STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF DWAYNE M. WILSON,	)	Case No. 1939-2011
Claimant,	)	
vs.	)	**FINAL AGENCY DECISION**
MIDLAND OFFICE EQUIPMENT, INC., a Montana corporation,	)	
Respondent.	)	

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I. INTRODUCTION

Dwayne M. Wilson appeals from a Wage and Hour Unit determination that found his former employer, Midland Office Equipment, Inc., did not owe him due and unpaid wages (consisting of three weeks of paid vacation) and a statutory penalty.

Hearing Officer Terry Spear convened a contested case hearing by telephone in this matter on January 3, 2011. The parties agreed to proceeding by telephone. Wilson acted on his own behalf. Benjamin LaBeau, LaBeau Law Firm LLC, represented the corporation. Wilson and Mark Koerber, President and owner of Midland Office Equipment, Inc., testified under oath. The parties stipulated to the admission of Documents 8-9, 12, 14, 20-25, 35-36, 39-43, 51, 64-65, 73, 87, 96, 106-08, 110, and A through T (Document 118 was a duplicate of Document 9, without the handwriting and department "received" stamp that were both on Document 9, and Document 118 was not admitted). Based on evidence and arguments, the hearing officer issues the following decision.

II. ISSUES

Is Wilson due wages for three weeks of vacation, earned and unpaid?

III. FINDINGS OF FACT

1. Midland Office Equipment, Inc. ("MOE"), acting through its President and owner, Mark Koerber, hired Dwayne M. Wilson as a service technician, at a time (December 2007) when MOE had lost the services of its previous service technician

and was having difficulty recruiting a qualified replacement. As a result of this need, Koerber negotiated with Wilson for his move to Billings, Montana, from Spokane, Washington, agreeing to more salary and various "accommodations" to induce Wilson to take the job. The term "accommodations" is not used in any legal sense, but simply to identify additional consideration offered to Wilson so that he would take the job, as he ultimately did.

2. During the back and forth communications between Koerber and Wilson, a number of proposals and counter-proposals were exchanged. Eventually, Wilson came to work for MOE on December 2, 2007, although he thereafter was away from work for times in December 2007. He received a cash bonus ($750.00), travel reimbursement ($806.08), a housing allowance for December 2007 ($1,329.60), and wages paid for the latter part of December 2007 even though Wilson did not actually work the last 11 days of 2007 ($2,885.68). All of these terms of commencement of employment were itemized in Document 9, a description of terms and conditions of Wilson's employment that MOE sent to Wilson.

3. Wilson credibly testified that he signed Document 9 and returned it to MOE, accepting it as the terms and conditions of his employment. Koerber denied that MOE had agreed to the terms set out in Document 9, testifying that all terms therein were "open to negotiation" rather than agreed upon. He denied ever signing the document. Whether he signed it or not, it is incredible that MOE provided Document 9 to Wilson (and the undisputed evidence is that it did so) but did not intend to offer the terms Document 9 contained. On the face of the substantial and credible evidence of record, Wilson did accept the terms of Document 9 as the terms of his employment.

4. Document 9 also addressed paid vacation for Wilson:

Vacation After Six Months	2 Weeks
2nd Year	2 Weeks
3+ Years	3 Weeks

The most natural reading of this document is that during Wilson's first full calendar year of employment, after completing six months of work, he would be entitled to take two weeks of vacation. Then, during his second and third calendar years of employment, he would be entitled to take two weeks of vacation. Thereafter, he would be entitled to take three weeks of vacation.

