

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1914-2017
OF TRISTIN J. ZIMMER,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
CROWLEY DESIGN GROUP, INC., a)	
Montana Corporation d/b/a MONTANA)	
CLOTHING COMPANY,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On May 22, 2017, Tristin Zimmer (Zimmer) filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging Crowley Design Group, Inc. d/b/a Montana Clothing Company (Respondent) owed her \$5,946.75 for vacation pay and overtime wages for work performed May 11, 2015 through May 22, 2017.

On July 8, 2017, the Wage and Hour Unit determined the Respondent owed Zimmer \$288.00 for vacation pay and \$4,480.00 for overtime wages. The Wage and Hour Unit also determined the Respondent was subject to the overtime provisions of the federal Fair Labor Standards Act (FLSA). FLSA at 29 USC § 216 provides for liquidated damages in overtime cases in the amount of 100% of the wages owed. The Wage and Hour Unit assessed damages at \$4,480.00 which represented 100% of the overtimes wages determined due to Zimmer. The Wage and Hour Unit also determined a penalty of 15% of \$43.20 was owed by the Respondent for vacation pay if the wages and penalty were paid by August 14, 2017. Otherwise a penalty of 55% or \$158.40 would be owed to Zimmer. The Respondent appealed and denied owing any overtime or vacation wages to Zimmer.

On December 4, 2017, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings for a hearing because mediation attempts were unsuccessful. On December 19, 2017, Hearing Officer Debra Wise held a scheduling conference and deadlines were established. The December 21, 2017 Scheduling Order in part stated that on or before March 9, 2018, the parties must file and exchange lists of exhibits and must exchange copies of all exhibits by this date. The Scheduling Order also informed the parties that the Hearing Officer may refuse to admit exhibits not timely listed and exchanged or to allow testimony from witnesses not timely identified. On or before March 9, 2018, Zimmer submitted a copy of Plaintiff's Exhibit 1 to the Respondent and the Hearing Officer stating this exhibit would be offered as evidence at the hearing. The Respondent submitted no proposed exhibits.

At the March 14, 2018 Final Pre-Hearing Conference, the parties stipulated to the admission of Documents 1 through 155, which were included in the administrative record compiled by the Wage and Hour Unit of the Montana Department of Labor and Industry. On March 14, the parties also stipulated to the following facts:

1. The full name of the claimant is Tristin J. Zimmer. She has been and continues to be a resident of the State of Montana. Her address is 504 Simons Street, Missoula, Montana 59803.
2. The full name of the Respondent is Crowley Design Group, Inc. Its location is 321 West Galena Street, Butte, Montana 59701. Its registered agent and owner is Beverly Crowley. The gross annual sales for the business exceeds \$500,000.00. It is still in operation.
3. Zimmer was hired by the Respondent on May 11, 2015, and her last day of work was approximately May 22, 2017. Zimmer's agreed upon rate of pay was \$17.00 to \$18.00 per hour. Zimmer's overtime compensation rate was one and one-half times her regular hourly rate.

On March 20, 2018, Hearing Officer Debra Wise conducted a hearing in this matter in Helena, Montana. Tristin Zimmer participated in the hearing, with her attorney, Adam Cook. Ben Everett, an attorney, observed the hearing. W. Wayne Harper, attorney at law, appeared on behalf of the Respondent. Beverly Crowley (Crowley), the owner, participated at the hearing. Zimmer and Crowley presented sworn testimony.

During the March 20 hearing, Plaintiff's Exhibit 1 was admitted. The Respondent offered Exhibits R-16 and R-71 at the hearing. Zimmer objected to admitting these exhibits because the Respondent had not listed and exchanged these documents prior to March 20, 2018. The Hearing Officer reserved ruling on the admission of these documents. After reviewing the Scheduling Order and the facts, Exhibits R-16¹ and R-71 are not admitted as evidence.

