

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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| IN THE MATTER OF THE WAGE CLAIM) | Case No. 1501-2006 |
| OF PAMELA K. MUSSI,) |) |
|) |) |
| Claimant,) |) |
|) |) |
| vs.) |) |
|) |) |
| BRACO RESOURCE MANAGEMENT, INC.,) |) |
|) |) |
| Respondent.) |) |

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER

* * * * *

I. INTRODUCTION

On January 7, 2006, Claimant Pamela K. Mussi (Mussi) filed a claim with the Montana Department of Labor and Industry, contending that Respondent BRACO Resource Management, Inc. (BRACO) owed her \$2,894.95 in vacation pay. On February 3, 2006, the Department issued a determination holding that BRACO owed Mussi \$2,890.17 plus penalty. On February 21, 2006, BRACO appealed the determination.

On June 22, 2006, the Department transferred the case to the Hearings Bureau for a contested case hearing. Officer David Scrimm conducted a hearing in the case on August 2, 2006. Mussi appeared and represented herself. Andrew Branch, president and registered agent for BRACO, Inc., represented the respondent. Mussi, Branch and Donald Busch testified. Documents 1-33 from the Department's investigative file and exhibits 1 and A-L were admitted into evidence. Following the hearing, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether BRACO, Inc., owes wages for work performed and specifically whether it owes vacation pay, as alleged in the complaint filed by Mussi, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. BRACO Resource Management, Inc., is an enterprise engaged in commerce, as that term is used in Federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*

2. BRACO hired Mussi on August 25, 1995. She worked for the company until the company closed its doors and her employment ended on October 31, 2005.

3. BRACO's primary source of funding was a subcontract with Unisys, Inc. That subcontract was not renewed in October of 2005.

4. Due to the loss of the Unisys, Inc. contract, Mussi's employment ended. Mussi was paid in full for all of her regular salary, but was not paid for 136.29 hours of earned vacation pay.

5. The parties stipulated to the facts and conclusions found in the department's determination (Doc. 11). Those facts and conclusions are incorporated into these Findings of Fact by this reference. That determination found that BRACO owed Mussi \$2,890.71 for her earned and unpaid vacation pay and a penalty in the amount of \$433.61 (if paid by February 21, 2006) for a total owed of \$3,324.32.

IV. DISCUSSION AND ANALYSIS¹

BRACO owes wages and penalties.

UNPAID WAGES

Montana law requires that employers pay employees wages within 10 days of when they become due in accordance with the employment agreement. Mont. Code Ann. § 39-3-204. "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; *In re the Wage Claim of Sharon Langager*, 1998 MT 44, ¶24, 287 Mont. 445, ¶24, 954 P. 2d 1169, ¶24.

¹Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Here, the respondent does not dispute that it owes Mussi payment for her earned vacation pay, but submits that it lacks the necessary funds to fulfill that obligation, in part because it has not been fully paid by Unisys, Inc. The respondent's contention, however, does not provide a defense to its liability in this forum.

PENALTY

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. By failing to pay Mussi for her earned vacation time, BRACO failed to pay her wages when they were due. The respondent is, therefore, subject to penalty. The penalty is 55% on the unpaid wages, or \$1,589.89. Admin. R. Mont. § 24.16.7551(2), Admin R. Mont. § 24.16.7566 (1)

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. BRACO, Inc., owes Mussi \$2,890.71 in unpaid wages. Mont. Code Ann. § 39-3-204.

3. BRACO, Inc., owes a penalty in the amount of \$1,589.89. Admin. R. Mont. § 24.16.7566.

VI. ORDER

BRACO, Inc., IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$4,480.60, representing \$2,890.71 in unpaid wages and \$1,589.89 in penalties, payable to the claimant, Pamela K. Mussi, and delivered to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than April 30, 2006. BRACO, Inc., may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 22nd day of September, 2006.

DEPARTMENT OF LABOR AND INDUSTRY

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.

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.

Mussi FOF dsp