



## II. FINDINGS OF FACT

1. Herden worked for Black Smoke from July 17, 2017 to August 22, 2019.
2. Black Smoke has a vacation policy which provides:

After completion of twelve months(12) of employment, full time employees will accrue paid vacation as follows:

Anniversary date through the end of the calendar year:

One (1) week vacation (five (5) work days).

Calendar Year Two(2):

One (1) week vacation (five (5) work days).

Calendar Years Three (3) through (4):

Two (2) weeks vacation (ten (10) work days).

Calendar Years (5) and over:

Three (3) weeks vacation (fifteen (15) work days).

Due to the nature of the work performed by employees, use of vacation leave is strongly encouraged to maintain the personal and professional health of employees.

Vacations are given as a benefit to the employee and cannot be converted to cash during the period of employment. If the vacation time is not used in the year it is earned it will be lost. All current year earned vacation shall be paid out at termination and any current-year borrowed vacation, shall be deducted from the employees final pay check.

All employees will schedule their vacations as far in advance as possible. In situations where two people request vacation at the same time, the policy will be first come, first serve. In case of a tie, seniority comes first. Requests for vacation time may be turned down in case of insufficient notice or if the business suggests that the employee cannot be spared. Employees are responsible for documenting all vacation usage on their time cards.

3. Based on the Black Smoke vacation policy, Herden received five days of paid vacation to use between July 17, 2018 and December 31, 2018. On January 1, 2019, he accrued another five days of paid vacation pay.

4. Herden did not use any of his paid vacation time.

5. Herden earned \$25.00 per hour. A week's paid vacation is \$1,000.00.

### III. DISCUSSION

#### A. Informal Proceedings.

The Montana Administrative Procedure Act allows parties to informally resolve a contested case. Mont. Code Ann. § 2-4-603, 604. The parties to this proceeding stipulated to resolve the matter on written briefs or statements.

#### B. Is Herden Entitled to be Paid for Unused Vacation Time?

##### 1. *Has Herden Earned Payable Vacation Time?*

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); *Langager v. Crazy Creek Prods.*, 1998 MT 44, ¶ 25, 287 Mont. 445, 453, 954 P.2d 1169, 1173-74.

The parties have argued about bookkeeping errors and the definition of "calendar year." However, a review of the vacation policy and the period of Herden's employment is what must be reviewed.

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*, ¶ 25 (quoting *Rowell v. Jones & Vining, Inc.*, 524 A.2d 1208, 1211 (Me. 1987)).

Once an employee has accrued paid vacation pay 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.

*Langager*, ¶ 31.

Black Smoke’s vacation policy reads, in pertinent part:

After completion of twelve months(12) of employment, full time employees will accrue paid vacation as follows:

Anniversary date through the end of the calendar year:  
One (1) week vacation (five (5) work days).

Calendar Year Two(2):  
One (1) week vacation (five (5) work days).

On July 17, 2018, Herden completed one year of employment and was therefore entitled to one week of vacation pay through the end of the year, December 31, 2018. On January 1, 2019, Herden was entitled to receive another week of paid vacation. Herden had worked an entire calendar year by this point (*i.e.*, all of calendar year 2018).

If Blacksmoke intended its policy to work in some other fashion, its policy must be interpreted in favor of Herden because Black Smoke created the ambiguity. *West v. Club at Spanish Peaks L.L.C.*, 2008 MT 183, ¶ 53, 343 Mont. 434, 450, 186 P.3d 1228, (citing *Eschenbacher v. Anderson*, 2001 MT 206, ¶ 1, 306 Mont. 321, 34 P.3d 87 (If a contract is found to be ambiguous, it is to be interpreted “most strongly” against the party who drafted it)).

## 2. *Did Herden Use or Lose His Paid Vacation Time?*

By the terms of Black Smoke’s vacation policy, Herden earned five days of paid vacation on July 17, 2018. Under the facts presented by the parties, there is no evidence to show that Herden used any of the time he accrued on July 17, 2018, by

December 31, 2018. Pursuant to Black Smoke’s interpretation of its policy, Herden lost those five days because he did not use them. Under Montana law, the five days Herden accrued on July 17, 2018 cannot be forfeited because they are wages that are due and payable. *Langager, supra*.