At the March 20 hearing, the parties agreed to send simultaneous post-hearing briefs by March 30, 2018. Upon receiving the final brief on April 2, 2018, the record was closed and the case was deemed submitted. Based upon the evidence and arguments presented at the hearing and in the post-hearing briefs, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

1. Whether the Respondent owes Zimmer overtime wages for May 11, 2015 through March 6, 2016, and for October 16, 2016 through May 22, 2017, and owes penalties or liquidated damages, as provided by law.
2. Whether the Respondent owes Zimmer vacation pay.
3. Whether attorney fees can be awarded.

III. FINDINGS OF FACT

1. Beverly Crowley is the owner of Crowley Design Group, Inc., a Montana corporation. The business is engaged in interstate commerce. The Respondent is subject to the Fair Labor Standards Act (FLSA).
2. Crowley hired Zimmer as an employee on May 11, 2015. Zimmer worked as a bookkeeper and office manager.
3. The Respondent initially paid Zimmer \$17.00 an hour. Zimmer received a raise to \$18.00 an hour on February 12, 2016.

¹The Hearing Officer notes that at the hearing Zimmer acknowledged she had reported and was properly paid for 13 hours of overtime from November 29 through December 12, 2015, which document R-16 reflected.

4. From May 11, 2015 through March 6, 2016, the Respondent did not have a time-keeping system. Neither Zimmer nor Crowley recorded the hours Zimmer worked during this time period.

5. From May 11, 2015, through March 6, 2016, Zimmer typically worked Monday through Friday, 8:00 a.m. to 6:00 p.m., with an hour off for lunch. During this time frame, Zimmer estimated she worked an average of 2.5 hours of overtime each week. Zimmer understood the Respondent would eventually pay her for the overtime hours she worked or she could use the overtime hours as “comp time.”

6. Zimmer’s signed bi-weekly time sheets do not accurately reflect the hours she worked each week. From May 11, 2015 through May 22, 2017, Zimmer’s signed bi-weekly time sheets indicate she worked 40 hours every week even when she worked more or less than 40 hours.

7. Zimmer acknowledged that for the pay period November 29 through December 12, 2015, she worked 13 hours of overtime. Zimmer reported this overtime and the Respondent properly paid her for 13 hours of overtime for this pay period.

8. On March 7, 2016, the Respondent installed a time-keeping system for Zimmer and other employees to punch in and out on. Crowley was away from the business a majority of the time and she did not know when Zimmer worked.

9. Based on Zimmer’s signed bi-weekly time sheets where she reported she worked only 40 hours a week, the Respondent did not pay Zimmer for any overtime May 11, 2015 through March 6, 2016.

10. Prior to Zimmer’s May 22, 2017 Wage and Hour claim, the Respondent paid Zimmer overtime wages for March 7, 2016 through October 15, 2016. As a result, there is no issue of overtime wages for March 7, 2016, through October 15, 2016. During Zimmer’s employment, she did not ask for overtime wages prior to March 7, 2016.

11. From October 16, 2016 through April 29, 2017, the Respondent paid Zimmer gross wages of \$1,440.00 every two weeks for 80 hours of work.

12. From October 16, 2016 through April 29, 2017, Zimmer worked the following hours:

Week Ending	Hours Reported	Hours Paid	Vacation/Holiday	Unpaid Overtime Hours
10-22-16	45.75	40.00	Zero	5.75
10-29-16	18.00	40.00	22.00 ²	Zero
11-05-16	17.50	40.00	22.50	Zero
11-12-16	47.750	40.00	Zero	7.75
11-19-16	48.50	40.00	Zero	8.50
11-26-16	Zero	40.00	9.50 vacation, 8.00 hours holiday	Zero
12-03-16	35.00	40.00	Zero	Zero
12-10-16	55.50	40.00	Zero	15.50
12-17-16	39.25	40.00	Zero	Zero
12-24-16	43.50	40.00	Zero	3.50
12-31-16	40.00	40.00	8.00 holiday ³	Zero
01-07-17	35.00	40.00	8.00 - holiday	Zero
01-14-17	47.75	40.00	Zero	7.75
01-21-17	44.00	40.00	Zero	4.00
01-28-17	47.25	40.00	Zero	7.75
02-04-17	45.00	40.00	Zero	5.00
02-11-17	45.00	40.00	Zero	5.00
02-18-17	35.00	40.00	Zero	Zero

²Zimmer recorded that she took 24 hours of vacation, but she only needed 22 hours to total 40 hours of work this week.

