



### **III. UNDISPUTED FACTS ESTABLISHED BASED UPON THE PLEADINGS**

1. The Billings Bookstore Cooperative (Cooperative) is a Montana cooperative association operating under the laws of the State of Montana.

2. The Cooperative filed its Statement of Intent to Incorporate a Cooperative Association on January 22, 2016. The Cooperative was formed to do business as “This House of Books,” a cooperative bookstore in Billings, Montana.

3. The Cooperative held its first meeting on April 8, 2016, at which time the Bylaws were approved and the Directors were elected.

4. On April 28, 2016, the Board of Directors presented an offer letter and agreement for Robson for the exempt position of General Manager of the bookstore, which was executed and accepted by Robson.

5. On April 3, 2017, Robson filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit), pursuant to Mont. Code Ann. § 39-3-201, et. seq. Robson alleged to be owed \$4,949.21 in unpaid semi-monthly salary (\$44,000.00 per year) for the period of February 16, 2017 through March 11, 2017, as well as \$1,071.67 for 50.67 hours of paid time off (PTO) at \$21.15 per hour, for a total of \$6,020.88.

6. On April 10, 2017, Robson amended his claim to reflect \$3,115.87 in unpaid wages plus \$1,071.65 in PTO, for a total of \$4,187.54.

7. The Board of Directors of the Cooperative responded on April 28, 2017. The Cooperative did not dispute the unpaid wages and tendered the amount.

8. On July 5, 2017, Renee Crawford, Compliance Specialist for the Wage and Hour Unit, issued a Determination that Robson was owed \$3,171.50 in unpaid salary but no PTO. Because the Cooperative paid the undisputed amount of \$3,171.50 prior to the determination, no penalty was issued.

### **IV. FACTS ESTABLISHED IN THE SUMMARY JUDGMENT ORDER**

1. The Robson Offer Letter and Agreement (Agreement) dated April 28, 2016 provides, “You will receive 20 days of paid time off per year, accumulated monthly. This will be in lieu of vacation or sick days.” See Docs. 19 - 27 (5/24/17 letter from the Cooperative to the Wage and Hour Unit); Docs. 29 - 32 (5/15/17 letter from Robson to the Wage and Hour Unit); Docs. 38 - 51 (Cooperative’s Response to the Wage and Hour Claim); and Docs. 63 - 74 (Robson’s Wage and Hour Claim).

2. Robson's signature on the Agreement is dated April 30, 2016. Doc. 74.
3. Robson's employment ended on or about March 12, 2017. Docs. 39 and 64.
4. Robson was to earn 20 days of PTO per year that was earned on a monthly basis at a rate of 1.66 days (20 days / 12 months = 1.66 days).
5. Robson earned 13.28 hours of PTO each month he worked for the Cooperative (1.66 days x 8 hours = 13.28 hours).
6. Robson earned a total of 146.08 PTO hours from April 30, 2016 through March 11, 2017 (11 months x 13.28 hours = 146.08 hours).
7. Robson's claim is for 50.67 PTO hours during the period of July 1, 2016 through March 11, 2017. Doc. 64.

## **V. FINDINGS OF FACT**

1. Pursuant to the terms of the employment offer letter, Robson was an exempt employee, with an annual salary of \$44,000.00. Both Robson and the Cooperative understood and agreed this compensation was intended to be the "full compensation for all services, regardless of hours worked."
2. Robson understood that he would routinely be required to work more than 40 hours per week and frequently did so.
3. The Cooperative did not implement a time keeping system until it opened the bookstore on October 1, 2016.
4. From July 1, 2016 through September 30, 2016, Robson accumulated 39.84 hours of PTO.
5. From July 1, 2016 through September 30, 2016, Robson did not have a set work schedule. Robson worked approximately 40 hours each week during that period, but he did not always work a traditional Monday through Friday schedule; nor did the Cooperative or any of its Directors ever advise Robson that such a schedule was required while the store was being prepared for opening.
6. The bookstore opened October 1, 2016.

7. From October 1, 2016 through March 11, 2017, Robson accumulated 66.65 hours of PTO for a total of 106.49 hours of PTO. See Docs. 65 - 66.

8. From October 1, 2016 through March 11, 2017, Robson used 56 hours of PTO during that period. See Docs. 65 - 66.

9. Robson did not accumulate PTO for March 2017 because he did not work the entire month.

10. Robson is owed unpaid wages in the amount of \$1,067.86 based upon his accumulated 50.49 hours of PTO (106.49 PTO hours - 56 PTO hours used = 50.49 PTO hours x \$21.15 hourly rate of pay = \$1,067.86).

11. A 55% penalty in the amount of \$587.32 on the unpaid 50.49 PTO hours is appropriate in this case as the hours were not paid by the Cooperative after the filing of Robson's claim and prior to the issuance of the Wage and Hour Unit's determination. See Admin. R. Mont. 24.16.7551.

12. Robson is owed a total of \$1,655.18 (\$1,067.86 unpaid PTO + \$587.32 penalty).

## VI. DISCUSSION<sup>1</sup>

An employee seeking unpaid wages has the initial burden of proving work performed 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. Unused paid-time-off (PTO) is "considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages." See 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.

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; see also, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding the lower court properly concluded the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract). As the Montana Supreme Court has long recognized, it is the

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<sup>1</sup> Statements 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.

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 he or 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.

The Montana Supreme Court provided guidance as to the analysis required in a situation such as this where neither party has maintained 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 employer. The court reasoned:

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 solution in such situations, however, is not to penalize the employee for his inability to accurately prove his hours by denying his claims in their entirety.

