

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

AMERITEXT CORPORATION

DECISION OF THE HEARING OFFICER

Appearances: James H. Schulte ESQ., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 275:44 IV liquidated damages

Employer: Ameritext Corporation, 45 Harvey Mill Road, Lee, NH 03861

Date of Hearing: December 17, 2013 and February 24, 2014
Written closings by March 20, 2014

Case No. 46422

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on July 29, 2013. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent on November 6, 2013.

The claimant is seeking \$393,835.61 in wages and liquidated damages. The claimant testified that he was given a salary of \$250,000.00 per year. He was also to get 6% of stock. The claimant further stated that he was never expected to transfer to New Hampshire for work. A document from May 3, 2012 confirms that the claimant is the Chief Technical Officer and his position would start full time when the first pay check was earned.

The claimant maintains that he was given an employment contract and worked to develop the product for sale. The claimant said that he put many hours into the product. The claimant was led to continue his employment by being given false expectations as to how the product was being sold and marketed. The claimant stated that there would be great capital gain once the product was purchased by entities that would use multiple units of the product.

The claimant said that he never spoke to any clients and when the employer was pushed into giving out information, it was admitted that there were no sales. The claimant

believes that the employer was a direct beneficiary of the claimant's work. He feels that the requirement that he work out of New Hampshire was put in just to offset any wages from the salary agreement. He stated that being located in New Hampshire had no logical benefit to the employer.

The claimant started out with a 6% stake in the business. This was later increased to 12% and then to 16%. The claimant felt that this was for doing a good job. Because the employer has no assets the stock has no value. The claimant still considers himself as an officer of the company but does not know where the software has been transferred. He did make a claim with a Securities Bureau to investigate the employer and this is ongoing.

The claimant presented a witness who was the Vice-President of Sales. His testimony was that the claimant was always an employee and a stockholder. This information came from the Chief Executive Officer. The witness stated that he continued to work for the employer because he was receiving false information as to the potential sale of the developed product. The witness also believes that the employer is hiding assets and does have the ability to pay the Wage Claim.

The employer testified that as of the present time he has no interest in the company and is not a controller of the Lowther Family Trust. The Trust owns what is left of the company. The Trust put around \$2.5 million into the Company. All of the licenses, the software and the patents were owned by the company.

The claimant worked for the company as an Independent Contractor. He later moved to Texas and then to Arizona. He continued with the company and produced parts of the product to be sold. The employer stated that there was speculation that once the product hit the open market the company would reap enough profits to make all the investors and the owner, a lot of money.

The claimant was to be paid once the product was sold and once he moved to New Hampshire to perform his duties for the employer. Neither of these things happened. The company was relying on the projections of the distributors. The claimant finally told the employer that he would come to New Hampshire if the amount of \$350,00.00 was put into a designated account. At this point in time the company was bankrupt.

FINDINGS OF FACT

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of

payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing,

RSA 275:43-b: Payment of Salaried Employees. –I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.
- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
- (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.
- (e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.

III. The employer may offset any amounts received by a salaried employee for jury duty or witness fees or military pay for a particular pay period, against the salary due for that pay period pursuant to a written bona fide leave plan, practice or policy.

This part of the law governs the payment of a salary as the wage plan.

RSA 275:44 IV reads: "If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10% of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition."

This part of the law allows for the claimant to seek liquidated damages up to the amount of the Wage Claim if there is a finding that the employer was willful and/or without good cause for their action(s).

It is the finding of the Hearing Officer, based on the submissions and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden. The claimant presented a case that showed he worked for the employer in the capacity of an Independent Contractor. He worked on products that would enhance a method of communication that could potentially lead to a great deal of reward(s) for the claimant.

The claimant continued to work on the project from his home in Texas and in Arizona. He was presented with an employment agreement but the terms of the agreement were never reached. The claimant had a proposed salary and was asked to work out of the company headquarters in Lee, New Hampshire. The salary was based on the sale of the developing produce, which never happened. The move to New Hampshire never happened and the claimant was negotiating a sum of money to be received if and when he moved to New Hampshire.

The claimant did receive stock in the company and is still an owner.

The employer testified credibly that he had high hopes for the product and the company. He was aware of the time and efforts some people were putting in for the company and those people were given various amount of stock for their work. This practice was done for the claimant. There were also reports of large potential sales that would make the company viable and profitable if these reports came through and resulted in sales.

It was at the point of sale when the employment agreement would be a hiring document. The claimant wants sections of the contract enforced (wages) and other sections ignored (residence location). The claimant was also in the process of negotiating a moving fee, if he was to move to New Hampshire.

The product was not sold and the company failed.

The Wage Claim is invalid.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time

frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

/s/

Thomas F. Hardiman
Hearing Officer

Date of Decision: April 7, 2014

Original: Claimant
cc: Employer

TFH/cag