³Eight hours of holiday pay is not included in the number of hours an employee works. Therefore, Zimmer only worked 40 hours this week and there is no overtime for this week or the week ending November 5, 2016.

02-25-17	50.75	40.00	Zero	10.75
03-04-17	42.75	40.00	Zero	2.75
03-11-17	40.00	40.00	Zero	Zero
03-18-17	36.75	40.00	Zero	Zero
03-25-17	44.00	40.00	Zero	4.00
04-01-17	42.25	40.00	Zero	2.25
04-08-17	38.50	40.00	Zero	Zero
04-15-17	43.75	40.00	Zero	3.75
04-22-17	19.50	40.00	20.50	Zero
04-29-17	Zero	40.00	Zero	Zero

Total Hours of Uncompensated Overtime 94.00

13. Including vacation pay, Zimmer did not work 40 hours during the weeks ending November 26, December 3 and 17, 2016, February 18, March 18, and April 8 and 29, 2017.

14. In February 2017, Zimmer informed Crowley that her overtime hours were beginning to add up again. The time-keeping system verified Zimmer worked overtime hours.

15. Crowley did not understand why Zimmer was working overtime hours during the Respondent's slow season. Crowley told Zimmer she was not authorized to work overtime and asked Zimmer to account for the work she did that required her to work overtime. Crowley did not work with Zimmer to personally observe what Zimmer did when she worked.

16. Crowley concluded Zimmer entered her time manually on the time system two-thirds of the time. Crowley did not submit any documentary evidence to establish when Zimmer may have manually entered her time or that any time Zimmer entered manually was incorrect.

17. In April 2017, Zimmer told Crowley about some health issues and was concerned about not having enough vacation to cover time off she needed for her medical issues.

18. In a mid-May email, Zimmer explained to Crowley that in addition to her regular duties, she had been working on installing the Respondent's new software since November. Zimmer found the new software program difficult and very detailed. As a result of the new software installation, Zimmer worked overtime.

19. As a result, at Zimmer and Crowley's May 13, 2017 meeting, Zimmer found discrepancies in her time sheets and fixed them. During the May 13 meeting, they discussed not only discrepancies in Zimmer's time sheets, but also discussed Zimmer's job duties, why it took longer for Zimmer to complete some jobs, and talked about Zimmer's medical issues.

20. As of May 16, 2017, Crowley and Zimmer were still discussing discrepancies in Zimmer's time records. Crowley also asked Zimmer if the Respondent could count the last two weeks, April 17 to April 30, as vacation pay if Zimmer agreed the Respondent owed her 44.25 hours of overtime pay. Zimmer did not agree to this and filed a wage complaint on May 22, 2017. Zimmer did not believe that she and Crowley could resolve the pay issue by themselves.

21. Zimmer's employment did not end until after she filed her Wage and Hour complaint.

22. Zimmer's overtime rate for May 11, 2015, through February 13, 2016 was \$25.50. From February 14, 2016, through May 22, 2017, Zimmer's overtime rate was \$27.00 an hour.

23. The Respondent does not have a written vacation policy. Crowley told Zimmer she received two weeks of vacation each year. Zimmer did not ask for or take any vacation the first year of her employment. After Zimmer's anniversary date, May 11, 2016, she requested vacation time and received it. Crowley acknowledged Zimmer earned her first 80 hours of vacation on May 11, 2016, and would accrue an additional 80 hours on her next anniversary date on May 11, 2017.

24. The Respondent does not have a personal leave policy and Crowley did not talk to Zimmer about a personal leave policy during her employment.

25. Zimmer used 80 hours of vacation she accrued on May 11, 2016 as follows:

June 6 through 8, 2016	24 hours
October 24 through 28	22 hours
October 31 through November 2	22.5 hours
November 22	8.0 hours
November 23	1.5 hours
As of November 23, 2016	<hr/> 78 hours used

26. Even though Zimmer did not work after April 21, the Respondent paid her for 40 hours the week ending April 29. As of May 13, 2017, Zimmer and Crowley were still talking about whether Crowley could consider the 40 hours paid to Zimmer the week ending April 29 as vacation pay.

