

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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| IN THE MATTER OF THE WAGE CLAIM) | Case No. 1735-2006 |
| OF JOSEPH PODGURSKI,) | |
|) | |
| Claimant,) | FINDINGS OF FACT; |
|) | CONCLUSIONS OF LAW; |
| vs.) | AND ORDER |
| LOWES HIW INC.,) | |
|) | |
| Respondent.) | |

* * * * *

I. INTRODUCTION

On March 16, 2006, Joseph Podgurski (Podgurski) filed a claim with the Department of Labor and Industry, contending that Lowe’s HIW, Inc. (Lowe’s) owed him \$193.00 in vacation pay. On April 28, 2006, the Department issued a determination holding that Podgurski was owed \$193.00 plus penalty. On May 15, 2006, Lowes appealed the determination asking for a formal hearing of the matter.

On May 23, 2006, the Department transferred the case to the Hearings Bureau for a contested case hearing. At the September 14, 2006 pre-hearing conference, the parties agreed to submit this matter for decision based on the stipulated facts set out below.

II. ISSUE

The issue in this case is whether Lowe’s owes wages for earned and unused vacation time as alleged in the complaint filed by Podgurski, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

Reference is made to numbered documents in the investigative file of the Employment Relations Division – Wage and Hour Unit of the Montana Department of Labor and Industry.

1. Lowe's HIW, Inc. (Lowe's) is a Washington corporation with its headquarters in Tukwila, Washington. Lowe's owns and operates a retail home improvement store in Missoula, Montana.

2. Joseph Podgurski has been employed by Lowe's in its Missoula store since October 7, 2003.

3. On October 7, 2003, Podgurski executed a document acknowledging that he received a copy of Lowe's Orientation Guide (Document 17).

4. The Lowe's Orientation Guide provides that, after one year of service, employees will be eligible for vacation (Document 19). It further provides:

Vacation is normally taken in one-week increments, but may be taken in minimum increments of four hours. No accumulation of vacation days from one year to the next will be allowed. Vacation must be taken in the fiscal year earned. Vacation not taken during the fiscal year will be forfeited.

(Document 20).

5. On February 10, 2006, because Podgurski did not take all vacation available to him within the time allotted, the amount of vacation available to him in 2006 was reduced from 19.99 hours to 1.53 hours per Lowe's policy (Documents 41-42).

6. On February 23, 2006, Podgurski filed a wage claim with the Montana Department of Labor and Industry, Employment Relations Division, Wage and Hour Unit (Documents 35-36). Podgurski claims \$193.00 in unpaid wages. *Id.* This amount was computed by multiplying Podgurski's hourly rate of pay, \$9.67, by 20 hours of vacation (Document 35).

7. Podgurski contends that vacation time cannot be taken away once it is earned and that his vacation time was earned (Document 38). Lowe's contests this (Documents 12-13).

8. On April 28, 2006, Compliance Specialist Renee Crawford determined that vacation wages were owed to Podgurski. Lowe's contested this determination and filed a request under A.R.M. 24.16.7537 for a formal hearing (Document 5).

IV. DISCUSSION AND ANALYSIS¹

Montana law requires that employers pay employees wages within ten days after the wages become due pursuant to the particular employment agreement. Mont. Code Ann. § 39-3-204. Except for compliance with minimum wage law, the parties can agree to the amount of wages to be paid. “Wages” are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

“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 (1949); *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, 453; 954 P. 2d 1169, 1173-1174.

In *Langager*, the court looked at other state court holdings regarding vacation pay and found that “an employer is free to set the terms and conditions of employment and compensation and the employee is free to accept or reject those conditions.” *Langager*, 1998 MT 445, ¶25, *quoting Rowell v. Jones & Vining, Inc.* (Me. 1987), 524 A.2d 1208, 1211.

In the case *sub judice*, the terms and conditions of Lowe’s vacation policy provide that its employees earn two weeks vacation after their first year of employment. It also allows employees to be paid their normal salary when they take their vacation time. The policy further states: “No accumulation of vacation days from one year to the next will be allowed. Vacation must be taken during the fiscal year earned. Vacation not taken during the fiscal year will be forfeited.” (Lowe’s Orientation Guide, Documents 15-16).

Thus, Lowe’s has adopted a “use it or lose it” policy regarding the vacation benefit it provides. Employees are provided a vacation benefit, which they must use it within the fiscal year they earn it. Had Podgurski asked to use his earned vacation time within the fiscal year he earned it, he would have been paid for it. Because he did not take the time during the fiscal year he earned it, he lost it. His pay for the year was actually the same as if he had taken the rest of his accrued vacation time, but he had to work the 18.46 hours that he could have spent on paid vacation. Podgurski acknowledged receipt of this “use it or lose it” policy at the time he was hired (Document 15).

In *Stuart v. Department of Social & Rehabilitation Services* (1993), the Montana Supreme Court provided a clear indicator that use it or lose it vacation policies are neither in conflict with the Wage Payment Act, nor unacceptable public policy. 256 Mont. 231, 235, 846 P.2d 965, 968. The court held that because the Legislature

created the right for public employees to earn annual vacation leave credits, it could condition those rights to limit the accumulation of those credits. *Id.*

The state expressed the terms of its “use it or lose it” vacation leave policy in statute. Private employees, so long as they do not violate express statutory limits (such as minimum wage law), can express the terms of their vacation leave policy (if they have one), in their employee policies. Lowe’s expressed the terms of its use it or lose it policy in its New Employee Orientation Guide, provided to Podgurski when he began his employment. In both cases, the employer was still free to set the terms and conditions of its conditions of employment. *Langager* at ¶25. In a more recent case involving payment for personal time, found analogous to vacation time, the court consistently held that “to the extent that an employer has obligated itself to pay money for earned but unused personal time, there exists an obligation to pay wages under 39-3-201(6)(a).” *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶21-22, 125 P.3d 1121 ¶21-22.

Like the State of Montana in *Stuart*, Lowe’s limited its obligation to pay for unused vacation time. The State of Montana’s “use it or lose it” vacation policy allows its employees to accumulate no more than two times the amount of vacation leave earned in one year. Lowe’s “use it or lose it” policy allows its employees to accumulate no more than the amount of leave earned in one year and provides no cash out provision. While under such a policy employees have to be vigilant lest they lose vacation time earned, Lowe’s policy does not require it to pay for unused time. Lowe’s set a value of zero on unused vacation time. Because employers are free to set the terms and conditions of employment and to limit their obligations regarding the benefits employees earn, Lowe’s is under no obligation to pay wages to its employees for earned, but unused vacation time. *McKonkey* ¶ 24.

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. Lowe’s, Inc., is not obligated to pay wages for the amount of unused vacation time earned in prior fiscal years by Joseph Podgurski.

VI. ORDER

Podgurski’s claim for unpaid wages is dismissed.

DATED this 27th day of December, 2006.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

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.