

**STATE OF MONTANA**  
**DEPARTMENT OF LABOR AND INDUSTRY**  
**HEARINGS BUREAU**

<b>IN THE MATTER OF THE WAGE CLAIM</b>	)	<b>Case No. 2649-2000</b>
<b>OF JANET R. BIERER,</b>	)	
<b>Claimant,</b>	)	
	)	<b>FINDINGS OF FACT;</b>
<b>vs.</b>	)	<b>CONCLUSIONS OF LAW;</b>
	)	<b>AND ORDER</b>
<b>D. A. DAVIDSON &amp; COMPANY,</b>	)	
<b>Respondent.</b>	)	

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**I. INTRODUCTION**

Michael T. Furlong conducted a hearing in this matter in Helena, Montana, on November 30, 2000. Janet R. Bierer, claimant, appeared and testified (pro se). Carol Smith appeared as a witness for the claimant. Respondent, D.A. Davidson and Company (DADCO), was represented by Daniel J. McLaughlin, vice president and director of human resources. Jim Moerkerke, Tiffani Martin, and Jody Pliley, appeared as respondent witnesses.

Claimant Exhibits 1 through 7 were admitted into evidence without objection. Claimant Exhibits 8 and 9 were admitted over the relevancy objection of the respondent. Respondent Exhibits A through U-1 were admitted into evidence without objection.

On November 8, 2000, Bierer requested to expand the issues for hearing, and to include all of the following:

1. 4¢ in back wages.
2. 19¢ per hour for all hours worked in May 2000.
3. 4 hours vacation pay.
4. 8 hours holiday pay.
5. additional mileage reimbursement for travel from Hamilton to Great Falls for business meeting.
6. mileage for errands in and around Hamilton office.

7. 100% of support staff bonus paid in November 1999 and May 2000.
8. Car repair deductible and insurance premium.
9. Future increase in auto insurance premiums.

DADCO objected to allowing Bierer to add issues to the hearing that were not identified during the pre-hearing telephone conference on October 5, 2000. As a result, the Hearing Officer held a second pre-hearing conference on November 15, 2000, in order for the parties to address the motion. During the November 15, 2000, conference, the Hearing Officer overruled DADCO's objection, finding that no prejudice would result from consideration of issues at the hearing. The expanded issues had been included in the original claim filed by Bierer. DADCO had received a copy of the claim identifying those issues. The Hearing Officer noted DADCO's request for a continuing objection.

## **II. ISSUE**

Whether D.A. Davidson and Company owes wages to Janet R. Bierer, pursuant to §39-3-205, MCA.

## **III. FINDINGS OF FACT**

1. D.A. Davidson and Company (DADCO) is a financial and investment management business with its corporate headquarters located in Great Falls, Montana. The corporation has branch offices in various locations throughout Montana and other states.
2. On May 25, 1999, DADCO hired Janet R. Bierer to work in its Hamilton, Montana office as cashier/receptionist. Upon hire, Bierer's supervisor gave her an orientation briefing concerning the policies, terms and conditions of her employment. Bierer's duties included answering the telephone, performing secretarial and reception tasks and data entry, and preparing account deposits.
3. DADCO has a policy handbook that includes the compensation and benefits packages for employees. A copy of the handbook is kept in each of the branch offices including the Hamilton office. DADCO tells new employees about handbook during their orientation process. The handbook sets forth the following policies regarding holidays, vacations and bonuses:

### **Vacation Policy . . .**

From the end of the 60-day probationary period to the end of your first year of employment, you are entitled to one day of vacation pay for each two months you have worked. This can be taken one day at a time or can be accumulated to a total of five normal work days during the first year. However, no vacation can be taken until you have been employed for at least six months.

In order to get all vacations on a calendar year basis, you will then be entitled to one day of vacation for each month you work to the end of the calendar year next succeeding the year of

your employment to a maximum of ten days.

During each of the next six years of employment, you are entitled to ten regular work days of vacation each year; from the eighth through the fifteenth years, you are entitled to fifteen regular work days of vacation. Thereafter, you are entitled to twenty work days a year.