27. On June 6, Crowley confirmed that Zimmer was no longer an employee because she considered Zimmer to have quit after May 13, 2017.

28. Zimmer was still an employee on her anniversary date of May 11, 2017. Zimmer accrued 80 hours of vacation pay on her second anniversary date.

29. During the week ending April 22, 2017, Zimmer reported she had used 24 hours of vacation, but she only needed to use 20.50 hours because she had worked 19.50 hours this week. As of May 22, 2017, Zimmer had used 20.50 hours of vacation that accrued on May 11, 2017. Since she had two left from 2016, these two hours are attributed to the week ending November 26, 2016. For the week of November 26, 2016, Zimmer used 11.50 hours, instead of 9.5 hours of vacation. The Respondent paid her for 40 hours of work the week ending April 29, but Zimmer did not work any hours this week. Since the Respondent does not have a personal leave policy, the 40 hours the Respondent paid Zimmer is attributed to Zimmer's vacation. As of May 22, 2017, Zimmer was entitled to receive 19.50 hours of vacation pay she had accrued and not used since her May 11, 2017 anniversary date.

30. Zimmer is due \$351.00 (19.5 x \$18.00) in vacation pay she had earned, but was not paid when her employment ended.

V. DISCUSSION⁴

A. Overtime Pay Legal Principles

Zimmer claims overtime under the Fair Labor Standards Act (FLSA). 29 USC § 207. The Department of Labor and Industry, State of Montana has jurisdiction in this wage claim. See *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978). Montana law allows employees owed wages, including wages due under FLSA, to file a claim with the Montana Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-201; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232. An employee seeking unpaid wages has the initial burden of proving work 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. 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 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.

Under the FLSA, no employer shall employ any of its covered employees for a work week longer than 40 hours unless that employee receives as compensation for his employment at one and a half times the regular rate for all overtime hours. 20 U.S.C. § 207(a). As defined in 29 U.S.C. § 203(g), “‘employ’ includes to suffer or permit to work.” “[T] words ‘suffer’ and ‘permit’ as used in the statute mean ‘with

⁴Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

the knowledge of the employer.” *Fox v. Summit King Mines*, 143 F.2d 926 (9th Cir. 1944).

[A]n employer who knows or should have known that an employee is or was working overtime must comply with the provision of § 207. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation. However, where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer’s failure to pay for the overtime hours is not a violation of § 207.

Forrester v. Roth’s I.G.A. Foodliner, Inc., 646 F.2d 413, 414-415 (9th Cir. Or. 1981).

1. *Zimmer is not entitled to overtime compensation for the time period May 11, 2015 through March 6, 2016*

For the period May 11, 2015 through March 6, 2016, both parties acknowledged that neither party recorded the actual times Zimmer worked. The Hearing Officer recognizes that the Montana Supreme Court provides guidance in situations where neither party maintains 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 employee. The court stated:

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 solutions in such situations, however, is not to penalize the employee for his inability to accurately prove his hours by denying his claim in its entirety.

Arlington, 378 Mont. 324, 331 P.2d 1222, 1229.

An employer must have an opportunity to comply with the FLSA provisions. This does not mean an employer can escape responsibility by negligently maintaining records required under FLSA, or by deliberately turning its back on a situation but where acts of the employee prevent an employer from acquiring

knowledge of alleged uncompensated overtime, the employer did not permit the employee to work in violation of the law.

Forrester, 646 F.2d at 415.

The evidence establishes that from May 11, 2015 through March 6, 2016, Crowley had no knowledge Zimmer worked more than 40 hours a week. Zimmer reported on her bi-weekly time sheets she worked 40 hours a week and she did not ask for overtime wages when the Respondent installed the time-keeping system. Additionally, Zimmer did not ask Crowley to include the overtime hours she worked prior to March 7, 2016, when Crowley agreed to pay Zimmer overtime wages for March 7 through October 16, 2016. Since Crowley did not consistently work with Zimmer, the Respondent had no constructive or actual knowledge that Zimmer worked more than 40 hours from May 11, 2015 through March 6, 2016. Crowley did not know or have constructive knowledge that Zimmer worked more than 40 hours a week. Therefore, Zimmer is not entitled to overtime wages for May 11, 2015 through March 6, 2016.

