("The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively."). *See also The S. S. India Arrow v. Collins*, 116 F.2d 8, 11 (5th Cir. 1940); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 485 (11th Cir. 1985) (both interpreting collective bargaining agreement provisions by explaining intent of employer and employees' union).

> Q: As far as you know, when the police union and the City in their longevity contracts talked about years of service, was the understanding that years of service was a count of completed years? That is, you sign on, and at the end of 12 months, you've got a year?
>
> A: I believe so, yes, sir. That would be longevity.

¶17 The City contends that the extrinsic evidence it presented to the District Court supports its interpretation of the applicable longevity provisions. Specifically, it presented affidavits that established the following:

1. Kevin Iffland, a member of the Union from 1995–2006, served as the contract negotiator for the Union in 1996 and 1997. He became Union Vice President in 1997 and President in 1998. He attended all negotiation sessions on CBA I. Iffland testified that the Officers' longevity calculation was "never how the Union or the City understood the longevity provisions" during the years he negotiated the CBAs and "would make no sense because they would contradict the clear pay matrix numbers."

2. David Cardillo, who has served with the Billings Police Department ("BPD") since 1995, was a Union member from 1995–2006 and Union President from 2003–2006. Cardillo explained that "Union members always understood and intended that 'years of service' in the formula meant *completed* years."

3. Timothy O'Connell, who joined the BPD in 1984, reached the rank of Deputy Chief in 2008. O'Connell stated, "Everyone always understood that years of service meant completed years. When an officer was first hired, his first year was probationary and considered his 'rookie' year. Nobody understood that a probationary or rookie officer got any longevity because they had not completed a year's service."

4. Kon Kunneman, who served as Union Shop Seward for the Detective Division from 2003–2011 and as Union secretary from 2003–2006, testified that "years of service" was always considered completed years and that is how he explained to the officers how the longevity formulas in Union contracts worked.

5. Karla Stanton, who has worked for the City for over eighteen years, now serves as Human Resources Director for the City. She was present at the negotiation of the Union contracts and she testified that the City's practice is and has been to calculate longevity based on completed years of service. She

> further testified that, to the best of her knowledge, no police officer ever challenged this interpretation of the "years of service" language prior to this litigation.

¶18 The Officers challenge the District Court's reliance on the City's affidavits. They object that the affidavits constitute inadmissible hearsay and lack the requisite personal knowledge under M. R. Civ. P. 56(e), and they argue that fundamental principles governing contract law forbid the affidavits because they express subjective, rather than objective, intent. The City responds that the affidavits it proffered are based on the affiants' personal knowledge, not hearsay, and fully comply with M. R. Civ. P. 56(e).

¶19 Rule 56(e)(1) states that "[a] supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify to the matters stated." As detailed above, the affiants possess years of experience working for the City and the Union. For example, Iffland testified that he was a member of the Union from 1995–2006, the contract negotiator for the Union in 1996 and 1997, and Vice President and President of the Union in 1997 and 1998, respectively. He further testified that he attended all negotiation sessions between the Union and the City regarding CBA I. Based on this personal experience, he testified to his understanding that "years of service" meant completed years. Similarly, Karla Stanton has worked for the City for over eighteen years, serves as its Human Resources Director, was present at the negotiation of the CBAs, and also testified in her affidavit to her personal experience in these negotiations. Although the affidavits reference a collective understanding among those affected, each affiant had direct involvement in the negotiation or implementation of the CBAs at issue and based his or her statements on the affiant's

own understanding of the terms. We thus conclude that the affidavits comport with Rule 56(e).

¶20 The Officers cite *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, 352 Mont. 401, 219 P.3d 492, and *Mary J. Baker Revocable Trust* to support their argument that the City's affidavits are subjective and "self-serving." But in *Broadwater*, ¶ 20, and *Mary J. Baker Revocable Trust*, ¶ 55, we explained that subjective evidence is inadmissible to determine whether an ambiguity exists in the first place, a question we resolved in *Watters I* and which is now law of the case. *Watters I*, ¶ 17. And in *Mary J. Baker Revocable Trust*, ¶ 48, we cited the Restatement (Second) of Contracts for the proposition that "[a]ny determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." In *Watters I*, we directed the District Court to consider extrinsic evidence, including the parties' course of dealing. The City's affidavits show the understandings of those present at the CBA negotiations and the course of dealing between the City and the Union over a long period of time, both of which are directly relevant to the meaning of the ambiguous CBA terms. Indeed, the parties' course of conduct is entitled to great, if not controlling, influence in ascertaining what they understood by its terms. *Ophus*, ¶ 29.

