

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2454-2006
OF ANN R. GRAYBIEL,)	
)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
JAMES KOMMERS, d/b/a KOMMERS)	
LAW FIRM)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On June 15, 2006, Ann R. Graybiel (Graybiel) filed a claim with the Montana Department of Labor and Industry, contending that Kommers Law Firm (Kommers) owed her \$446.25 in regular wages and \$1,020.00 of vacation pay. On July 6, 2006, the Department issued a determination dismissing Graybiel's claim. On July 17, 2006, Graybiel appealed the determination.

On July 24, 2006, the Department transferred the case to the Hearings Bureau for a contested case hearing. The Hearing Officer conducted a telephone hearing in this matter on September 27, 2006. Graybiel appeared and represented herself. James Kommers, attorney at Law, represented the respondent.

Documents 1 through 89, from the Department's investigative file, were admitted into the record without objection. Exhibits 90 and 90-A, offered by the employer were admitted into the record over Graybiel's objection that they were not proposed for admission prior to the hearing. The document had been provided to her prior to the deadline for submission of additional documents. Following the hearing, the case was deemed submitted for decision.

II. ISSUE

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

III. FINDINGS OF FACT

1. Kommers Law Firm is an enterprise engaged in the practice of law. Kommers hired Graybiel on July 6, 2004, to work as a legal secretary and paid her \$11.00 per hour. On May 16, 2005, Kommers gave Graybiel a raise in pay to \$11.75 per hour. On April 1, 2006, Kommers gave Graybiel a raise in pay to \$12.75 per hour.

2. At the time Kommers hired Graybiel, he did not have a written policy related to the payment of wages during vacation or to the accrual of vacation time. There was no initial discussion about the accrual of vacation time or pay.

3. Graybiel's paychecks and paycheck stubs were created by Kommers' wife, Nancy, using a computer program called *Quick Books*. Graybiel assumed Nancy Kommers knew how to use the program and that her paycheck stubs were accurate.

4. Graybiel noted the accrual of vacation time on her paycheck stubs which led to several discussions with Kommers. Kommers advised Graybiel of his policy that she would accrue 40 hours of paid vacation time after one year of service and 80 hours of paid vacation after two years of service. The policy states that the anniversary of an employee's hire date was the date the vacation time began to accrue and that the vacation time must be accrued before it could be used. In practice, Kommers agreed to pay it as it accrued, on a six-month basis.

5. Based upon Kommers' vacation policy and practices, Graybiel accrued 40 hours of paid vacation by July of 2005, and another 40 hours of paid vacation by December of 2005.

6. During December of 2005, Graybiel took 80 hours of paid vacation.

7. Based upon Kommers' vacation practice and policy, Graybiel would have accrued 40 hours of paid vacation by the first week of July, 2006, and another 40 hours by the end of December of 2006, for a total of 80 hours for the year.

8. On June 7, 2006, Graybiel quit without notice or explanation and took a job with another law firm. On June 16, 2006, Kommers paid Graybiel her accrued wages for the period beginning June 1, 2006, and ending June 7, 2006. He also paid her for 40 hours of accrued vacation.

9. On June 15, 2006, Graybiel filed a wage and hour claim, contending that Kommers owed her \$446.25 for 40 hours of regular wages and \$1,020.00 for 80 hours of accrued vacation pay. The payment made by Kommers on June 16, 2006 consisted of \$446.25 based upon 35 hours of work at \$12.75 per hour, plus \$510.00 for 40 hours of accrued vacation at \$12.75 per hour. Graybiel's remaining claim is for \$510.00 for 40 hours of vacation pay.

IV. DISCUSSION AND ANALYSIS¹

PAID 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.

In this matter, Kommers paid Graybiel all accrued wages and 40 hours of accrued vacation in her final paycheck. The payment of accrued vacation pay was made in accordance with Kommers' practice and policy and was in compliance with the law. Graybiel is claiming payment for 40 hours of vacation which appeared on her check stub but which had not accrued. Since vacation pay which has been earned is considered as wages and is collectible in the same manner and under the same statutes as wages, vacation pay, or wages which have not accrued are not payable. Graybiel is technically asking for \$510.00 of future wages which have not accrued and to which she is not entitled.

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.

PENALTY

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Since Kommers paid all accrued wages and vacation pay when due, no penalty can be assessed.

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. Kommers has paid all accrued wages and vacation pay. Graybiel’s claim must be dismissed.

VI. ORDER

1. Graybiel’s claim for unpaid, unaccrued vacation pay is dismissed.

DATED this 20th day of October, 2006.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID H. FRAZIER
David H. Frazier
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.