2. Zimmer is entitled to receive overtime compensation October 16, 2016 through May 22, 2017

After the Respondent installed a time-keeping system on March 6, 2016, Crowley knew or should have known the number of hours Zimmer worked each week. Crowley knew Zimmer's signed bi-weekly time sheets were inaccurate when she paid Zimmer the uncompensated overtime hours she had worked March 7 through October 16, 2016. After this overtime payment was made, Zimmer informed Crowley in February 2017 that she was again accumulating overtime hours for which she had not been paid. Even though Zimmer continued reporting on her bi-weekly time sheets she only worked 40 hours a week, the time-keeping system reflected that she worked more than 40 hours a week.

From October 16, 2016 through April 22, 2017, Zimmer punched in and out on the Respondent's time-keeping system. When Zimmer informed Crowley in February 2017 that she was again accumulating overtime, Crowley questioned why Zimmer was working overtime because November through February is the Respondent's slow season. Crowley was not at the business to monitor Zimmer's work and questioned whether the time-keeping records were accurate. Crowley asked Zimmer to document work she performed during the slow season that resulted in Zimmer working more than 40 hours a week. Even though Zimmer ultimately

provided Crowley with an accounting of work she did during these times, Crowley did not pay Zimmer for overtime hours she accrued during this time.

Crowley asserted Zimmer modified her time on the time-keeping system by manually clocking in and out. The evidence does not establish when, if at all, Zimmer modified her time or that she was not working during times the time-keeping system indicated she was working. The evidence establishes the time-keeping system's record that reflected Zimmer's clock in and out times was the most reliable evidence in this case. Therefore, the evidence does not establish that Zimmer manipulated the time-keeping system to reflect hours she did not work for the Respondent.

Zimmer produced sufficient evidence through her sworn testimony, as well as the documentary evidence, to meet her burden that she performed work for the Respondent during the period of October 16, 2016 through April 22, 2017, for which she has not been compensated. The Respondent failed to meet its burden by failing to produce any evidence showing the precise amount of work Zimmer performed during the period of her wage claim or evidence to negate the reasonableness of the inference drawn from Zimmer's evidence. *Id.* quoting *Anderson*, 328 U.S. 680, 687. Therefore, Zimmer has shown she is owed additional wages for work performed October 16, 2016 through April 22, 2017. Based on Finding of Fact 12, Crowley owes Zimmer 94 hours of overtime, or \$2,538.00 (94 x \$27.00).

3. *Liquidated Damages*

The FLSA entitles employees owed wages to liquidated damages when their employers violate the minimum wage and overtime laws.

Any employer who violates the provisions of Section 206 or Section 207 of the title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216.

The employer is liable for liquidated damages unless the employer demonstrates that the employer's act was in good faith and based upon reasonable grounds. See 29 U.S.C. § 260, *Brock v. Shirk*, 833 F.2d 1326 (1987); and *Tacke v. Energy West*, 2010 MT 39, 355 Mont. 243; 227 P.3d 601. It is the duty of management to exercise its control and see that the work is not performed if it does not want it to be

performed. The employer cannot sit back and accept the benefits without compensating for them. 29 CFR § 785.13.

The evidence does not establish that the Respondent acted in good faith. Crowley failed to pay Zimmer overtime compensation even though the Respondent's time-keeping system revealed she worked overtime. After Crowley paid Zimmer overtime wages for March 7 through October 16, Crowley could have monitored Zimmer's time if she was concerned about Zimmer's work and the hours she worked. Crowley also knew or should have known the Respondent's new software program could result in overtime hours. The Respondent owes Zimmer liquidated damages of \$2,538.00.