You can not accrue vacation time for more than one year unless expressly authorized by management. If you terminate employment, you are entitled to the number of days accrued through the end of the previous month

### **Holidays**

Presently, nine holidays are observed on a regular basis:

New Year's Day	Good Friday	Labor Day
Martin Luther King Day	Memorial Day	Thanksgiving Day
President's Day	Independence Day	Christmas Day

When any of the above holidays fall on a weekend, the Company will follow the published industry in their observance.

### **Performance/Profitability Bonus**

(Support Staff Only)

Each year, as determined by the Executive Committee, DADCO Support Staff will receive bonuses based on the firm's profitability. Each individual's bonus amount will relate to their monthly salary and their tenure with the firm. If a bonus is to be paid, you must be an active employee when the payments are made and a vesting percentage is used in the calculation as follows:

#### Length of Employment Vesting Factor

Less than 3 months 0%

3 to 6 months 5%

6 months to 1 year 10%

1 year to 1½ years 20%

1½ years to 2 years 30%

2 years to 2½ years 40%

2½ years to 3 years 50%

3 years to 3½ years 60%

3½ years to 4 years 70%

4 years to 4½ years 80%

4½ years to 5 years 90%

5 years or more 100%

The performance/profitability bonuses are a special recognition of each person for the growth and success of DADCO. Payments are made in May and November.

4. Under the conditions of hire, Bierer was to be paid \$6.50 per hour. She was also eligible for DADCO's support staff semi-annual profitability/performance bonus in November and May of each year.

5. Beginning in May 1999, in addition to her other duties Bierer made daily trips to the bank and post office for the Hamilton office using her own vehicle. The time she spent making the errands was included as compensable work time. DADCO did not reimburse her for fuel expenses for these trips.

6. On November 17, 1999, DADCO paid Bierer a \$117.00 bonus (10% rate) based on her length of employment and the firm's profitability. Bierer became upset because she anticipated she would receive \$1,170.00, equal to 100% of the vesting factor. When she complained about the bonus amount, DADCO gave Bierer a copy of the handbook to show how her bonus had been calculated. She contends she is still owed \$1,053.00 in pay for the November bonus. (\$1,170.00 - \$117.00)

7. Bierer believed the bonus amount she received in November 1999 to be unfair because she misunderstood the vesting method used to determine her bonus while going through the job orientation. However, the bonuses and vesting percentage of the other Hamilton office employees have always been calculated according to the guidelines set in the handbook.

8. In May 2000, DADCO paid Bierer a \$208.00 bonus. DADCO calculated the bonus according to the firm's profitability and vesting percentage. Based on her initial misunderstanding of the policy, Bierer believed she should have received an additional \$951.60 in pay for the May bonus.

9. Bierer did not review the handbook until November 1999. Therefore, at the time of her orientation, she misunderstood the amount of bonus she was to receive. (Bonus handbook, Exhibits B-1, B-8, D-1, and D-9.)

10. On April 17, 2000, Bierer gave notice to the Hamilton office manager that she intended to terminate her employment. Bierer agreed to continue working until a suitable replacement could be found.

11. On April 28, 2000, Bierer asked the officer manager if he had begun looking for a replacement. On May 17, 2000, Bierer informed the office manager that he needed to look for a replacement as soon as possible so she could end her employment.

12. On May 25, 2000, the officer manager informed Bierer that a replacement had been found and that her last day of work would be May 26, 2000. She reported to work on May 26, 2000, and filled out a company employee termination form which she signed, stating that she was terminating her employment effective May 26, 2000, to pursue her Mary Kay Cosmetics business. She did not return to work thereafter.

13. On May 31, 2000, DADCO sent Bierer's final paycheck to her direct deposit account. On June 5, 2000, Bierer informed DADCO that her final pay did not include a raise of 19¢ per hour that she believed was to have begun on May 1. Based on her reported time and the raise she was to have received on May 1, 2000, Bierer believed that her wages had been shorted in the amount of \$551.30.

