

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1304-2015
OF CAROL L. GERHARDT,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
ROCKY MOUNTAIN DENTAL, P.C.,)	
a Montana corporation, d/b/a ROCKY)	
MOUNTAIN DENTAL CLINIC,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On January 12, 2015, Claimant Carol L. Gerhardt (Gerhardt) filed a claim with the Montana Department of Labor and Industry, contending that Respondent Rocky Mountain Dental Clinic (RMDC) owed her \$2,259.36 in unpaid severance pay and vacation pay. On February 6, 2015, the Department issued a determination holding that RMDC owed Gerhardt \$611.06 which included \$531.36 in unpaid vacation pay and a penalty in the amount of \$79.70. The Department also found that the severance pay issue was not within its jurisdiction because those kinds of payments are not considered wages. On February 20, 2015, RMDC filed an appeal of the determination. On March 9, 2015, the Department transferred the case to the Office of Administrative Hearings for a contested case hearing. Hearing Officer David Scrimm conducted a hearing in the case on June 30, 2015. Gerhardt appeared and represented herself. RMDC appeared and was represented by Michael Uda, attorney at law.

At the beginning of the hearing, the hearing officer denied Gerhardt's Motion for Sanctions seeking RMDC's default for filing its pre-hearing filings four days after the date established by the Scheduling Order. The hearing officer could find no prejudice to Gerhardt caused by the late filing. No surprise exhibits were identified, only one witness was identified - someone who Gerhardt knew was likely to be a witness - and RMDC did not provide any new defenses.

At the hearing, the parties agreed that there were no factual issues in dispute and that the matter could be decided by interpreting the employer's vacation leave policy. Documents 1-35 from the Department's investigative file, Claimant's Exhibits 1 and 2, and Respondent's Exhibit A were admitted into evidence. At hearing, counsel for RMDC raised the topic of whether additional testimony was needed because it seemed to be a case that turned on the interpretation of the facts already in the record. RMDC stipulated to the hours worked and waived its defense based on its "intolerable offenses" policy. Based on those stipulations, the parties agreed that the matter could be decided on the existing evidentiary record. At that point, the hearing was concluded without taking any testimony. Following the hearing, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether RMDC owes wages for work performed and specifically whether it owes vacation pay, as alleged in the complaint filed by Gerhardt, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Gerhardt began her employment with RMDC on March 29, 2013. Her last day of work was September 24, 2014.

2. RMDC has a vacation policy that provides:

After working in the office for twelve consecutive months, a full time employee will be eligible for up to one week vacation, but not to exceed, which is accrued at 2% of hours worked per pay period. After 24 months an employee is eligible for up to two weeks, but not to exceed, which is accrued at 4% of hours worked per pay period. After 5 years, an employee is eligible for up to three weeks, but not to exceed, which is accrued at 6% of hours worked per pay period. Employees will be paid accrued vacation time when terminated, assuming that all the provisions of the Employment Policy have been satisfied.

3. Gerhardt used vacation time in 2014 on June 9, June 10, July 2, and July 3. A total of 32 hours.¹ If Gerhardt only began accruing paid vacation time after her

¹Doc. 29 indicates the employer asserted it paid Gerhardt 40 hours of vacation time before she earned them assuming she was going to continue working there. The memo also states that Amory at RMDC would send in the documentation of the 40 hours that were paid. Only 32 hours were documented. In reading RMDC's Pre-Hearing Memorandum, it contends that sick leave taken is considered the same as vacation time under RMDC's policy. However, there is no evidence in the record to support that contention and it was paid and treated separately on RMDC's pay stubs.

first year of employment (after April 3, 2014), she would have accrued 6.4 hours of paid vacation leave prior to June 9 and 10 resulting in a balance of (-9.6) hours of vacation leave. By July 2 and 3, Gerhardt would have accrued 3.2 hours of paid vacation leave, leaving her with a balance after the July days off of (-22.4) hours (-9.6 + 3.2 - 16). There is no indication in the record that this is how RMDC tracked Gerhardt's vacation pay.

4. If Gerhardt began accruing vacation pay during her first year of employment, she would have accrued 37.53 hours through the pay period ending April 3, 2014 (1876.5 hours x 0.02). During her second year of work, with the pay period beginning April 4, 2014 to her last day of work, Gerhardt would have earned 34.56 hours of paid vacation leave (864 hours worked x 0.04). Gerhardt accrued 72.09 hours of paid vacation time while employed with RMDC. Gerhardt used and was paid for 32.00 hours, leaving a balance of 40.09 hours of paid vacation time.