B. Vacation Pay

The evidence establishes Crowley does not have a written vacation policy to inform employees when vacation is earned. Zimmer earned 80 hours of paid vacation on each of her anniversary dates, May 11, 2016 and 2017. The Montana Supreme Court in *Langager v. Crazy Creek Products, Inc.*, 1998 MT 44, 287 Mont. 445, 954 P.2d 1169, held that once an employee has accrued paid vacation pursuant to the terms of the employment contract, an employer may not then impose conditions subsequent which would, if unmet, effectively divest an employee of that accrued vacation. The conclusion that Zimmer did not accrue paid vacation until May 11, 2016 is supported by the fact Zimmer did not ask or take any vacation until June 2016, or after her first anniversary date of May 11, 2016. The evidence suggests that when Zimmer worked for the Respondent, she understood she did not have any vacation time to use until May 11, 2016.

Based on Findings of Fact 25 and 29, the Respondent has not paid Zimmer for used 20.5 hours of vacation between April 16 and 22, 2017. The Respondent had not paid her for 19.50 hours for vacation wages.

Vacation pay which has been earned and now owing is considered as wages and is collectable in the same manner and under the same statutes as any other kind of wages. Attorney General Opinion No. 56 (Sept. 17, 1949). The Respondent owes Zimmer a total of \$351.00 (Finding of Fact 30).

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. By failing to pay Zimmer for her vacation wages, the Respondent failed to pay her wages when they were due. Therefore, the

Respondent is subject to a penalty. There are no special circumstances in the case that requires the imposition of the maximum penalty of 110% under Admin. R. Mont. 24.16.7556. As a result, the penalty is 55% on the unpaid vacation wages or \$193.05. Admin. R. Mont. 24.16.7551(2); 24.16.7561. The Respondent owes Zimmer a total of \$544.05 (\$351.00 + 193.05) for unpaid vacation wages, in addition to the penalty.

There were some weeks Zimmer did not work 40 hours (even when vacation hours are included) but the Respondent paid her for 40 hours of work. Montana's law under Title 39, Chapter 3 does not address this situation. As a result, the Hearing Officer has no authority to offset the 34.5 hours the Respondent paid Zimmer since October 17, 2016, that she did not work.

C. Attorney Fees

No attorney fees are awarded. Mont. Code Ann. § 39-3-214 states reasonable attorney fees may be awarded if the employee seeks redress in district court to collect wages. This proceeding was not in district court. Therefore, attorney fees cannot be awarded.

V. CONCLUSIONS OF LAW

1. The State of Montana and Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under §§ 39-3-216 and 39-3-407, MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Crowley Design Group, Inc. d/b/a Montana Clothing Company is engaged in interstate commerce and is subject to the Fair Labor Standards Act. 29 U.S.C. § 207(1).

3. Zimmer is not eligible for overtime compensation from May 11, 2015, through March 6, 2016.

4. Between October 17, 2016, and May 22, 2017, Zimmer worked overtime as defined by the Fair Labor Standards Act. The Respondent owes Zimmer unpaid overtime compensation of \$2,538.00.

5. The Respondent's failure to pay overtime compensation was not based on reasonable grounds or good faith. The Respondent owes Zimmer liquidated damages in the amount of \$2,538.00.

6. As of May 22, 2017, when Zimmer's employment ended, she had not been paid for 19.50 hours of accrued vacation time. Crowley owes Zimmer a total of \$351.00 in vacation wages. Crowley also owes a 55% penalty on the unpaid vacation wages in the amount of \$193.05. Admin. R. Mont. 24.16.7566.

7. No attorney fees are awarded.

VI. ORDER

Crowley Design Group, Inc., d/b/a Montana Clothing Company IS HEREBY ORDERED to tender a cashier's check or money order in the amount \$5,620.05, which represents \$2,538.00 in unpaid overtime wages, \$2,538.00 in overtime penalties, and \$351.00 in vacation pay and a penalty of \$193.05 payable to Tristin Zimmer, and delivered to the Employment Relations Division, P.O. Box 201503, Helena, MT 59624-1503, no later than 30 days after the date of mailing 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 25th day of May, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DEBRA L. WISE
DEBRA L. WISE
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 59624-1503

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.