14. Bierer's hourly rate of pay remained at \$6.50 throughout her employment. DADCO did not agree to any increase in her rate of pay. DADCO continued to pay Bierer \$6.50 per hour for her services during May 2000.

15. On June 8, 2000, DADCO informed Bierer that it had found an error while checking company payroll records and that she had been partially underpaid for her work in May of 1999. As a result, DADCO issued her a check in the amount of \$347.75, representing 53.5 hours of work in May 1999 for which she had not been previously compensated.

17. In October 1999, Bierer confronted the Hamilton branch manager and Great Falls corporate office alleging that she had been shorted mileage expenses while attending a training meeting in Great Falls. Bierer indicated that she drove 615 miles round trip and turned in an expense sheet seeking reimbursement for mileage at a rate of 30.5¢ per mile. She received mileage reimbursement at a rate of 25¢ per mile for 532 miles.

18. DADCO has no written policy concerning the amount employees receive for mileage reimbursement. As a general practice, DADCO reimburses employees to travel in their personal vehicles for business at a rate of 25¢ per mile, and expects them to use the most direct route available. DADCO did not pay the claimant for all miles she claimed because she did not use the most direct route. The most direct round trip between Hamilton and Great Falls is 438 miles.

19. While driving to the post office in the course of her work on November 17, 1999, Bierer was involved in an automobile accident with her personal vehicle. The accident caused damage to her vehicle. Bierer reported the accident to the Hamilton office manager immediately and inquired whether DADCO carried insurance for her car while she was running business errands.

20. Representatives of the Hamilton and corporate human resource offices advised Bierer that she was not covered under DADCO's insurance policy while making deliveries to the post office and bank.

21. As a result of the accident, the cost of Bierer's auto insurance increased in the amount of \$699.00 over a 3 year period following the accident. She also had to pay a \$500.00 deductible to fix her car. DADCO paid Bierer \$250.00 to help her pay for the deductible.

22. Bierer did not ask for mileage reimbursement until after she was involved in the accident. She stopped doing the errands when she learned from DADCO that she would not be reimbursed mileage for her trips to the post office and bank. She drove 5 miles each day that she made the deliveries. She drove a total of 600 miles making the deliveries.

23. Bierer earned 40 hours of paid vacation during the course of her employment under the terms and conditions of hire. DADCO payroll records show Bierer received 40 hours of vacation pay.

24. Bierer filed a wage claim on June 12, 2000. As a result of her claim, DADCO paid Bierer an additional \$120.84 for 18.59 hours. Following this payment, DADCO still owed Bierer 4¢.

#### **IV. DISCUSSION/RATIONALE**

Montana law requires employers to pay employees wages when due in no event more than 15 days following termination of employment. §39-3-204, MCA. Wages are any compensation owed by an employer to an employee for services, including earned compensation such as vacation pay and bonuses. §39-3-201 et seq, MCA.

Bierer claims that she is entitled to unpaid wages for services performed under the terms and conditions of employment as follows:

1. 4¢ back wages
2. 19¢ per hour for all hours worked during the month of May 2000.
3. 4 hours vacation pay
4. 8 hours holiday pay for the Memorial Day holiday that occurred on May 29, 2000.
5. \$49.39 for additional mileage remuneration for driving round trip from Hamilton to Great Falls, Montana, in October 1999.
6. \$187.58 for mileage driven in the Hamilton area making business deliveries for DADCO using her personal vehicle.
7. 100% of the bonus declared for support staff in November 1999, less the amount already paid to Bierer.
8. 100% of the bonus declared for support staff in May 2000, less the amount already paid to Bierer.
9. \$699.00 for future expenses in car insurance.

10. \$250.50 for half of her automobile insurance deductible.

### Back Wages

Payroll records show that Bierer was not paid 4¢ in back wages during the course of her employment. Therefore, she is owed that amount.

### Hourly Wage Raise

Other than to establish a minimum wage, the law does not provide for the amount of compensation to be paid by an employer to an employee. The amount of an employee's compensation is a matter for agreement between the parties. Bierer failed to prove that DADCO agreed to pay her an additional 19¢ per hour for the services she rendered in May 2000. While she contends that the officer manager promised her a raise equal to 19¢ per hour in May 2000, there is no documentation to support a finding that she was offered the pay raise by the branch manager. Further, the Hamilton office manager credibly testified that he never offered Bierer a raise in May 2000.

