

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

IN THE MATTER OF THE WAGE CLAIM) Case No. 1849-2017
OF TIMOTHY J. WHALEN,)

Claimant,)

vs.)

FINAL AGENCY DECISION

FRANK & WETCH TRUCK BODY)
SHOP, INC., a Montana corporation)
d/b/a FRANK & WETCH TRUCK)
REBUILDERS,)

Respondent.)

* * * * *

I. INTRODUCTION

On May 11, 2017, Timothy Whalen (Whalen) filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging Frank & Wetch Truck Body Shop, Inc., d/b/a Frank & Wetch Truck Rebuilders (Respondent) owed him \$1,688.00 in vacation pay, holiday pay, and regular wages that he earned July 1, 2014, through March 3, 2017.

On July 21, 2017, the Wage and Hour Unit determined Whalen earned wages, \$280.00, March 1 through 3, 2017, that the Respondent did not pay. This amount was not paid because the Respondent offset the amount that Whalen had been overpaid for vacation and concluded the two offset one another. Based on an overpayment of vacation and non-payment of wages, the Wage and Hour Unit concluded the Respondent owed Whalen \$110.00. Since the Respondent made a payment of \$140.00 prior to July 21, 2017, the Wage and Hour Unit did not assess the Respondent any penalty.

On December 5, 2017, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings for a hearing because mediation attempts were unsuccessful. On April 18, 2018, Hearing Officer Debra Wise conducted a telephone

hearing in this matter. Timothy Whalen participated in the hearing. Daniel Miller, attorney at law, appeared on the Respondent's behalf. The owner, Ladd Yamanoha, participated at the hearing. Whalen and Yamanoha presented sworn testimony.

The parties stipulated that Whalen worked for the employer from May 26, 2014 through March 3, 2017. During the April 18, 2018 hearing, the parties also stipulated to the admission of Documents 74 through 175 (from the administrative record), and Claimant Exhibits L and M. During the hearing, Documents 27, 28, 45 through 48, 53-60 (from the administrative record), and Claimant Exhibits A, C, E-1, E-2, F through I, and O were offered and admitted. Claimant Exhibit A is sealed. The Hearing Officer reserved ruling on Claimant Exhibits B and P. After reviewing the evidence, Claimant Exhibits B and P are admitted, but Claimant Exhibit B is also sealed.

Exhibits A and B are accurate copies of the original paystubs for Employees A and B. As a result, the Office of Administrative Hearings has shredded the original paystubs for these employees.

At the April 18, 2018 hearing, the parties agreed to submit simultaneous post-hearing briefs by April 27, 2018. Upon receiving the final briefs on April 30, 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 Whalen holiday pay for May 26, 2014 through April 1, 2015.
2. Whether the Respondent owes Whalen wages for March 1 through 3, 2017.
3. Whether the Respondent owes Whalen any vacation pay.
4. Whether a penalty should be assessed against the Respondent.

III. FINDINGS OF FACT

1. Ladd Yamanoha is the owner of Frank and Wetch Body Shop, Inc. He bought the business about five years ago.

2. Yamanoha hired Whalen on May 26, 2014, to work as a part-time laborer. Initially, the Respondent paid Whalen \$10.00 an hour. On August 15, 2014, the Respondent increased Whalen's hourly wage to \$14.00 an hour.

3. The Respondent did not pay Whalen any holiday pay when he worked as a part-time employee, May 26, 2014 through April 1, 2015.

4. As a part-time employee, May 26, 2014 through April 1, 2015, Whalen frequently worked as many hours as a designated full-time employee, Employee A. Employee A received holiday pay, but Whalen did not receive holiday pay.

5. On April 1, 2015, Yamanoha designated Whalen as a full-time employee. After Whalen was designated a full-time employee, he received holiday pay.

6. The Respondent pays for six holidays a year: New Year's Day, Memorial Day, July 4, Labor Day, Thanksgiving Day, and Christmas Day.