On January 1, 2019, Herden accrued another five days of paid vacation. Herden left his employment with Black Smoke on August 17, 2019. At that point, he had earned two weeks paid vacation time.

Black Smoke’s vacation policy includes the following provisions regarding how the time may be used and how it can be forfeited:

Vacations are given as a benefit to the employee and cannot be converted to cash during the period of employment. All current year earned vacation shall be paid out at termination and any current-year borrowed vacation, shall be deducted from the employees final pay check.

Employees must use their vacation within the year after it is earned. Vacation does not carry over from year to year. (i.e. At the end of the first year an employee has one week of paid vacation accrued. Vacation must be taken before the end of the second year - 2nd anniversary date.) Vacation must be used all at once in consecutive days.

\* \* \*

An employee must work the regularly scheduled work days before and after the paid vacation period in order to be eligible to receive vacation pay.

The last section of Black Smoke’s policy contains a requirement that an employee must work the day before and the day after vacation is taken, a provision the *Langager* court found to be an objectionable condition subsequent which was not allowed under Montana law.

Black Smoke’s vacation policy informs its employees that they will “accrue paid vacation” based on the schedule included in the policy. Based on that language, it is clear that the accrued paid vacation is wages earned as additional consideration for the employee’s labor. *Langager, supra* (citing *Kistler v. Redwoods Community College*

*Dist.*, 14 Cal. App. 4<sup>th</sup> 1326, 19 Cal. Rptr. 2d 417, 421 (1993)); *see also Boothby v. Atlas Mech., Inc.*, 6 Cal. App. 4th 1595, 1600, 8 Cal. Rptr. 2d 600, 604 (1992).

The question becomes whether Black Smoke can divest an employee of accrued vacation wages. Black Smoke’s vacation policy states, “[i]f the vacation time is not used in the year it is earned it will be lost.” As already stated, this was earned wages which, under statute, must be paid to an employee upon their departure from the workplace. In *Boothby*, the court described “use it or lose it” policies as impermissible and no additional accrual policies as permissible.

A “use it or lose it” vacation policy provides for forfeiture of vested vacation pay if not used within a designated time, while a “no additional accrual” vacation policy prevents an employee from earning vacation over a certain limit. Although both policies achieve virtually the same result, the former is impermissible and the latter permissible.

*Boothby*, 6 Cal. App. 4th at 1601, 8 Cal. Rptr. 2d 600, 604. The *Boothby* court further discussed accrued vacation in no uncertain terms: it “is nonforfeitable.” *Id.*, 6 Cal. App. 4th at 1602, 8 Cal. Rptr. 2d at 604.

Herden earned two weeks of paid vacation time while employed at Black Smoke; it has paid him for one. The other cannot be forfeited, it is due and owing as unpaid wages in the amount of \$1,000.00.

#### C. Penalty.

Montana Administrative Rules applicable to wage and hour cases require imposition of penalty when wages are found to be due and unpaid. Where regular wages are found to be due, the applicable administrative rules require the imposition of a 55% penalty. Admin. R. Mont. 24.16.7566.

### IV. 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*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Black Smoke Diesel Performance, LLC owes Dalton Herden \$1,000.00 in unpaid vacation wages. Mont. Code Ann. § 39-3-204.

3. A 55% penalty amounting to \$550.00 is due on the unpaid vacation wages. Admin. R. Mont. 24.16.7566.

**V. ORDER**

Black Smoke Diesel Performance, LLC is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,550.00, representing \$1,000.00 in unpaid vacation wages and \$550.00 in penalty, made payable to Dalton Herden, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Black Smoke Diesel Performance, LLC may deduct applicable withholding taxes from the portion of the payment representing wages, but not from the portion representing liquidated damages or penalties.

DATED this 30th day of November, 2020.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

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 the date of mailing of the hearing officer's decision. *See also* Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry  
Wage & Hour Unit  
P.O. Box 201503  
Helena, MT 59620-1503

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.