5. In 2007, MOE's vacation policy was stated in an "employee handbook" for which each employee signed an acknowledgment of receipt. Wilson signed his acknowledgment on December 3, 2007 (Document 20). This acknowledgment included the express statement that the content of the employee handbook "does not

create a contract of employment." The handbook stated that employees of MOE were "eligible" for paid vacation after one year of continuous service, going on to define vacation entitlements as follows, in Document 23:

> AFTER 1 YEAR OF SERVICE – 1 WEEK
> AFTER 2 YEARS OF SERVICE – 2 WEEKS
> AFTER 10 YEARS OF SERVICE – 3 WEEKS

6. The substantial and credible evidence of record established that, as a customary practice, MOE acknowledged and made available accrued paid vacation time to employees who had worked the entire previous calendar year. The amount of paid vacation time acknowledged and made available to each employee was based upon the number of previous complete calendar years each employee had worked for MOE (disregarding any prior consecutive fraction of a year the employee might have worked right before the first complete calendar year of work). MOE did not credit or make available any paid vacation time until January 1 of the calendar year after that employee completed a full calendar year of work. The vacation awarded January 1 of the employee's second year was one week of vacation. After the second through the ninth full year of work, on January 1 of the third through the tenth calendar years of work, MOE awarded two weeks of vacation to the employee. Thereafter, starting with January 1 of the employee's eleventh year of consecutive full-time work, MOE awarded three weeks of vacation to that employee, with the same amount available in each successive year of consecutive full-time employment thereafter. For each year's awarded vacation, the employee had to use the entire vacation awarded during that calendar year, or lose it.

7. It is inherently incredible that Wilson, in December 2007, came to work for MOE based upon the terms and conditions in Document 9, and then accepted, by signing an acknowledgment of receipt of the MOE employee handbook, that he would be receiving no paid vacation until 2009, one week of paid vacation in 2009, two weeks of paid vacation from 2010 through 2017, and would not receive three weeks of vacation until 2018. By its own terms, the employee handbook was not even a contract.

8. This premise of MOE's case that the employee handbook trumped the amounts of paid vacation stated in Document 9, to Wilson's prejudice, is particularly incredible given that MOE, in the three years and five months that Wilson worked there, paid him for 137 more vacation hours than the employee handbook entitled him to take. That was nearly double the employee handbook entitlement.

9. The conduct of the parties in this case clearly confirms that the terms of Wilson's employment included the vacation entitlement set forth in Document 9,

even if the employer never signed it or formally approved it in writing. By offering it to Wilson in writing, and never directly revoking it before or after Wilson accepted the written offer, MOE committed to the terms and conditions of employment for Wilson stated therein. There was never any disciplinary action against Wilson that led to reducing his vacation or paid time off entitlement. There was never any notice to Wilson that the change from vacation to paid time off would impact his accrual amounts. And there were also the ongoing approvals of Wilson's paid vacations, over and above those stated in the employment handbook.

10. MOE was entitled to set the terms and conditions of any vacation policy it decided to adopt, within the confines of Montana law. In late 2010, after Wilson contacted the Department of Labor and Industry regarding MOE's "use it or lose it" policy, the department wrote a letter to MOE advising that under Montana law, earned paid vacation is not legally subject to a "use it or lose it" policy.

11. On December 12, 2010, after receiving the letter from the department, MOE eliminated its paid vacation policy. It instituted a "paid time off" policy under which entitlement to paid time off accrued to each employee as that employee worked hours during the current calendar year. The maximum paid time off earned during a continuous year of employment year was calculated (absent some other agreement with a particular employee) in the same way as vacation time had been calculated under the previous policy. In other words, after their first continuous year of employment, new employees earned a fraction of their maximum paid time off (one week for that second year of continuous employment) for each fraction of that year they had so far worked full-time. In the third through the tenth years of continuous employment, employees earned a fraction of two weeks paid time off for working that same fraction of a full year. Starting in the eleventh year of continuous employment, employees earned a fraction of three weeks of paid time off for working that same fraction of a full year. Under this new paid time off policy, each employee's current maximum possible paid time off also was the maximum number of hours that employee could accrue, after which no further paid time off would accrue until some of the existing paid time off was used.

12. During the department's investigation of Wilson's wage and hour complaint herein, Koerber wrote a letter to the department (Document 96) in which he stated that MOE, when it eliminated the paid vacation policy and adopted the paid time off policy, decided to permit its employees to use up to 40 hours of paid time off before they earned those hours, as a way to soften the transition to the new policy. Wilson and one other employee took advantage of the one-time offer and took paid time off in December 2010, demonstrating that the paid time off policy started then, on December 12, 2010, and not on January 1, 2011.