7. From May 26, 2014 through April 1, 2016, Whalen did not request any vacation time and was not paid any vacation pay.

8. Even though Yamanoha used a written policy as a guideline for the Respondent's vacation policy, he did not give employees this written policy. In accordance with Yamanoha's guideline, to be eligible to take vacation and receive vacation pay, the employee must be in active pay status as a full-time employee for one year. Vacation benefits are earned only on an employee's anniversary date of becoming a full-time employee. Vacation benefits are not prorated prior to the anniversary date. Yamanoha does not consider regular part-time employees eligible for vacation pay. The exception to this general rule occurs for regular part-time employees with 20 or more years of continuous service. This employee is eligible for vacation benefits if the employee works and maintains 20 or more hours per week.

9. Employee B has worked for the business for 20 or more years. Employee B continues to work part time, 20 or more hours a week. Based on Employee B's longevity with the business, Yamanoha agreed when he purchased the business that

Employee B would receive vacation benefits as long as he worked 20 or more hours a week.

10. On his first anniversary date of becoming a full-time employee, April 1, 2016, Yamanoha informed Whalen he had earned one week or 40 hours of vacation leave.

11. From March 26, 2014, through April 1, 2015, when Whalen was designated as a part-time employee, his paystubs do not reflect that he earned or took any vacation. From April 1, 2015 through April 1, 2016, Whalen's paystubs do not reflect that he earned or took any vacation. Subsequent to April 1, 2016, Whalen's paychecks reflect he earned and used vacation leave as follows:

Date	Vacation Hrs. Used	Vacation Pd.
April 21, 2016	10 hours	\$140.00
April 22, 2016	10 hours	140.00
April 25, 2016	10 hours	zero
August 12, 2016	10 hours	140.00
December 8, 2016	10 hours	140.00
December 21, 2016	10 hours	100.00
February 2017	5 hours	70.00
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	55 paid hrs.	\$730.00

12. The Respondent inadvertently forgot to pay Whalen for 10 hours of vacation he took on April 25, 2016. The Respondent also mistakenly paid Whalen \$10.00 an hour instead of \$14.00 an hour for 10 hours of vacation he took on December 21, 2016.

13. The summer of 2015 an employee, Steve Goodman, started hassling Whalen. Whalen did not report any problems with Goodman in 2015. The summer of 2016 Whalen reported to Yamanoha that Goodman had threatened him. Yamanoha told Whalen not to take Goodman seriously.

14. Yamanoha did not know about any issues between Whalen and Goodman again until February 2017.

15. In early February 2017, Whalen received Yamanoha's permission to have some work done in the shop on Whalen's personal vehicle. When Goodman asked Whalen what his vehicle was doing in the shop, Whalen believed Goodman was

angry at him. Whalen told Goodman that he did not appreciate his tone of voice. Goodman in turn told Whalen that he was sick of Whalen's shit and commented that they should go to the parking lot to settle things. Neither employee went to the parking lot.

16. Whalen reported the incident to Yamanoha and told him that Goodman again threatened him.

17. Yamanoha gave both Whalen and Goodman written warnings because he did not allow employees to engage in threats or altercations at work.

18. After Yamanoha gave the written warnings, the work environment was tense. Whalen and Goodman isolated themselves from one another. Even though Whalen had little, if any, contact with Goodman, he concluded that Goodman still harassed him by hiding the newspaper Goodman knew Whalen read and throwing Whalen's clean coveralls on the floor.

19. On March 2, 2017, Whalen's vehicle was parked next to Goodman's in the employer's parking lot. When Whalen left work, he noticed a small ding on the driver's side of his vehicle. Based on where Goodman's vehicle was parked and tracks in the snow, Whalen concluded that Goodman deliberately damaged Whalen's vehicle.

20. Whalen immediately told Yamanoha about Goodman's threatening conduct and that he had intentionally damaged Whalen's vehicle. On March 3, 2017, Yamanoha told Whalen that he had investigated the incident and did not believe Goodman dented Whalen's vehicle.

21. Whalen thought about the situation over the weekend and decided he had to quit because he believed Yamanoha would do nothing about Goodman's threatening conduct. On March 6, Whalen sent Yamanoha a letter informing him that he was quitting because the work environment was not safe for him.

