

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1416-2015
OF JULY T. HARDESTY,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	GRANTING SUMMARY
)	JUDGMENT
MRCH-LIVINGSTON, LLC, a Montana)	
limited liability company, d/b/a Montana's)	
Rib & Chop House,)	
)	
Respondent.)	

* * * * *

Respondent, MRCH-Livingston, LLC d/b/a Montana's Rib & Chop House (MRCH), seeks summary judgment in this matter, alleging that the claimant, July T. Hardesty (Hardesty), is not entitled to unpaid vacation benefits under its vacation policy because the benefits were not yet earned.

MRCH requested oral argument on its Motion for Summary Judgment but was not available during the time the hearing officer issued this decision. Hardesty did not submit a response to the motion. The hearing officer finds that summary judgment in favor of the respondent is appropriate. The rationale for this decision follows.

I. FACTS THAT ARE NOT IN DISPUTE

1. MRCH operates a restaurant in Livingston, Montana.
2. Hardesty worked for MRCH from March 7, 2010 through August 3, 2014.
3. Hardesty worked as a regular full-time manager beginning July 18, 2013 until the time he quit.
4. On or about August 3, 2014, Hardesty stopped showing up for work and eventually told MRCH's chief human resources officer that he was quitting when he came into the office to turn in his keys.

5. Prior to his leaving employment, Hardesty was eligible to use 15 days of “vacation to be earned after use.” Hardesty seeks payment of that time as wages.

6. Hardesty acknowledged his receipt of MRCH’s Employee Manual when he was hired. Ex. 2. The Manual included MRCH’s vacation policy which provides:

Montana’s/Wyoming’s Rib Chop House and Rio Sabinas considers vacations to be an important employee benefit. We realize that employees of Montana’s/Wyoming’s Rib & Chop House and Rio Sabinas have worked hard to achieve success for our Company, and all of us need some time away from our job for rest and relaxation. Vacation time with pay is available to all eligible management full-time employees and regular full-time employees after two years of continuous full-time employment. Eligible employees are encouraged to take advantage of this benefit, following the guidelines below.

Vacation time **IS NOT** a delayed compensation program that enable [sic] employee to receive cash compensation in lieu of taking time off from work. Employees only qualify for vacation time after the employee is actually away from work and works the preceding day after the scheduled vacation. Employees shall not be entitled to receive any payment above their regular compensation if they do not actually take the time off away from work.

All vacation time is to be taken in the year it is eligible to be earned after use beginning on the employee’s anniversary date. Once a year of eligible vacation time is to be earned after used but not taken, vacation days no longer accrue until some of the previously accrued days are taken. In other words, if you earn 152 hours in a year, once you have reached that balance, no more hours will go into your bank until you have used some of them. Montana’s/Wyoming’s Rib & Chop House and Rio Sabinas reserves the right to carry over accumulated vacation for special situations at the discretion of the Owner.

Regular full-time employees eligible for vacation to be earned after use have completed two years of continuous full-time service. Any employee that has a break in service due to layoff or termination will be required to re-establish eligibility for vacation as if a new employee.

Vacation pay is at your regular rate of pay. Employees who are tipped and/or paid on time credit will be paid minim [sic] wage or paid time out. All other employees will receive their regular hourly pay rate. All paid time out must be taxed. Vacation time must be taken in half-day or larger increments.

Employees will be granted vacation to be earned after use according to the following schedule:

One year eligibility thru two years eligibility - 5 days
Three years eligibility thru four years eligibility - 10 days
Firth [sic] year eligibility and after - 15 days

Vacation leave may not be used before it is granted (vacation time is earned after use).

Vacations [sic] request [sic] of three or less consecutive days must be submitted to your supervisor one week prior to the first day requesting off. Vacation request [sic] of three or more days must be submitted to your supervisor two weeks prior to the first day requesting off. Vacation requests will be scheduled according to employee seniority.

When an employee leaves the company for good cause with proper notice and who has accumulated vacation days off to take during that year, but has not taken at the time of leaving, at the Owners discretion, the Employer may pay the departing employee for those days at there [sic] current rate of pay.

Vacation is normally taken in one-week increments, but may be taken in minimum increments of four hours. No accumulation of vacation days from one year to the next will be allowed. Vacation must be taken in the fiscal year earned. Vacation not taken during the fiscal year will be forfeited.

7. Hardesty did not use all of the vacation time he had available to him. Whether Hardesty left for good cause or not, payment for any unused vacation time was, under the policy, up to the owner's discretion who did not exercise that discretion in Hardesty's case.

8. Hardesty filed a claim with the Wage & Hour Unit that he was owed \$1,320.00 for 110 hours of accumulated vacation time.

II. DISCUSSION

A. Propriety of Summary Judgment in Administrative Proceedings.

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment are met. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where “the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once a party moving for summary judgment has met the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, P18 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330, ¶16, 170 P.3d 474, ¶ P16).

B. MRCH’s Motion for Summary Judgment should be granted because Hardesty failed to respond.

Hardesty was properly served MRCH’s Motion for Summary Judgment at the address OAH has used in these proceedings. Hardesty had previously acknowledged receiving the Notice of Hearing sent to his post office box in Livingston.