¶21 The City's extrinsic evidence establishes the historical practice of calculating police officers' longevity based on completed years of service and that both the City and the Union intended to continue paying longevity in this way when they drafted and entered

into CBAs I, II, and III. Karla Stanton testified to this practice in her deposition: "[B]ut how do you have 1 year of experience at Day 1? . . . You have to complete a year before you get longevity[.]" Iffland, Cardillo, O'Connell, and Kunneman, all of whom either served as Union representatives or attended negotiations on one or more of the CBAs at issue, similarly testified that "years of service" means completed years. No witnesses for the Officers testified that the Union or City ever understood "years of service" to include uncompleted years. The Officers' discussion of other non-longevity provisions in the CBAs does not alter this fact.

¶22 As the Officers recognize, even when extrinsic evidence is considered, the plain language of an agreement "remain[s] the most important evidence of intention." *Mary J. Baker Revocable Trust*, ¶ 48 (citing Restatement (Second) of Contracts § 212 cmt. b (Am. Law Inst. 1981)). The City's CBA with its firefighters sheds little light on the longevity provisions in its CBAs with the Officers. It is a separate agreement, drafted by parties and negotiated in a process not detailed in the record. "[W]here the language of [a] contract is doubtful and ambiguous, the conduct of the parties under the contract is one of the best indications of their true intent." *Rumph v. Dale Edwards, Inc.*, 183 Mont. 359, 368, 600 P.2d 163, 168 (1979). We are here concerned with the course of conduct between the City and the Union; the firefighters' CBA does not overcome the testimony from multiple witnesses, including one of the named plaintiffs, that the City historically considered longevity to be based on completed years of service—just like it did for firefighters—and that both the City and the Union intended to continue this practice when they negotiated and drafted CBAs I, II, and III. The disparities in wording between

the two contracts do not resolve the ambiguous language in the CBAs at issue. And the Officers do not explain why the City would treat longevity differently for two similar groups of public safety employees, or that it ever did.

¶23 In sum, the Officers' arguments do not overcome the City's extrinsic evidence of intent and course of conduct, which, as stated above, is entitled to controlling weight. *Ophus*, ¶ 29. Accordingly, we agree with the District Court that the parties to the CBAs, the City and the Union, intended "years of service" to include completed years only, a reasonable construction of the contract language. Thus, the City does not owe any additional longevity pay to the Officers. The District Court correctly granted summary judgment to the City on the Officers' claim for unpaid longevity.

¶24 *2. Did the District Court err in dismissing the Officers' non-longevity claims for unpaid straight-time, overtime, and retirement contributions on annual bonus pay?*

¶25 The District Court dismissed the Officers' claims for unpaid straight-time, overtime, and retirement contributions, stating only that the longevity claim was dispositive.

¶26 Early in this litigation, the Officers retained John Myers, a certified public accountant, to calculate the loss the Officers suffered as a result of the City's alleged failure to pay longevity in accordance with their interpretation of the CBAs. Myers compiled a detailed spreadsheet summarizing the Officers' alleged lost compensation and unpaid wages. He identified and computed numerous unpaid wage items, detailed the amounts owed to each City police officer for each item, and listed the total amounts of unpaid longevity and other wages and benefits owed the Officers as a class.

¶27 Myers made numerous adjustments to the spreadsheet over the course of the litigation. In December 2013, the District Court recessed trial to allow further discovery. Myers testified that the City furnished additional data during the recess that made it possible to more accurately calculate each officer's regular rate of pay. He also testified that the City disclosed that it had not made retirement contributions to cover additional elements of officers' annual pay or bonus pay, including Degree Pay, Certification Performance Pay, Specialty Performance Pay, and Fitness Testing Qualification Pay. Myers subsequently recalculated the Officers' overtime on annual bonus pay (Column 7) and added columns for unpaid straight-time on annual bonus pay (Column 7a) and unpaid retirement contributions on annual bonus pay (Column 7b).

¶28 Based on these adjustments, the Officers claim unpaid annual bonus pay wages and retirement contributions. They argue that both state and federal law require the City to convert annual bonus pay items into an hourly rate and then add it to each officer's hourly rate of pay. This new hourly rate of pay, they contend, forms the basis for calculating overtime and retirement. Because the City failed to incorporate these pay items into the Officers' base hourly rates, it undercalculated and underpaid straight-time, overtime, and employer retirement contributions.