22. On March 8, 2017, when Whalen came to pick up his toolbox, he talked to Yamanoha. During their hour-long conversation, Yamanoha told Whalen that he would figure a way to make him feel safe at work. Yamanoha talked about putting up security cameras in the shop. Yamanoha did not want Whalen to quit. As a result of this conversation, Whalen indicated he would think about continuing his employment instead of quitting.

23. On March 14, when Whalen went to the shop, he thought Yamanoha would be at the shop. When no one was at the shop, Whalen again concluded Yamanoha would not take the necessary measures to provide a safe work environment and decided he would not return to work.

24. On May 28, 2017, the Respondent submitted check #10003 for a net amount of \$122.29. The check was for \$140.00 in unpaid wages less payroll deductions.

IV. DISCUSSION¹

A. Holiday Pay

There is no Federal statute or state law indicating private employers are obligated to provide employees with any paid holidays. If an employer chooses to provide either paid or unpaid holiday leave, the employer must comply with the terms of its established policy or employment contract. As long as the employer's policy is not discriminatory, the employer can provide holiday pay to regular full-time employees and not regular part-time employees. The evidence does not establish that the Respondent's holiday pay policy is discriminatory.

Unlike vacation pay, holiday pay is not covered under Montana's wage and hour laws. Therefore, the Hearing Officer has no legal jurisdiction or authority to address whether the employer owes Whalen holiday pay May 26, 2014, through April 1, 2015. Also, under Mont. Code Ann. § 39-3-207, Whalen cannot claim any unpaid wages prior to March 14, 2015.

B. Unpaid Wages

The undisputed facts establish that Whalen earned \$280.00 for work he performed March 1 through 3, 2017. The Respondent admitted the Respondent did not pay Whalen \$280.00 in wages he earned March 1 through 3, 2017. Therefore, the Respondent owes Whalen \$280.00 in wages.

The Hearing Officer realizes the Respondent believed the amount Whalen had been overpaid in vacation offset or cancelled out the wages he had earned. Any offset is discussed in the following paragraphs.

1. 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.

C. Vacation Pay

An employer is free to set the terms and conditions of employment and compensation. Likewise, an employee is free to accept or reject the conditions of employment. *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, 330 Mont. 48, 125 P.3d 1121, 2005. The evidence establishes Whalen accepted the Respondent's condition of how an employee earned vacation benefits when Yamanoha told him on April 1, 2016, he was then eligible for vacation benefits and would earn vacation benefits in subsequent years on his anniversary date of April 1. Even though Yamanoha did not publish a written vacation policy, he used a written policy as a guideline.

The evidence clearly establishes Whalen did not start receiving vacation pay until after April 1, 2016. Prior to April 1, 2016, Whalen did not question Yamanoha about the fact he did not receive vacation benefits. Based on the Respondent's vacation benefit policy, new employees, including Whalen, do not earn vacation benefits until they had worked one year as a full-time regular employee.

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 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 facts establish that when Whalen earned 40 hours of vacation benefits on April 1, 2016, he started taking vacation leave and received vacation pay in April 2016. Based on the Respondent's vacation policy, Whalen is not eligible to receive vacation pay prior to April 1, 2016. In accordance with the Respondent's policy, Whalen did not earn or accrue additional vacation leave until April 1, 2017. Even though Whalen took more than 40 hours of vacation and the Respondent paid him for 55 hours between April 1, 2016, and March 3, 2017, Whalen had only earned 40 hours of vacation pay for this time frame or \$560.00 of vacation pay. As of March 3, 2016, the Respondent overpaid Whalen for 15 hours (55 hours - 40 hours) of vacation he had not yet earned. This means as of March 3, 2016, the Respondent overpaid Whalen \$170.00 in vacation pay. The employer paid him \$730.00 (Finding of Fact 11), but Whalen had only earned \$560.00 in vacation pay.