*Arlington*, 378 Mont. 324, 331, 343 P.3d 1222, 1229.

Robson is claiming 50.67 hours of PTO, which includes 40 hours of PTO accumulated between July 1, 2016 through September 30, 2016. Robson concedes he took five days off during that period but argues he “made up time” by working other days to ensure he worked approximately 40 hours each week. The Cooperative argues that it understood and believed Robson, as the only employee and the General Manager, would track the hours he worked and any PTO used. The Cooperative further argues that Robson was the only person who could have been able to track his hours prior to the opening of the bookstore and implementation of the time keeping system.

The parties' Agreement does not specifically address how Robson was to use his PTO. It appears he was not required to ask permission to take time off, and he

clearly did not seek permission to “make up time.” The Agreement also does not address how Robson was to track the time he worked or his used PTO.

Given the bookstore did not open until October 1, 2016, it is reasonable that Robson would be free to “make up time” he took off during the week as the General Manager. There is no evidence showing Robson did not work approximately 40 hours per week during the period of July 1, 2016 through September 30, 2016 or was otherwise not entitled to accumulate PTO under the Agreement. While Robson would have been well advised to clarify with the Board how he was to track the hours he worked and any PTO he had taken, his failure to do so is not fatal to his claim for unpaid PTO. The Cooperative has failed to produce evidence sufficient to negate the reasonableness of the inference to be drawn by the evidence offered by Robson showing he is owed wages for 50.67 hours of unpaid PTO. *Id.* quoting *Anderson*, 328 U.S. 680, 687. Therefore, Robson has shown he is owed additional wages for work performed during the period of his wage claim.

Robson contends a penalty of 110% is appropriate in this case because the Cooperative has previously violated similar wage and hour statutes within three years prior to the filing of his wage claim.

Admin. R. Mont. 24.16.7551(1), (2) provides, in pertinent part:

(1) In cases where the wages claimed are paid by the employer either before or after receipt of the initial letter commencing the claim ARM 24.16.7527(1) and prior to the issuance of a determination, no penalty will be imposed unless any of the special circumstances described in ARM 24.16.7556 apply.

(2) In cases where payment made either before or after receipt of the first letter does not resolve the claim and a determination is made finding that additional wages are due, a penalty will be calculated only on the balance determined still due to the employee, unless any of the special circumstances described in ARM 24.16.7556 apply.

The Cooperative submitted payment to the Wage and Hour Unit in the amount of \$2,442.31 on August 10, 2017. Doc. 2. This payment satisfied the amount found to be due and owing by the Wage and Hour Unit in its determination dated July 5, 2017. Docs. 13 - 16. Therefore, any penalty assessed in this matter will only be applied to the difference between the amount paid in August 2017 and the amount due and owing in this matter.

Robson argues the special circumstances mentioned in Admin. R. Mont. 24.16.7551 and outlined specifically in Admin. R. Mont. 24.16.7556 apply in this case. Admin. R. Mont. 24.16.7556 provides:

(1) The following conduct by the employer constitutes special circumstances that justify the imposition of the maximum penalty allowed by law:

- (a) the employer fails to provide information requested by the department and/or does not cooperate in the department's investigation of the wage claim;
- (b) there is substantial credible evidence that the employer's payroll records are falsified or intentionally misleading;
- (c) the employer has previously violated similar wage and hour statutes within three years prior to the date of filing of the wage claim; or
- (d) the employer has issued an insufficient funds paycheck.

(2) Exceptions may be made in instances where the employee has failed to provide records or information necessary for the employer to make final payroll calculation and issue the final paycheck.

(3) The maximum penalty is mandatory under the above circumstances and may be reduced only upon the written mutual agreement of the parties and the department.

There is no agreement between the parties that the maximum penalty should be reduced in this case. However, Robson has failed to prove any of the special circumstances outlined in Admin. R. Mont. 24.16.7556(1)(a)-(d) apply in this case. The Cooperative appears to have fully cooperated with the investigation of the Wage and Hour Unit and there is no evidence showing it has offered false or misleading information either during the investigation or at hearing. Further, there is no evidence showing the Cooperative issued an insufficient funds paycheck.

Robson contends the Cooperative has previously violated similar wage and hour statutes within three years prior to the date of his wage claim. However, Robson offered no proof of this assertion other than referencing a case number (1582-2017) that is close in sequence to his case number (1583-2017). Without proof of a determination by the Wage and Hour Unit; a final agency decision of OAH; or a judgment by the District Court of Montana Supreme Court, the hearing officer is not persuaded there are special circumstances in this case justifying the imposition of the maximum penalty of 110% in this case.

It is therefore determined that the Cooperative owes Robson \$1,067.86 in unpaid wages for PTO accumulated during the period of his employment. A penalty of 55% is hereby imposed in the amount of \$587.32 for a total amount of \$1,655.18.

## VII. 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. Billings Bookstore Cooperative, a Montana corporation, owes Gary D. Robson \$1,067.86 in unpaid wages based upon his earned and unpaid PTO hours totaling 50.49. Mont. Code Ann. § 39-3-204.

3. Billings Bookstore Cooperative, a Montana corporation, owes a penalty of \$587.32. Admin. R. Mont. 24.16.7566.

## VIII. ORDER

Billings Bookstore Cooperative, a Montana corporation, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,655.18 representing \$1,067.86 in unpaid wages for 50.49 hours of accumulated PTO and \$587.32 in penalty, made payable to Gary D. Robson, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Billings Bookstore Cooperative, a Montana corporation, may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 12th day of January, 2018.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN  
CAROLINE A. HOLIEN  
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.