

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1988-2018
OF MARY J. MCCRACKEN,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
THOMAS PRINTING, INC., a Montana)	
corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On May 21, 2018, Mary J. McCracken filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging the Respondent, Thomas Printing, Inc., owed her \$3,500.00¹ in unpaid wages, including \$250.00 in salary; \$3,000.00 in commission; and \$400.00 in vacation/paid time off, for the period beginning December 24, 2016 through March 26, 2018. Thomas responded to the claim on July 12, 2018. McCracken’s claim does not include a claim for minimum wages or overtime pay.

On June 21, 2019, the Wage and Hour Unit issued a determination finding Thomas Printing, Inc. owed McCracken \$262.12 in unpaid wages for the period beginning February 23, 2016 through February 23, 2018, based upon the statute of limitations imposed by Mont. Code Ann. § 39-3-207(2). The determination also imposed a penalty of 15% of \$39.31, for a total owed of \$301.43.

On July 5, 2019, the Wage and Hour Unit received a cashier’s check from Thomas Printing, Inc. in the amount of \$264.38, representing the wages and penalty owed less appropriate state and federal withholdings.

On July 6, 2019, McCracken appealed the determination. Following mediation efforts, the case was transferred to the Office of Administrative Hearings (OAH) on September 6, 2019.

¹McCracken’s claim was for \$3,500.00 despite her figures totaling \$3,650.00. See Ex. 466.

Hearing Officer Caroline A. Holien conducted a hearing in this matter at the Kalispell Job Service in Kalispell, Montana, on January 8, 2020. Mary J. McCracken, Chad Thomas, President, and Tammy Bohland, Bookkeeper, testified under oath. Sarah L. Johnson, Attorney at Law, represented Thomas Printing, Inc. The parties stipulated to the admission of Documents 1 through 468, which were included in the administrative record compiled at the Wage and Hour Unit.

The parties requested the opportunity for post-hearing briefing. Upon the timely filing of the final brief, the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Thomas Printing, Inc., a Montana corporation, owes wages for work performed and paid leave benefits, as alleged in the complaint filed by Mary J. McCracken, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Thomas Printing, Inc. (Thomas) employed Mary J. McCracken as a commissioned salesperson beginning on or about December 19, 2015. McCracken's last day worked was February 23, 2018.

2. McCracken was hired by Frank Thomas, who was then President of Thomas. Frank Thomas passed away shortly prior to hearing. McCracken did not deal with Chad Thomas, who is now President of Thomas, when she was hired or during her employment.

3. McCracken's agreed upon payment schedule was \$500.00 per week base salary, with 3% commission on all paid invoices to be paid weekly. The payment schedule also included, "We do not pay commission on postage or freight; we do however pay commission on mail prep. . . Upon termination sales people receive commission on all invoiced jobs when paid." Ex. 48.

4. McCracken was entitled to one week vacation and one week personal leave "12 months from start day," with one additional week of vacation after two years. Ex. 48.

5. On December 22, 2015, McCracken signed an acknowledgment of receipt of the Employee Handbook. The acknowledgment noted McCracken as a full-time

employee, with a commission pay type. It is noted, "Base pay is hourly/salary - no overtime paid - commission paid on collected accounts." Ex. 49.

6. The Employee Handbook provides that a full-time permanent employee receives five (5) paid vacation days after the first year of employment and ten (10) days of paid vacation after their second year of employment. Exs. 89-90. A full-time permanent employee receives five personal days after completing one full year of employment. The handbook provides:

. . . Any employee missing time and having acquired personal days will automatically receive personal pay to achieve the 40-hour workweek. These personal days are designed for employees to use at their discretion for personal reasons or illness and are not to be misconstrued as "vacation." At the end of the calendar year, the unused personal days each employee has will be paid to the employee as wages. This balance will be paid during the first pay period following the calendar year end. Employees must complete the calendar year to be compensated for personal days.

Employees whose date of employment is not January 1 of a given year will have their personal time pro-rated for the remainder of the calendar year following their 1st year anniversary date.

At the beginning of the next calendar year you would receive 5 days (40 hours) for that year. Personal days are earned at the end of each calendar year after the first year adjusted to compensate for a calendar year.

7. The Employee Handbook also addresses commission:

Base pay based on a 40-hour workweek. All benefits are paid on the base pay only. No overtime is paid to commission sales people. Commission paid on collected accounts received within 60 days of invoice date. Upon terminating, commission will be paid on jobs invoiced prior to termination date.