5. RMDC's pay stubs did not track the amount of vacation hours accrued, only those hours taken.

6. RMDC owes Gerhardt \$962.16 for her earned and unpaid vacation pay and a penalty in the amount of \$529.19 for a total owed of \$1,491.35.

IV. DISCUSSION AND ANALYSIS²

RMDC owes wages and penalties.

Gerhardt did not appeal the determination that found she could collect any severance pay through the filing of a claim for unpaid wages nor did she identify severance pay in her pre-hearing contentions. In any case, severance pay is not wages. *Jovick v. New West Health Services*, 2001 ML 3563, 14 (Mont. Dist. Ct. 2001). Therefore, this decision does not consider that part of Gerhardt's original claim.

Montana law requires that employers pay employees wages within 10 days of when they become due in accordance with the employment agreement. Mont. Code Ann. § 39-3-204. "Vacation pay which has been earned and is due and owing must be considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages." 23 Op. Att'y Gen. 151, 153; *In re the Wage Claim of Sharon Langager*, 1998 MT 44, ¶24, 287 Mont. 445, ¶24, 954 P.2d 1169, ¶24.

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

RMDC argues that under its vacation policy, Gerhardt did not accrue any vacation leave during her first year of employment. However, its policy allows an employee to only take paid vacation after 12 months, but due to less than skillful drafting it does not clearly describe how one accrues the time to take off. Under RMDC's interpretation, an employee would neither accrue any paid vacation time or be able to take any paid vacation time off during the first year of employment and would begin the second year with no accrued vacation time. A full-time employee would then, based on an 80-hour pay period, accrue 1.6 hours of annual leave per pay period. If the employee wanted to take a week of vacation, she would not accrue 40 hours of paid vacation time until the end of the 25th pay period (or 50th week). Assuming they take that time off, they would have 1.6 hours of paid vacation time to start their third year of employment during which they can take two weeks of paid vacation time off. Still, at two percent accrual rate (1.6 hours per pay period or 41.6 for a full year), that same employee would never accrue 80 hours of paid time off that second year of employment. So if RMDC allowed her to take two weeks off with pay, the employer would have to credit the employee's account for time taken off but not earned, not a situation that most employers would want to put themselves in and an obvious misinterpretation of the RMDC vacation policy.

RMDC's vacation policy can make sense if you interpret it the way Gerhardt and this hearing officer do. During the first year of employment, you can accrue up to 41.6 hours of vacation pay but cannot use it during the first year. At the beginning of the second year of employment, you may take up to one week of paid vacation. You also accrue paid vacation time at four percent so that you will have 80 hours accrued by the end of the year. When the end of the second year arrives, you could have taken your one week paid vacation and accrued 80 hours for your third year of employment which under RMDC's vacation policy allows you to take two weeks of paid vacation.³ Under this interpretation, the employer would never be in a deficit situation with regards to an employee's leave balance. The "after twelve months" and the "after 24 months," etc., modifies only the eligibility to take paid vacation not the accrual of the time. To interpret RMDC's vacation policy in any other way leads to absurd results which are not favored.

Accordingly, RMDC owes Gerhardt \$962.16 for unpaid vacation pay.

³This conclusion results because the policy is clear on how many weeks of paid vacation an employee can take in a given year, but assumes the employer would not violate its own policy and allow an employee to take more paid vacation time than they have accrued.

Penalty.

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 Gerhardt for her earned vacation time, RMDC failed to pay her wages when they were due. The respondent is, therefore, subject to penalty. The penalty is 55% on the unpaid wages, or \$529.19. Admin. R. Mont. 24.16.7551(2), Admin R. Mont. 24.16.7566(1).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. RMDC owes Gerhardt \$962.16 in unpaid wages based on her earned and unpaid vacation wages. Mont. Code Ann. § 39-3-204.

3. RMDC owes a penalty in the amount of \$529.19. Admin. R. Mont. 24.16.7566.

VI. ORDER

RMDC IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$1,491.35, representing \$962.16 in unpaid wages and \$529.19 in penalties, payable to the claimant, Carol L. Gerhardt, and delivered to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than August 20, 2015. RMDC may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 20th day of July, 2015.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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 service of the decision. See also Mont. Code Ann. § 2-4-702.

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.