13. The department advised MOE that it could not impose a "use it or lose it" provision as part of its paid vacation policy, presumably deciding that once vacation was "awarded" on January 1 of the year after it accrued, it could not thereafter be "unawarded." This department advice resulted in the elimination of the paid vacation policy and the creation of the paid time off policy.

14. For the legal reasons stated in the discussion herein, the department misconstrued the paid vacation policy. In the same paragraph of the employee handbook that created the policy, as it applied to employees without some kind of special "deal," MOE specifically limited the right of employees to use their paid vacation to the 12 calendar months following the date of the award. In other words, MOE created a system of paid vacation in which an employee with appropriate seniority who worked an entire calendar year was awarded, on January 1 of the next calendar year, the right to take a certain amount of paid vacation during the 12 calendar months of that year. These were genuine conditions precedent to the right to take the vacation, and there was no impermissible condition subsequent.

15. While the paid vacation policy was in effect, nothing in that policy, as set forth in the employee handbook, operated to vest a right to take accrued paid vacation unless and until the employer "awarded" the vacation on the following January 1, for the employee to use within that calendar year. Nothing in that policy, as set forth in the employee handbook, operated to extend the right to take awarded paid vacation beyond December 31 of the year in which it was awarded. The right to take paid vacation was expressly limited. It could only be exercised after the paid vacation was awarded at the beginning of a calendar year, within the year in which it was awarded. These limitations were just as clear and unambiguous as the provision that the employer reserved the right to refuse permission to take an available paid vacation at a time when the absence of the requesting employee would be inconsistent with the smooth operation of the business.

16. Nothing in Document 9 altered the "use it or lose it" provisions of the employee handbook. Wilson reasonably (and correctly) understood that the terms of Document 9, rather than the employee handbook, stated how his paid vacation would accrue. Even with Document 9 applicable, he still had no right or power to carry over to a subsequent calendar year any paid vacation awarded on January 1 of a calendar year that he had not used by the end of that calendar year. Even with Document 9 applicable, he had no vested right to take any paid vacation (after his first six months of employment) until the paid vacation was awarded on January 1 of a calendar year.

17. Because of these facts, Wilson had certain vacation entitlements at various times, as set forth in the following findings.

18. In December 2007, when he commenced his employment, Wilson had no vacation entitlement he could have used during that period. The 56 hours of paid time off he took in December 2007 was an "initial accommodation," and not paid vacation time.

19. At the end of his first six months of employment, in late June 2008, Wilson had 80 hours of paid vacation available for use by the end of that calendar year that should have been awarded in accord with Document 9. He used 32 hours of that entitlement, the rest of which expired at the end of that calendar year, in conformity with the valid terms of the vacation policy. Wilson is not entitled to payment for unused and expired paid vacation time from previous years.

20. In calendar 2009, his second full calendar year, Wilson had 80 hours of paid vacation available (based on his work in 2008, his first full calendar year) for use by the end of that calendar year that should have been awarded in accord with Document 9. He used 96 authorized paid vacation hours during that calendar year, none of which MOE ever tried to recapture. In other words, MOE suffered him to use 16 authorized paid vacation hours to which he had no entitlement. Having freely "given" him those extra paid vacation hours, MOE cannot take credit for them in any subsequent period.

21. In calendar 2010, Wilson initially had 80 hours of paid vacation available for use by the end of that calendar year (based upon his work in 2009, his second full calendar year) that should have been awarded in accord with Document 9. From January 1, 2010 to December 12, 2010, Wilson used 104 authorized paid vacation hours, none of which MOE ever tried to recapture. In other words, MOE, by December 12, 2010, had suffered him to use 24 authorized paid vacation hours to which he had no entitlement. Having freely "given" him those extra paid vacation hours, MOE cannot take credit for them in any subsequent period.

22. Effective December 12, 2010, MOE's cancellation of the paid vacation policy eliminated any accruing vacation that could otherwise have been awarded on January 1, 2011.

