

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

V

BIG MIKES CLEANING AND MAINTENANCE

DECISION OF THE HEARING OFFICER

Appearances: Gary Apfel Esq., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:21 VIII unpaid overtime

Employer: Big Mikes Cleaning and Maintenance
PO Box 736
Newport, New Hampshire 03773

Date of Hearing: July 23, 2014 (written closings due on August 4, 2014)

Case No. 47929

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on April 9, 2014. 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 to both parties on June 26, 2014.

The claimant testified that he worked for the employer for three years and was an hourly employee. He testified that there were time sheet for the job but only one person filled them out. The claimant testified that he was paid overtime when he worked on weekends but over the course of his employment he was not paid for 1948.5 hours of work time. The claimant's hourly rate was \$18.75.

The claimant was questioned about his position and the duties of that position. He said he was a foreman. He said that he did not file a complaint in the three years he worked. He also said it took some time to file the complaint after he was terminated because he was undergoing a tough period in his life.

The bookkeeper for the company was the claimant's aunt and he knew she was involved in a contentious divorce from the owner of the company. He also said that he lived with this aunt in her house.

The employer presented testimony that the keeper of the records was the claimant's aunt and she made out the paychecks according to the time sheets. The company said that the foreman was responsible for reporting his crew's hours to the bookkeeper for payment.

A witness for the employer stated that he worked on the claimant's crew and overtime was paid when it was written down by the foreman. He said that they started at the shop and were driven to the various work locations. He also did not ever remember a time when he was not paid for overtime.

Another witness is currently the General Manager. He was a foreman of the other crew while the claimant was employed. A review of selected time sheets showed that there was only one that he filled out. He testified that it was the foreman's job to fill out the time for each employee.

Both witnesses testified that there were times when the claimant did not show up for work or they had to pick him up on the way to the job. The employer provided statements that the claimant had been out on medical leave and was incarcerated at another time. The claimant was always paid for these times.

The whole wage problem began when the owner and his wife were going through acrimonious divorce proceedings. The employer believes it is a try at getting money out of the owner by his wife (the bookkeeper) and her nephew (the Claimant) who lived in her house.

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 279:21 VIII. Those employees covered by the introductory paragraph of this section, with the following exceptions, shall, in addition to their regular compensation, be paid at the rate of time and one-half for all time worked in excess of 40 hours in any one week:

(a) Any employee employed by an amusement, seasonal, or recreational establishment if:

- (1) It does not operate for more than 7 months in any calendar year; or
- (2) During the preceding calendar year, its average receipts for any 6 months of such year were not more than 33- 1/3 percent of its average receipts for the other 6 months of such year. In order to meet the requirements of this subparagraph, the establishment in the previous year shall have received at least 75 percent of its income within 6 months. The 6 months, however, need not be 6 consecutive months.

(b) Any employee of employers covered under the provisions of the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. section 201, et seq.); provided however, employers that pay any delivery drivers or sales merchandisers an overtime rate of compensation for hours worked in excess of 40 hours in any one week shall not calculate such overtime rate of compensation by the fluctuating workweek method of overtime payment under 29 C.F.R. section 778.114.

This part of the law spells out when and how an employee is to be paid premium time under the New Hampshire law.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, 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 testimony shows that the claimant never raised this issue while he was employed. The claimant also waited eight months to file the Wage Claim. He was not credible in his testimony as to why he never questioned the overtime or why he filed the claim some eight months later.

The employer presented credible testimony that the employee received their overtime when it was worked. One witness was part of the claimant's crew and he said he was paid all overtime due to him. It was also stated that the claimant was responsible for the record keeping with the time cards.

The employer also presented credible testimony that the claimant did not work every day during his employment. There were days when the claimant needed medical time off and times when he was incarcerated. The testimony was that all these days were paid by the employer.

The claimant was not credible in meeting his burden to show that there were wages due and owing. 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.

Thomas F. Hardiman
Hearing Officer

Date of Decision: August 19, 2014

Original: [REDACTED]
cc: Big Mikes Cleaning and Maintenance
Gary Apfel, Esquire
TFH/klt