¶29 The City responds that because the longevity issue is dispositive, these non-longevity issues "fall by the wayside." It argues that Myers based his calculations on the Officers' version of the "years of service" multiplier—that is, uncompleted years—and therefore that the "entire spreadsheet . . . is wrong[,]" including Columns 7, 7a, and 7b. The City also contends that Columns 7, 7a, and 7b are outside the pleadings because the

Officers' complaint alleged only a claim for unpaid longevity, not for unpaid straight-time, overtime, or retirement contributions on annual bonus pay, items Myers added after trial commenced. Lastly, it argues that retirement contributions are due, if at all, to the Municipal Police Officers' Retirement System, part of the Montana Public Employee Retirement System ("MPERS").

¶30 The Officers respond that unpaid straight-time, overtime, and retirement contributions on annual bonus pay constitute "wages" as broadly construed under the MWPA. They assert that because their complaint alleged a claim for unpaid "wages," they sufficiently put the City on notice of the non-longevity claims in Columns 7, 7a, and 7b. They add that the City impliedly consented to try these claims.

¶31 The District Court did not expressly find the arguments waived, and we are unpersuaded that the Officers should be precluded from arguing their bonus pay claims.

¶32 "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." M. R. Civ. P. 15(b)(2). Implied consent exists when the other party is "put on notice that [the] issue was being raised[,]" and the issue is "actually tried." *Bates v. Neva*, 2013 MT 246, ¶ 15, 371 Mont. 466, 308 P.3d 114 (citing *Gallatin Trust & Sav. Bank v. Darrah*, 152 Mont. 256, 261–62, 448 P.2d 734, 737 (1968); *Reilly v. Maw*, 146 Mont. 145, 154, 405 P.2d 440, 446 (1965)). "Actual litigation is often referred to in support of a holding that a party was not prejudiced by initially inadequate pleadings." *Bates*, ¶ 17 (quoting *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir. 1972)). Although not separately pleaded, the Officers' non-longevity claims developed during the

discovery process. Based on data the City provided, Myers discovered additional unpaid wage items and incorporated them into his spreadsheet. The Officers raised these issues before trial recommenced, Myers testified about the additional wage items, and his spreadsheet was admitted at trial. Although the City objected to the claims and to the evidence supporting them, it had the opportunity to address these claims on the merits and to present evidence to refute them. Thus, the City had notice of the Officers' claims and was not prejudiced by their consideration.

¶33 Rule 15(b)(2) also provides, "A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. *But failure to amend does not affect the result of the trial of that issue.*" (Emphasis added.) Therefore, the Officers' failure to amend their complaint to specifically allege the non-longevity claims is not fatal under Rule 15(b)(2).

¶34 The Officers' claims arise from the MWPA. Section 39-3-201(6), MCA, defines "wages" under the MWPA 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, and includes bonus, piecework, and all tips and gratuities." Section 39-3-403, MCA, authorizes the Commissioner of Labor and Industry to "adopt and revise administrative rules to carry out the purposes of this part." Pursuant to that authority, the commissioner has established rules governing the "regular rate" of pay, which is "determined by dividing [an employee's] total remuneration for employment in any workweek by the total number of hours actually worked by [the employee] in that workweek." Admin. R. M. 24.16.2512 (2019). Further, "[w]here a bonus payment is considered a part of the regular rate at which

an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation." Admin. R. M. 24.16.2517 (2019). To do this, the bonus amount "is merely added to the other earnings of the employee and the total divided by total hours worked." Admin. R. M. 24.16.2517 (2019). Federal law imposes identical requirements. *See* 29 C.F.R. §§ 778.200, 778.208, 778.209 (2019).

¶35 With respect to overtime, § 39-3-405(1), MCA, provides, "An employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1 ½ times the hourly wage rate at which the employee is employed." Admin. R. M. 24.16.2516 establishes guidelines for calculating overtime.

¶36 The inclusion of bonus pay and overtime in calculating wages and related retirement contributions is not dependent on an officer's years of service. Myers testified that neither longevity nor the Officers' proposed "years of service" multiplier factored into the calculations shown in Columns 7, 7a, and 7b of his spreadsheet. Rather, those calculations informed his determination of longevity payments: "[I]n order to apply [the] formula for computing longevity, it is first necessary to calculate each officer's correct regular hourly rate." Myers did this by dividing the bonus pay items by 2,080 hours and adding those amounts to each officer's hourly rate to recalculate straight-time and overtime.