23. Effective December 12, 2010, MOE employees, including Wilson, began to accrue paid time off for full-time employment worked. Although no employee had earned 40 hours of paid time off in December 2010, MOE allowed employees to use up to 40 hours of paid time off before they earned those hours, as a way to soften the transition to the new policy. Wilson took advantage of this offer and used 32 hours of paid time off, not the 40 hours listed on Document 73 (4 days, not 5 days).

24. From December 12 through December 31, 2010, Wilson earned .054 of 80 hours of paid time off (20/365), which was 4.32 hours. Effective January 1, 2011, Wilson could earn up to 120 hours of paid time off for working full time the entire year. He worked to May 20, 2011, and earned .381 of 120 hours of paid time off (139/365), which was 45.720 hours of paid time off. Thus, he earned 46.101 hours of paid time off by the end of his employment. From December 12, 2010 through May 20, 2011, Wilson used 44 hours of paid time off, and was paid for an additional 12 hours of paid time off when he received his final check. In other words, MOE suffered him to use 9.899 authorized paid vacation hours to which he had no entitlement. Having freely "given" him that extra vacation, MOE cannot recoup it.

25. Since Wilson used more paid vacation time and more paid time off than his entitlements, MOE does not owe him any unpaid wages for any additional paid time off or paid vacation time off.

IV. DISCUSSION[1]

Mont. Code Ann. § 39-3-204 provides in pertinent part that "every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee . . ."

An earned entitlement to paid leave (whether it is called "paid vacation," "paid time off," or any other rubric) is a vested right to wages under Montana wage and hour laws. *Langager v. Crazy Creek Prod., Inc.*, ¶30, 1998 MT 44, 287 Mont. 445, 954 P.2d 1169: "[O]nce an employee has accrued paid vacation pursuant to the terms of his or her employment contract, an employer may not then impose conditions subsequent which would, if unmet, effectively divest an employee of that accrued vacation."

The three justices who dissented from the *Langager* majority opinion argued that Langager's employer had clearly and properly set out a vacation policy that made it a condition of paid vacation to take it while still employed (*i.e.*, to come back to work after the vacation was taken). The dissent argued that the employer's vacation policy was valid and sound, and Langager was not entitled to payment for the time she spent on vacation. *Langager*, ¶¶35-46. Since this was the dissent, it was clearly NOT the majority holding, specifically stated, at *Langager* ¶¶31-32:

> Crazy Creek argues employees only earn paid vacation if they comply with the personnel manual's additional requirements and take their accrued paid vacation in consecutive days within

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

> the next calendar year, request vacation thirty days in advance, and work their regularly scheduled shifts both before and after vacation. Termed conditions precedent by Crazy Creek, these contractual requirements are, in effect, conditions subsequent which do not affect the accrual of paid vacation which occurs, pursuant to the terms of Crazy Creek's personnel manual, upon each anniversary of employment. Instead, these contractual requirements affect an employee's ability to take advantage of accrued vacation and, if unmet, divest that employee of accrued vacation. In the present case, the fact that Langager failed to fulfill Crazy Creek's requirements that she report to work for the shifts immediately preceding and following her vacation effectively divested her of her two weeks vacation already accrued pursuant to the explicit terms of the company's own personnel manual. Moreover, we note the inherent inconsistency of a vacation policy pursuant to which an employee cannot earn paid vacation until that vacation has come to an end.
>
> Based on the foregoing, we conclude the Board of Personnel Appeals erred in concluding that Langager was not entitled to recover two weeks of vacation pay from Crazy Creek, and that the District Court similarly erred in concluding Langager was entitled to one week of vacation pay pursuant to Crazy Creek's verbal vacation policy. We remand to the District Court for a determination of appropriate penalties, if any, pursuant to § 39-3-105, MCA, and § 39-3-206, MCA.

Clearly, a vested entitlement to accrued vacation, pursuant to the employer's personnel manual and/or employment contract, cannot, after vesting, be divested by a subsequent requirement to work the next shift after taking the vacation. That is the precise holding of *Langager*. Legally, "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* **at** ¶25, quoting *Rowell v. Jones & Vining, Inc.* (Me. 1987), 524 A.2d 1208, 1211.

