

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE


V

Black Rock Restaurant LLC dba Sharky's Beach Bite

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:42 I/II employer/employee relationship

Employer: Sharky's Beach Bite, 480 Newbury Street, Danvers, MA 01923

Date of Hearing: April 30, 2014

Case No.: 47375

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$6,780.44 in unpaid wages for hours worked between May 24, 2013 and July 30, 2013. He worked a total of 830 hours at \$13.00 per hour.

He testified that he was working for Mark Pelletier doing construction and they had known each other for some time. He was working to get the location for Black Rock Restaurant LLC dba Sharky's Beach Bite (hereafter "Sharky's") ready for opening. During this process the employer offered him a position at Sharky's as the manager on May 27 or 28, 2013, just after the opening.

He argues he worked seventeen to nineteen hours each day for several weeks, documentation previously submitted. The restaurant was open between 7:00am to 1:00am. He was to be paid \$3.25 per hour as a bartender and \$10.00 per hour as a manager. The employer promised to pay out his wages as a lump sum at the close of the season, around September 15, 2013. The lump sum payment monies were designated for child support for his six children. He "lived off his tips" for the summer

He testified as manager he prepared the schedules for himself and the other employees. He did not have any schedules as documentation. He previously submitted copies of his date book showing hours he worked and hours of some other employees, prior to their timekeeping system being put in place. He cashed out every night and ordered all of the liquor.

He also testified that Jennifer Gauthier, who previously submitted a letter stating the employer allegedly promised he would pay the claimant's child support, incorrectly referenced June 2012, when it should have stated June 2013.

Mark Pelletier denies the claimant was an employee. He argues the claimant worked on the construction of the Sharky's and liked the pace and atmosphere of the beach. He paid the claimant's room and board and the claimant was to pick up the occasional shift in return. Any tips received were the claimants to keep. The claimant "self appointed" himself as the manager. They advised the claimant if he wanted to be paid for the hours he was working, he needed to complete a W-4 and complete a timecard. The employer submitted one partially completed time card for the claimant, the only one the claimant submitted.

The employer argues the documentation submitted by the claimant showing the hours he worked are completely false. The letter the claimant submitted from Jennifer Gauthier in support of his claim references June 2012 as the date the employer allegedly promised he would pay the claimant's child support. The employer helped the claimant out many times with child support, and this was not the timeframe Sharky's was open.

At the hearing, Mr. Pelletier submitted statements from two employees stating that the claimant was not in a managerial or a regular employee role of Sharky's. The claimant did not object to the submission of these documents.

FINDINGS OF FACT

The parties agree the claimant performed work. They disagree as to when he worked, the number of hours he worked, and any pay arrangements.

They also disagree on the whether the claimant was an employee.

Based on the testimony and evidence presented, the Hearing Officer finds the claimant was an employee of the employer. No testimony or evidence was presented that would exempt the claimant from the definition of employee pursuant to RSA 275:42 II.

The claimant presented conflicting testimony about the dates he worked. He originally testified he began working May 27 or 28, 2013, just after the opening of the restaurant, however, the date book he submitted shows a start date of May 22, 2013, two days prior to the opening on May 24, 2013.

The claimant argued he worked seventeen to nineteen hours daily for several weeks. The employer countered that argument with credible testimony from his witness that the claimant was not at the restaurant all the hours he claimed.

The date book submitted by the claimant did not appear to have been kept contemporaneously. Therefore, the Hearing Officer finds it more likely than not that the entries were produced after the fact, rather than completed as the work occurred.

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he was an employee of the employer. He met that burden. He further has the burden to prove by a preponderance of the evidence that he was not paid for all hours worked. The Hearing Officer finds that the claimant failed to meet this

burden of proof as he did not provide credible testimony and evidence that he worked the hours he is claiming.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages.

DECISION

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 that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that the Wage Claim is invalid.

/s/

Melissa J. Delorey
Hearing Officer

Date of Decision: May 16, 2014

Original: Claimant
cc: Employer

MJD/clc