8. Thomas provided McCracken with a daily Production Schedule, which showed jobs currently in production. The Production Schedule also shows who wrote up the specific job.

9. Thomas also provided McCracken with weekly commission reports outlining what jobs had been paid during the previous week and what invoices had

not yet been paid. McCracken also received monthly reports showing her total sales for the month.

10. McCracken was expected to review both the weekly commission reports and monthly reports for any errors regarding the calculation of her commission. McCracken did not protest commission payments during the term of her employment.

11. McCracken was not entitled to receive commission on “house accounts,” which are accounts that have been established for long-term customers that have been serviced by management for several years.

12. Thomas does not pay commission on postage, freight, or mail preparation, although it is included on the customer’s invoice. Ex. 48. Customers often pay Thomas directly for the cost of postage, and Thomas issues a check to the U.S. Postal Service. Postage was paid by Boone & Crockett Club; Whitefish Mountain Resort; Bob Marshall Wilderness; Bigfork Harvest Foods; Four Seasons Nursery; and Whitefish Mountain Resort. Exs. 137-143; 158-59.

13. Thomas stipulated² to owing McCracken commissions³ on the following accounts for a total owed of \$235.87. Exs. 15, 16.

Customer	Job No.	Amount Owed
Glacier National Park	81288 83100	\$122.25
Hockaday	81242	\$8.26
Montana West Econ. Development	82187	\$0.60
Russell Markham		\$5.64
Whitefish CVB	82594	\$90.03
Whitefish Mountain Resort	80831	\$9.09

14. McCracken is owed \$26.26 in commission for Leland Honda, Job No. 82820, based upon Thomas’ practice of regularly paying commission on accounts that were paid after their 60-day deadline. Exs. 80; 178-179.

²See Exs. 15-16.

³McCracken’s claimed commissions are taken from Docs. 15-16; 43-46; 280-283; and 343-361.

15. On December 29, 2017, Cheri Hansen Remax prepaid \$1,164.00 for a print job. The job was later disputed. However, the amount was paid prior to McCracken's discharge. Therefore, McCracken is owed \$39.42 in commission. Exs. 15, 16, 47.

16. The following jobs were invoiced after McCracken's discharge on February 23, 2018. Therefore, Thomas does not owe McCracken commissions on those jobs.

Customer	Job No.	Invoice Date	Exhibits
Flathead Lake Biological Station	83054	03/16/2018	121, 124
Smart Lam	83066 83102	03/07/2018	121, 135, 136
Paradise Dental Technology	83006 83102	02/24/2018 03/06/2018	121, 125, 133
Montana West Econ. Development	83117	02/28/2018	121, 126
S&K Housing Authority	83120	03/09/2018	121, 127
Bigfork Harvest Foods	83122	02/27/2018	121, 130
Meissenberg Design	83143	02/24/2018	121, 131
Whitefish Mountain Resort	83144 83155	02/25/2018	121, 132
Eagle Bend Golf	83157	03/07/2018	121, 134

17. The following jobs were never printed. Therefore, Thomas does not owe McCracken commissions on those jobs.

Customer	Job No.
Smart Lam	82321
Whitefish Mountain Resort	83146
Matt Rosendale for Montana	83148 83149
Eagle Bend Golf	83231
Kalispell Electric	NA

18. The following were jobs belonging to other Thomas employees or were considered house accounts.

Customer	Job No.
Whitefish Mountain Resort	80403
	80405
Blackfeet Housing Authority	80365
	80344
Advanced Gunslinger	83160
Glacier Symphony	NA
Glacier Bank	NA
Flathead Community College	NA

19. Thomas does not owe McCracken for Job No. 83119 (S&K Housing). The job was invoiced after her discharge. Thomas ultimately had to reprint the job due to McCracken's error in ordering the wrong type of envelope. Ex. 128.

20. McCracken was paid in full for the following accounts:

Bigfork Center for the Performing Arts
CHS
Four Seasons Nursery
Immanuel Lutheran
Jennifer Shelley
Kalispell Electric
National Park Realty
Pepsi
Flathead Lutheran Bible Camp

Exs. 43-44; 120.

21. Tammy Bohland, who has served as a bookkeeper for Thomas for 15 years, maintained an attendance calendar for each employee as a method of tracking the employees' vacation and personal leave. Exs. 98-106.