¶37 The Officers' claims for unpaid straight-time and overtime on annual bonus pay were not dependent on the longevity claim, and the District Court thus erred in dismissing these claims without considering them. The District Court should consider on remand whether the City owes the Officers unpaid straight-time and overtime on annual bonus pay

and, if so, how much. The extent to which any such bonus pay recalculations may affect the City's retirement contributions will not affect amounts the City owes the Officers on their wage claims.

¶38 The Officers acknowledge that any outstanding retirement contributions would be paid to MPERS, not to the Officers. They argue, though, that the City's failure to account for all necessary wage items in computing the Officers' base hourly rate impacted the retirement system in numerous ways and should be considered in determining the Officers' entitlement to fees and penalties.

¶39 The Montana Public Employees' Retirement Board is responsible for administering the municipal police officers' retirement system. Sections 19-2-403, -302, MCA. Pursuant to its authority to administer, operate, and enforce the retirement system, the board has established rules for correcting defined benefit retirement system reporting errors. Section 19-2-403, MCA; Admin. R. M. 2.43.2115 (2019). It seems readily apparent that any miscalculations in the City's retirement contributions will not impact the relief, if any, to which the Officers may be entitled on their wage claims.

¶40 The District Court on remand should determine whether these claims require further consideration in light of the applicable law once it rules on the Officers' non-longevity wage claims.

¶41 *3. What statute governs the limitations and "look-back" periods for the Officers' claims?*

¶42 The Officers contend that § 7-32-4121, MCA, which governs actions to recover salaries by members of a city police department, dictates both the applicable statute of

limitations and the damages limitation—or "look-back"—period for their non-longevity wage claims. The City responds that § 39-3-207, MCA, controls because the Officers brought this suit pursuant to the MWPA. We agree with the City.

¶43 Section 7-32-4121, MCA, provides:

> (1) Actions to recover salaries by members of the police departments of cities must be commenced within 6 months after the cause of action shall have accrued.
> (2) No action for unpaid salary can be maintained by members of the police department of cities except for service actually rendered and, if suspended or placed on the eligible list, then only for the days the member of the police department reports for duty.
> (3) The word "action", as used in this section, is to be construed, whenever necessary to do so, as including a special proceeding of a civil nature.

The Officers filed their complaint under the MWPA. They did not bring a claim for unpaid "salaries" pursuant to § 7-32-4121, MCA, and they are not paid on a salaried basis. Rather, they seek wages specifically based on the more recent MWPA statutes and related administrative rules. In their complaint, the Officers pleaded their claims for unpaid wages and other employment benefits, as well as statutory penalties, attorney fees, and costs, under the MWPA. Therefore, the MWPA controls and its statute of limitations[3] and damages look-back period apply.

[3] Section 39-3-207(1), MCA, provides, "An 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." Section 7-32-4121(1), MCA, provides, "Actions to recover salaries by members of the police departments of cities must be commenced within 6 months after the cause of action shall have accrued." We note that the statute of limitations for filing a claim under both statutory schemes is nearly identical—180 days and 6 months, respectively. Section 7-32-4121, MCA, however, does not specify a period for which an officer may seek unpaid salary.

¶44 "[A] wage claim under § 39-3-207, MCA, accrues when the employer's duty to pay the employee matures and the employer fails to pay the employee." *Jensen v. State*, 2009 MT 246, ¶ 11, 351 Mont. 443, 214 P.3d 1227. Where an employer fails to comport with Montana's wage laws on a monthly basis, "the employee's wage claims accrue on a monthly basis." *Jensen*, ¶ 11. "Failing to pay wages due in past months when the employer has begun paying wages again for each current month, however, does not prevent the clock on the statute of limitations from starting." *Harrell v. Farmers Educ. Coop. Union*, 2013 MT 367, ¶ 28, 373 Mont. 92, 314 P.3d 920. The Officers' claims thus accrue, and the 180-day clock begins to run, on the last date on which the City allegedly failed to pay in accordance with Montana's wage laws.

¶45 Section 39-3-207(2), MCA, states, "Except as provided in subsection (3), an employee may recover wages and penalties for a period of 2 years prior to the date on which the claim is filed if the employee is still employed . . . or prior to . . . the last date of employment." Section 39-3-207(3), MCA, extends the period to three years where "an employer has engaged in repeated violations." Despite this language, the Officers assert that the eight-year limitation for actions on a written contract applies. *See* § 27-2-202(1), MCA. They cite *Craver v. Waste Mgmt. Partners*, 265 Mont. 37, 874 P.2d 1 (1994), *overruled in part on other grounds by In re Estate of Lande*, 1999 MT 179, 295 Mont. 277, 983 P.3d 316, in which we applied the five-year limitations period set forth in § 27-2-202(2), MCA, to Craver's suit for unpaid overtime under the MWPA. *Craver*, 265 Mont. at 40–41, 874 P.2d at 3. That section governs actions involving employment relationships with no written contracts.