### Vacation Pay

Bierer contends that DADCO owes her 4 hours of additional vacation time. During her year of employment, payroll records show that she earned and received 40 hours of paid vacation. This amount is consistent with the calculations described in the DADCO handbook (Employer's Exhibit B-7 and D-7). Bierer did not earn and she is not due any additional vacation pay pursuant to the terms and conditions of employment.

### Holiday Pay

Bierer contends that she is owed holiday pay for Memorial Day (May 29, 2000). The record reveals that Bierer gave her termination notice on April 17, 2000. On May 26, 2000, her employment actually terminated because a replacement had been found. Bierer signed and submitted an employee termination report that shows May 26, 2000 was her last day of employment. She has provided no evidence to show that DADCO would provide holiday pay under such circumstances. Therefore, she is not entitled to holiday pay, since she was not employed by DADCO on the holiday.

### Bonus Pay for November 1999 and May 2000

Bierer seeks total unpaid bonus of \$2,004.60 (\$1,053.00 November bonus plus \$951.60 May bonus). Bierer is not entitled to additional bonus pay under the conditions of hire. She received bonuses of \$117.00 in November 1999, and \$208.00 in May 2000. The bonus amounts she received on those dates are consistent with her period of employment and the provisions set forth in the DADCO employment handbook. Bierer's allegation that the office manager and other office employee led her to believe that she would qualify to receive a 100% bonus lacks supporting evidence. There is no documentation in the record to show that DADCO initiated an



exception to the employee bonus pay policy for Bierer. Further, the office manager and other office employee credibly denied that they ever suggested that she would receive a 100% bonus.

Bierer's contention that she did not receive the portion of the handbook at the time of hire which explains the vesting/bonus system does not entitle her to the additional amounts she seeks. DADCO offered Bierer employment in accordance with the terms of its written employee compensation policies in effect at the time she was hired. Bierer's mistake as to those terms did not alter the terms of the agreement. Both the office manager and other employee testified that a complete handbook was available in the office, including the section explaining bonuses and vesting policies. Bierer was aware that DADCO had a published employee policy handbook. As an employee, Bierer had an obligation to familiarize herself with the handbook and with employment policies. Bierer was entitled to the bonuses set forth in the policy, and DADCO paid her what she was entitled to.

#### Mileage and Automobile Reimbursement Claims

Bierer also asks that DADCO pay her mileage reimbursement for using her own car while running the daily errands and for her trip to Great Falls for the business meeting. In addition, she seeks reimbursement pursuant to §39-2-701, MCA, relating to insurance deductible and increased premium expenses she incurred as a result of the accident she had while making a business delivery for DADCO. However, expense reimbursements are not compensation for work performed. The Department lacks jurisdiction over claims made pursuant to §39-2-701, MCA. Therefore, they are not recoverable under wage and hour statutes. Johnson v. K & T Manufacturing, Inc., 191 Mont. 458, 652 P.2d 66 (1981).

#### Summary

Bierer alleges that DADCO owed her a total of \$3,303.41 for various claims which arose in connection with her employment. Some of her claims were for matters over which the Department lacks jurisdiction. Of the remaining claims, Bierer established at hearing only that DADCO owed her 4¢. This trivial sum is insufficient to support an award to the claimant. "The law disregards trifles." §1-3-224, MCA.

### **V. CONCLUSIONS OF LAW**

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over Bierer's claim for unpaid wages under §39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).
2. The Department lacks jurisdiction over Bierer's claim for mileage and automobile reimbursements.
3. DADCO paid Bierer all wages to which she was entitled in the course of her employment, with the exception of 4¢.
4. Four cents is an insufficient sum to support an award of back wages to the claimant.



**VI. ORDER**

The claim of Janet R. Bierer is hereby dismissed.

DATED this 20th day of July, 2001.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/MICHAEL T. FURLONG

Michael T. Furlong  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.