Thus, an entitlement to take a paid vacation within a certain period of time, defined as such when it vests, is precisely that, time-limited. A policy that creates such an entitlement is valid policy and enforceable as written. The terms of the vacation or paid time off policy itself control, not the label given to the benefit. Be it "paid vacation" or "paid time off," the terms and conditions of the offered benefit control what it is.

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. MOE expressed the terms of its "use it or lose it policy" in its "employee handbook," provided to Wilson when he began his employment, and not at all in conflict (with regard to "use it or lose it") with Document 9. MOE 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,* MOE effectively limited its obligation to pay for unused vacation time. Wilson's paid vacation entitlements and subsequent paid time off entitlements had to be used within the calendar year of each award. The subsequent paid time off entitlement also capped, and no additional time off could accrue until some of the accrued time off was used. Both benefits were precisely and properly defined, and neither involved an impermissible "use it or lose it."

The differences between Wilson's status and that of other MOE employees stemmed from the Document 9 offer he received and accepted. That accepted offer gave him more vacation time sooner.

In support of his denial of any such agreement about vacation, Koerber testified that MOE had a standard policy of giving three weeks of paid vacation per year to employees who had finished 10 years' employment with MOE, and that giving three weeks of paid vacation per year to a newer employer would cause problems. While this testimony was credible, it does not suffice to alter or to invalidate the Document 9 offer that MOE provided to Wilson, which governed how much paid vacation he would get over his employment. Indeed, whether MOE called

it “paid vacation time” or “paid time off,” the accrual rate in Document 9 still applied.

Koerber also testified to MOE’s immediate need for a service tech in 2007 and its difficulties recruiting one. Thus, he testified, it offered Wilson generous terms and, during his employment, authorized more paid vacation time than he had earned. The rationale Koerber provided was undoubtedly the rationale for MOE to offer Wilson all of the inducements that appeared in Document 9, which included the better vacation package. MOE hired Wilson based upon the terms outlined in Document 9, even though Koerber never provided Wilson with a fully signed copy.

Whether Wilson, in December 2007, first signed for receipt of the employer’s employee handbook or first received, signed, and returned Document 9, Document 9 contained the effective terms of his employment agreement with MOE.

If Wilson first received Document 9 from MOE (with his name and Mark Koerber’s at the bottom, looking very much like places for their signatures) and accepted it as his terms of employment, he at that point had a binding agreement with MOE for his employment. It is simply not credible that he would then have signed for the employee’s handbook if he understood it meant he would not be eligible for three weeks of paid vacation until he finished his tenth year of service with MOE. Thus, if Wilson signed the employee handbook receipt after agreeing to the terms of Document 9, he would have reasonably believed that his employment agreement still applied to him and to his paid vacation, despite signing for receipt of an employee handbook that was expressly not a contract of employment.

If Wilson first received and signed for the employee handbook, he acknowledged receipt of policies and procedures that were expressly not a contract of employment. Thereafter, he received Document 9, on its face a statement of the terms and conditions of his employment, and accepted it. Under this scenario as well, he would have reasonably believed that Document 9, as the terms and conditions of his employment, would control, rather than being trumped by the employee handbook.

Document 9 used the language of the current benefit plan (“paid vacation”), but it remained in effect under the subsequent benefit plan, in terms of the accrual rate of paid time off for Wilson.

As already discussed in perhaps excruciating detail, by the time his employment ended, Wilson had received all of the paid vacation time and all of the paid time off to which he was entitled, and had actually taken considerably more such paid time, with the approval of his employer. He has no entitlement to any unpaid wages for additional paid vacation time or paid time off.

V. CONCLUSIONS OF LAW

The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint pursuant to the provisions of Mont. Code Ann. § 39-3-201 **et seq.**, *State v. Holman Av.* (1978), 176 Mont. 31, 575 P.2d 925. MOE does not owe Wilson any due and unpaid vacation or time off.

VI. ORDER

Dwayne M. Wilson's claim against Midland Office Equipment, Inc. is dismissed.

DATED this 7th day of February, 2012.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
Terry Spear
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.