

Opinion No. 89
Vacation of Employees—Vacation Pay
—Survival of Right—Executors—
Administrators.

Held: The vacation provisions of Montana law become an implied part and parcel of the employees contract of hire.

A vacation with pay is not a gratuity but is compensation for services rendered.

Vacation time and pay is a matter of right vesting in the employee after his fulfillment of the required period of employment as provided by law and such right on the death of the employee will survive to the decedent's executor or administrator.

May 23, 1952.

Mr. O. J. Paulson
County Attorney
Sweet Grass County
Big Timber, Montana

Dear Mr. Paulson:

You have requested my opinion as to whether the executor or administrator of a deceased county employee is entitled to submit a claim for accrued vacation leave under the provisions of Chapter 131, Laws of 1949, as amended by Chapter 152, Laws of 1951.

The Act is embodied into the statutes under Sections 59-1001 through 59-1007, Revised Codes of Montana, 1947, and Section 59-1001 provides as follows:

"Annual Vacation Leave. Each employee of the state, or any county or city thereof, who shall have been in continuous employment and service of the state, county or city thereof, for a period of one (1) year from the date of employment is entitled to and shall be granted annual vacation leave with full pay at the rate

of one and one-quarter (1¼) working days for each month of service."

Section 59-1003 contemplates the separation of the employee from service and cash payment for unused vacation leave thus:

"Separation From Service or Transfer To Other Department—Cash For Unused Vacation Leave. An employee, who is separated from the service of the State, or any county or city thereof, for reason not reflecting discredit on himself, or any employee transferred to or employed in another division or department of the state, or any county or city thereof, shall be entitled upon the date of such separation from, transfer to or acceptance of new employment within the state, county, or city service, to cash compensation for unused vacation leave."

Where a party performs all of the acts necessary to insure himself the right of a vacation and there is nothing remaining for him to do except exercise that right which depends on no contingency, then the "vacation with pay" is not a gratuity, but is rather compensation for services rendered. As compensation for services rendered, the vacation pay is a right which rests in the employee. It was stated in *Ramey v. State*, 296 Mich. 449, 296 N.W. 323, that vacation pay being compensation for services rendered, that "after the services are rendered under a law which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate." See Vol. 23, p. 151, *Opinions of the Attorney General*, in which I held that vacation pay which has been earned and owing is considered as wages.

The question remains whether this right is of a personal nature which dies with the person. I think not. The appropriate statute on general survival is Section 93-2824, Revised Codes of Montana, 1947:

"An action, or cause of action, or defense, shall not abate by death, or other disability of a party or by the transfer of any interest therein, but shall in all cases, where a cause of action or defense arose in favor of such party prior to his death or other disability, or transfer of interest there-

in, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the court shall, on motion, allow the action or proceeding to be continued by or against his representative, or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

Montana's statute (supra) is broad enough to cover all causes of action. In the case of *Lynde v. Wakefield*, 19 Mont. 23, 47 Pac. 5, decided in 1896, the question was raised as to the right of a widow's personal representative to have dower and the value of rents and profits assigned. The court declared:

"We are aware that at the common law, if the widow dies before the damages in such cases are assessed, her personal representatives cannot claim or recover them. * * *"

"But we think under our statute, and the great weight of authority, a different rule prevails in equity. * * *"

It is almost universal law that actions on contract as distinguished from actions due to wrongful acts will survive the party to whom the right accrues. The provision for vacation with pay is an implied part of the employees contract of hire.

In the instant problem, since vacation time with pay is a matter of right vesting in the employee after his fulfillment of the required period of employment as provided by law, it is my opinion that such right on the death of the employee will survive to the decedent's executor or administrator.

Very truly yours,
ARNOLD H. OLSEN
Attorney General