Whalen's assertion that Yamanoha discriminated implementation of the vacation policy is without merit. It is not a discriminatory policy if an employer pays vacation benefits to full-time employees, but not part-time employees. Even though Employee B, a part-time employee, received vacation benefits, he worked more than 20 years for the business and continued to work 20 or more hours a week. Therefore, his employment situation is substantially different than Whalen's.

Whalen also asserted that under Mont. Code Ann. § 39-3-103, he should be paid vacation benefits he would have earned on April 1, 2017, if he had not quit in mid-March 2017. The statute states:

An employee who quits the service of an employer for good cause is entitled to the proportion of the compensation that would become due in case of full performance as the services that the employee has already rendered bear to the services that the employee was to render as full performance.

Neither the parties nor the Hearing Officer found any Montana case law that has applied this statute. Even without case law guidance, the facts do not establish that Whalen quit the employment with good cause. The facts show Whalen had problems getting along primarily with one employee, but Yamanoha was in the process of taking timely and reasonable steps to resolve issues Whalen brought to his attention just a few days before Whalen quit. Whalen established personal reasons for quitting in mid-March, but he did not establish that he left for good cause. Therefore, this statute does not apply to this case.

Even though the employer allowed Whalen to use more than 40 hours of vacation before April 1, 2017, the policy establishes Whalen did not earn an additional 80 hours of vacation until April 1, 2017, and the employer does not prorate to an employee's anniversary day. The Respondent was lenient in paying Whalen more than 40 hours of vacation prior to April 1, 2017. However, Whalen was not legally entitled to any more than 40 hours of vacation pay until April 1, 2017.

Since Whalen was not entitled to additional vacation wages until his anniversary date of April 1, 2017, the amount of vacation pay the Respondent overpaid Whalen, \$170.00, shall be used to offset the \$280.00 in wages Whalen was not paid. Therefore, the employer owes Whalen a total of \$110.00 in wages (\$280.00-\$170.00).

D. Penalty

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. The Respondent made a gross payment of \$140.00 prior to the July 21, 2017 determination. With payroll deductions, the total amount of the check was \$122.29. In accordance with Admin. R. Mont. 24.16.755(1), no penalty is assessed against the Respondent. The administrative rule expressly states that in cases where the wages claimed are paid by the employer either before or after the receipt of the initial letter commencing the claim, and prior to the issuance of a determination, no penalty will be imposed unless any of the special circumstances described in Admin. R. Mont. 24.26.7556 apply. There are no special circumstances in the case that requires the imposition of any penalty. No penalty is imposed upon the Respondent.

V. CONCLUSIONS OF LAW

1. With the exception of the holiday pay issue, 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. The State of Montana and Commissioner of the Department of Labor and Industry do not have jurisdiction over the issue of holiday pay from May 26, 2014 through April 1, 2015.

3. The Respondent did not properly pay Whalen the wages he earned March 1 through 3, 2017. Whalen earned a total of \$280.00 in wages.

4. Whalen is not eligible for any vacation pay May 26, 2014, through April 1, 2016. Whalen was only eligible to receive 40 hours of vacation pay April 1, 2016, through April 1, 2017. Whalen did not earn any additional vacation pay after he left employment because he quit without good cause and did not work until his anniversary date of April 1, 2017.

5. The employer overpaid Whalen vacation pay that he had not earned in the amount of \$170.00.

6. Based on the wages Whalen earned March 1 through 3, 2017, and the amount the Respondent overpaid him in vacation pay, the Respondent owes Whalen a gross payment of \$110.00.

7. The Respondent has paid a gross payment of \$140.00 to the Wage and Hour Unit on Whalen's behalf. The Respondent deducted the applicable payroll taxes and submitted a check in the amount of \$122.29.

VI. ORDER

The Wage and Hour Unit of the Montana Department of Labor and Industry shall tender a check payable to Timothy J. Whalen in the amount of \$110.00, which represents the amount Frank & Wetch Truck Body Shop, Inc. owes Whalen. The excess funds will be returned to the Respondent.

The Wage and Hour Unit may deduct applicable withholding taxes from the check payable to Timothy Whalen.

DATED this 26th day of June, 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