22. McCracken received 40 hours of vacation and personal leave on her first anniversary, December 22, 2016. Exs. 96-106.

23. From December 29, 2016 through August 17, 2017, McCracken used 40 hours of vacation time. Exs. 96-106.

24. From January 1, 2017 through September 5, 2017, McCracken used 40 hours of personal time. Exs. 96-106.

25. Once McCracken depleted both her vacation and personal leave, she was allowed to take time off unpaid. Exs. 96-106.

26. McCracken received 80 hours of vacation on her second anniversary, December 22, 2017. McCracken used 16 hours of vacation on December 22, 2017, and December 29, 2017. McCracken had 64 hours of accrued vacation at the end of her employment. Exs. 96-106.

27. On February 28, 2018, McCracken received \$800.00 for her accrued vacation, which represented 64 hours paid at an hourly rate of \$12.50. Ex. 117.

28. Thomas owes McCracken nothing by way of unpaid vacation and personal time.

29. On July 5, 2019, Thomas submitted a cashier's check to the Wage and Hour Unit in the amount of \$264.38, which was the net of the commissions that Wage & Hour found owing (\$262.12) and the \$39.31 in penalties after taxes and other payroll deductions were made. McCracken is owed a total of \$39.43 in unpaid commissions (\$301.55 earned - \$262.12 paid = \$39.43).

30. A penalty of 55% in the amount of \$21.68 is appropriate ($\$39.43 \times 55\% = \21.68).

IV. DISCUSSION

McCracken argued she is owed \$3,000.00 in unpaid commissions and \$400.00 in unpaid vacation and/or personal time. McCracken argued she did not know precisely what she was owed due to the employer having all the records. McCracken engaged in no discovery and made no effort to seek the information she claims Thomas withheld prior to hearing. Rather, McCracken argued the Wage and Hour Unit failed by not performing a full audit of Thomas as she had requested.

McCracken's argument fails to note she is the claimant in this proceeding. 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. 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 that the lower court properly concluded that 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).

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.

A. McCracken has shown she is owed unpaid commissions.

McCracken submitted hundreds of documents detailing jobs completed and commissions owed from 2016 through her discharge on February 23, 2018. *See* Exs. 280 - 464. McCracken repeatedly acknowledged at hearing that her calculations may not be accurate. McCracken argued Thomas had the burden of showing what she was owed due to the documents being in its possession. McCracken also suggested the Wage and Hour Unit and the Hearing Officer were responsible for determining precisely what she was owed.

This is a misstatement of the claimant’s burden. A claimant alleging he or she is owed unpaid wages bears the burden of proving he or she is owed unpaid wages. To that end, neither the Wage and Hour Unit nor the Hearing Officer are responsible for assisting either party in meeting their evidentiary burdens.

Despite her failure to determine with some greater specificity than what was offered to the Wage and Hour Unit, McCracken has succeeded in showing she is owed unpaid commissions. McCracken initially claimed to be owed \$3,000.00 in unpaid commissions. Thomas rebuffed that estimate by noting that would have required her to have at least \$100,000.00 in sales during the period in question. A review of the evidence in this matter makes it clear McCracken’s sales never approached that level.

Montana Code Annotated § 39-3-201(6) defines “wages” to include “any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, and all tips and gratuities We have previously determined that the Wage Protection Act (Title 39, chapter 3, MCA) is sufficiently broad to cover employees who are paid on a commission basis.” *America’s Best Contrs., Inc. v. Singh*, 2014 MT 70, ¶19, 374 Mont. 254, ¶19, 321 P.3d 95, ¶19, citing *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶ 32, 293 Mont. 97, 973 P.2d 818. As a result, an employer who fails to pay an employee his or her earned commissions in accordance with the Wage Protection Act is subject to a penalty under Mont. Code Ann. § 39-3-206(1), based on the amount of wages that are due and unpaid. *Id.*

McCracken has shown by a just and reasonable inference that she is owed \$301.55, which represents unpaid commissions in the amount of \$26.26 for Leland Honda, \$39.42 for the Cherie Hanson job that was pre-paid prior to McCracken’s separation, and \$235.87 in commissions stipulated to by Thomas. While the customer may have disputed the Hanson job at the time of McCracken’s discharge, the credible evidence of record shows the account was paid prior to McCracken’s discharge. Therefore, under Thomas’ commission policy, she is owed 3% commission on that job.