¶46 But, as the City points out, we revisited *Craver* in *Harrell*. We explained that, at the time we decided *Craver*, the MWPA's look-back period applied only to penalties and not to unpaid wages. *Harrell*, ¶ 31. In 1999, however, the Legislature amended § 39-3-207, MCA, to include wages in addition to penalties. The amended statute was titled, "Period within which employee may recover *wages and* penalties." *Harrell*, ¶ 31. And the title of the bill introducing the amendment was "ESTABLISHING A TIMEFRAME FOR RECOVERY OF IMPROPERLY PAID WAGES." Mont. 1999 Laws 442. We observed, "It is clear that [§ 39-3-207, MCA] is no longer limited to penalties." *Harrell*, ¶ 31. Therefore, if the claims are filed within the allotted 180-day period, the employee's damages are those that accrued during the two- (or three-, as applicable) year period preceding the filing of the complaint or the last date of employment.

¶47 Accordingly, on remand the District Court is directed to apply the 180-day statute of limitations from § 39-3-207, MCA, to determine whether the Officers timely filed their claims. If the District Court determines that the City has continually failed to pay correct amounts of straight-time and overtime on annual bonus pay to the Officers, the Officers' wage claims have continued to accrue on a monthly basis. Thus, the statute of limitations has not expired, but rather continually renewed. The District Court then must apply the two-year look-back period to the Officers' claims for unpaid straight-time and overtime on annual bonus pay under § 39-3-207(2), MCA. If the Officers prove that the City has engaged in repeated violations, the court alternatively should apply a three-year look-back period under § 39-3-207(3), MCA.

¶48 *4. Are the Officers are entitled to penalties, attorney fees, or costs?*

¶49 The Officers also claimed penalties under the MWPA. Section 39-3-206(1), MCA, provides, "An employer who fails to pay an employee as provided in this part or who violates any other provision of this part is guilty of a misdemeanor. A penalty also must be assessed against and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid." The Department of Labor and Industry has, by administrative rule, established four circumstances that justify the imposition of the 110% penalty, including where "the employer has previously violated similar wage and hour statutes within three years prior to the date of filing of the wage claim[.]" Admin. R. M. 24.16.7556(1)(c) (2019). Absent one of these special circumstances, the penalty will be reduced to 55% of the wages determined to be due. Admin. R. M. 24.16.7566 (2019). "[A]n employer who pays some or all of a contested wage claim prior to a final determination may be relieved in whole or part of paying a penalty." *Reier Broad. Co. v. Reier*, 2000 MT 120, ¶ 32, 299 Mont. 463, 1 P.3d 940 (discussing Admin. R. M. 24.16.7551).

¶50 The issue of penalties will depend upon the District Court's resolution on remand of the non-longevity issues discussed above. If the District Court finds that the City does in fact owe the Officers unpaid wages, it should then determine any appropriate penalty consistent with Montana law and this Opinion.

¶51 Finally, the Officers argue they are entitled to attorney fees and costs under well-settled statutory and common law. "A party who prevails in a wage-claim action shall

be entitled to a reasonable attorney's fee." *Stimac v. State*, 248 Mont. 412, 415, 812 P.2d 1246, 1248 (1991). Section 39-3-214, MCA, provides in pertinent part:

> (1) Whenever 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.
> (2) A judgment for the plaintiff in a proceeding pursuant to this part must include all costs reasonably incurred in connection with the proceeding, including attorney fees.

¶52 We identified eight factors a court should consider when assessing whether to award contingent fees as a reasonable attorney's fee under § 39-3-214, MCA. *Stimac*, 248 Mont. at 417, 812 P.2d at 1249. If the District Court rules in favor of the Officers on remand, it should determine a reasonable attorney fee in accordance with § 39-3-214, MCA, and the *Stimac* factors, limited to the fees incurred on the non-longevity-based wage claims.

CONCLUSION

¶53 The District Court correctly concluded that the City does not owe the Officers unpaid longevity. The court erred, however, in dismissing without consideration the Officers' claims for non-longevity wage items and in declining to address the applicable statute of limitations, look-back period, and potential award of penalties, attorney fees and costs for those claims. We therefore affirm in part, reverse in part, and remand for further proceedings on the non-longevity claims consistent with this Opinion.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ JIM RICE