Hardesty did not file a response to the motion and was thus not in compliance with the scheduling order in this matter and therefore subject to sanction. Additionally, M. R. Civ. P. 56 (e) 2 provides:

...

If the opposing party does not so respond, summary judgement should, if appropriate, be entered against that party.

Thus, under the rules governing motions for summary judgment, Hardesty’s failure to respond forms one basis for granting MRCH’s motion.

C. Hardesty is not entitled to be paid for unused vacation time.

Even if Hardesty's failure to respond to MRCH's Motion for Summary Judgment was an insufficient basis to grant the motion, the undisputed facts demonstrate MRCH is entitled to summary judgment as a matter of law.

Montana law requires employers pay employees wages within ten days after the wages become due pursuant to the particular employment agreement. Mont. Code Ann. § 39-3-204. Except for compliance with minimum wage law, the parties can agree to the amount of wages to be paid. "Wages" are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

"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 (1949); *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, 453; 954 P.2d 1169, 1173-1174.

The Montana Supreme Court has consistently looked to the terms of the employment agreement, be it a written policy or governing statute, to determine whether an employee is dues wages for vacation time. In *Langager*, the court looked at other state court holdings regarding vacation pay and found that "an employer is free to set the terms and conditions of employment and compensation and the employee is free to accept or reject those conditions." *Langager*, 1998 MT 445, ¶25, quoting *Rowell v. Jones & Vining, Inc.* (Me. 1987), 524 A.2d 1208, 1211.

In a more recent case involving payment for personal time, which under the employer's policy could be used for vacation, illness, or other personal business, the court held "to the extent that an employer has obligated itself to pay money for earned but unused personal time, there exists an obligation to pay wages under 39-3-201(6)(a)." *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶21-22, 125 P.3d 1121 ¶21-22. In that case, the personnel policy provided that employees would be paid for earned personal time at 95% of their pay rate. *Id.* at ¶22. The court held that because "employers are free to negotiate with employees what benefits will be extended and the value of such benefits," the other 5% did not constitute wages that were part of *McConkey's* agreed compensation. *Id.* at ¶24.

The Montana Supreme Court has also held that the Montana state government did not have to pay out accumulated earned vacation pay to a former employee it discharged for alleged criminal conduct toward a former co-worker. *Stuart v. Department of Social & Rehabilitation Services*, 256 Mont. 231, 235, 846 P.2d 965, 968 (1993). The state refused to pay out the unused vacation pay

because the termination was for reasons that “reflected discredit” on the employee. *Id.* See Mont. Code Ann. § 2-18-617. The court held that, because the Legislature created the right for public employees to earn annual vacation leave credits, it could condition those rights to limit the accumulation of those credits or to divest them altogether. *Id.*

MRCH’s vacation policy emphasizes that “vacation time IS NOT a delayed compensation program that enable employee [sic] to receive cash compensation in lieu of taking time off from work” (emphasis in original). The vacation policy, taken as a whole, makes clear that an employee is only to be paid for vacation time when the employee has earned the time off and used it. The only exception is very similar to the State of Montana’s that was found to be in accord with the wage and hour laws in *Stuart*, *supra*, in that it only allows a cash out of vacation time earned if the employee leaves employment for good cause and provides proper notice. Unlike the state’s vacation policy, pay out under these circumstances is still based on the discretion of the owners of MRCH. Thus, under MRCH’s vacation policy, even if Hardesty left for good cause, and there is no evidence that he did, he was not due any pay for his earned vacation time because MRCH exercised its discretion and did not pay him for the time.

Moreover, Hardesty did not use the vacation time he had earned before he was discharged. While this part of MRCH’s policy is on its face similar to that which was found to be in violation of Montana’s wage and hour laws in *Langager*, it is clear in its terms that an employee only earns vacation time and that in order to be paid for that time the employee has to go on vacation and return. In *Langager*, the court focused on the fact that Crazy Creek’s vacation policy provided for “one week paid vacation per year.” MRCH did not have similar language in its policy. It instead focuses on earning vacation time, stating employees will be “granted vacation to be earned after use,” a strange, but effective way of stating that an employee will only be paid for earned vacation time after they use it. The *Langager* court held that because Crazy Creek’s policy stated that it provides one week paid vacation, requiring employees to return from their vacation before they would be paid for the time earned was an improper attempt to divest *Langager* of wages already earned. In contrast, MRCH clearly set the terms and condition of employment regarding its vacation pay policy. It was not a delayed compensation plan - the employee only got paid for actually using vacation time while still employed, or if, after leaving for good cause with proper notice, the former employee was paid in the owners’ discretion. Thus, under MRCH’s vacation policy, Hardesty was not entitled to be paid for vacation time he had earned because he had not used it during his employment.

III. 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. There is no dispute of material fact in this matter and MRCH is entitled to summary judgment as a matter of law.

3. No wages were due the claimant because he quit his employment and the employer exercised its discretion in deciding not to pay him for the vacation time; and because the claimant also failed to use the vacation time during his employment.

IV. ORDER

MRCH's motion for summary judgment is GRANTED and this matter is dismissed.

DATED this 9th day of November, 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.