Thomas produced production reports, weekly reports, and monthly summaries for the period in question that had been provided to McCracken throughout her employment. These reports and summaries were detailed and corresponded with the paystubs also submitted by Thomas. Thomas provided sufficient credible evidence to rebut McCracken’s claim that she was owed a minimum of \$3,000.00 in unpaid commission. Further, Thomas produced sufficient credible evidence to rebut McCracken’s claim she was owed on certain accounts that were clearly either house accounts or serviced by other Thomas employees.

The preponderance of the evidence shows McCracken earned \$301.55 commissions for the period of the wage claim.

B. McCracken has not shown she is owed additional wages for unpaid vacation or personal time.

McCracken contends she is owed \$400.00 in accrued vacation and paid time off. McCracken alleges Thomas improperly chose to use her vacation time when she should have been able to use her paid time off for two days in 2017. Thomas argues McCracken received 40 hours of personal time on January 1, 2017, and 40 hours of vacation time on her first anniversary, December 22, 2016. Thomas contends McCracken exhausted her personal time September 5, 2017. Thomas notes

McCracken then received 80 hours of vacation time on her second anniversary, December 22, 2017, after having exhausted her vacation time August 17, 2017.

The Montana Attorney General addressed vacation pay in Attorney General Opinion No. 56, dated September 17, 1949:

Vacation pay which has been earned and is now owing is considered to be wages and is collectable in the same manner and under the same statutes as any other kind of wages.

The Montana Supreme Court examined a former employee's wage claim for two weeks of unpaid vacation in *Langager v. Crazy Creek Products*, 287 Mont. 445, 954 P.2d 1169 (Mont. 1998). In *Langager*, a former employee filed a wage claim seeking payment for two weeks of vacation. *Langager*, 287 Mont. at 447. The employer's vacation policy required the employee to work the shift prior to and after the requested time in order to be qualified to receive paid vacation time. *Langager*, 287 Mont. at 447 and 448. The court found this to be a condition subsequent that imposed an unreasonable restriction on the employee's accrual of paid vacation:

Langager earned her vacation pay when she completed the second year of her employment. The condition subsequent that she work the shift following her vacation does not pertain to whether she "earned" the vacation, rather it pertains to whether she will be paid for the vacation she earned. Conditions which purport to divest an employee that which the employee has earned are not reasonable and should not be upheld.

Langager, 287 Mont. at 456 and 457 (Leaphart, J., specially concurring).

The court noted the critical question was whether the former employee earned the vacation time and whether the employer was "obligated to pay that which is earned and due and owing." *Langager*, 287 Mont. at 453.

The evidence shows McCracken used five days of personal time from February 1, 2017 through September 5, 2017. Thomas then allowed her to use two vacation days on December 22, and December 29, 2017, which resulted in McCracken being compensated for her time off despite having already exhausted her personal time. *See Exs. 96-105*. McCracken had a total of 64 hours of accrued vacation time at the time of her separation from employment. Thomas fully compensated McCracken for her accrued vacation on her final check that was issued on February 28, 2018. McCracken has failed to show Thomas acted improperly by utilizing her vacation time to cover her absence when she had exhausted her personal

time. McCracken has failed to show she is owed any additional compensation for vacation or paid time off.

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. Mary McCracken has shown she performed work for Thomas Printing, Inc. during the period of her wage claim for which she was not properly compensated.

3. Thomas Printing, Inc. has negated the reasonableness of the inference raised from McCracken's evidence that she performed work that entitled her to a minimum of \$3,000.00 in unpaid commissions, by producing invoices, weekly commission reports, monthly summaries, and production reports showing McCracken was not owed commission on every job claimed in her wage claim or at hearing.

4. McCracken has failed to show she is owed additional compensation for accrued vacation or paid time off.

5. Thomas Printing, Inc. owes McCracken \$39.43 in unpaid commissions earned during the period of her wage claim. (\$301.55 earned - \$262.12 paid = \$39.43).

6. McCracken is owed a penalty on the unpaid commissions in the amount of \$21.68 (\$39.43 x 55%).

7. Thomas Printing, Inc. owes McCracken a total of \$61.11 (\$39.43 + \$21.68), including unpaid wages and penalty.

VI. ORDER

Thomas Printing, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of **\$61.11**, representing \$39.43 in unpaid regular wages, as well as \$21.68 in penalty, made payable to Mary McCracken 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.

DATED this 28th day of August, 2020.

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 59620-1503

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.