

III. FINDINGS OF FACT

1. Houchin began her employment with McDonald's on May 17, 2006. Her last day of work was April 20, 2010.

2. At the time of hire, McDonald's vacation policy provided that: no vacation pay was earned during the first year of employment; that an employee would accrue one week of vacation after 18 months of continuous employment and another week of accrued vacation after two years. Thereafter employees would earn one week for every six months of employment. The initial policy allowed employees to take vacation prior to having accrued the time. The policy was amended January 1, 2008 to no longer allow employees to take vacation before they accrued the time. The revised policy did not alter the schedule for accrual of vacation time.

3. McDonald's accounting system tracked accrued vacation time on a January to January basis because tracking each employee's start date for purposes of vacation time was logistically difficult. This accounting mechanism did not create a right to additional vacation pay.

4. The table below shows how Houchin accumulated vacation time under McDonald's vacation policies; how Houchin believes she accrued vacation time; and how much time Houchin used and was paid for (Docs. 22-26).

McDonald's Vacation Policy		Houchin's theory		Houchin Vacation paid	
11/16/07	1 week	1/1/08	1 week	9/5/07	4 days
5/16/08	1 week	1/1/09	2 weeks	9/5/08	1 week
11/16/08	1 week	1/1/10	2 weeks	12/20/08	1 week
5/16/09	1 week	4/20/10	4 days	3/20/09	1 week
11/16/09	1 week			8/20/09	2 weeks
4/20/10	4 days				

5. Even if Houchin's concept of vacation time accrual was McDonald's policy, and the hearing officer does not so find, Houchin received and used all the time she was entitled to receive.

6. McDonald's vacation policy was as provided in Documents 31 and 32.

7. McDonald's does not owe Houchin any additional vacation pay.

IV. DISCUSSION AND ANALYSIS.

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*, 287 Mont. 445, 453; 954 P.2d 1169, 1173-1174, (1998).

The Montana Supreme Court has consistently looked to the terms of the employment agreement, be it a written policy or governing statute, to determine whether an employee is dues wages for vacation time. 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.*, 524 A.2d 1208, 1211, (Me. 1987).

McDonald's vacation policy with regard to the accrual of vacation time did not change during the term of Houchin's employment. She earned one week's time after her first 18 months and one week every six months thereafter. As the table in Finding of Fact #4 shows, Houchin earned a total of five full weeks of vacation pay and four days for the less than six-month period between November 16, 2009 and her last day of employment, April 20, 2010. Houchin's pay stubs show that she was paid for five weeks and four days of vacation time used (Docs. 22-26). Accordingly, Houchin is not owed any additional pay for accrued, but unused vacation time.

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. Houchin was paid for all the vacation time she accrued during the course of her employment.

3. McDonald's does not owe Houchin additional wages for unused vacation time.

VI. ORDER

Houchin's claim for unpaid wages is dismissed.

DATED this 15th day of November, 2010.

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.