

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

STUDIO 90 ON FLEET

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
Employer: Studio 90 on Fleet, 90 Fleet St., Portsmouth, NH 03801
Date of Hearing: March 3, 2015
Case No. 49467

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on December 8, 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 February 10, 2015.

The claimant testified that she worked for the employer from August 13, 2014 until October 8, 2014. She said that she was hired on a commission wage plan. She would receive 40% of all money she brought into the salon. She worked on Wednesday and Saturdays. She stated that there were no employee records kept but she worked 120 hours during that period of time. She said that she was paid \$109.81 in commissions.

She said that she had a small base of clients and was not allowed to take on new clients. She said that when she was not doing hairdressing, she was looking up new products and cleaning the salon. It was after a review of the labor laws she realized that she was not even making minimum wage based on her commission plan.

Her Wage Claim was filed for \$760.00 plus interest.

The employer testified that the claimant answered an ad for a booth rental position. The claimant responded to the ad but did not want to rent a booth and so she agreed to the commission plan. The employer said the claimant told them that she had a good base of clients who would follow her to this salon.

The employer said that they provided training for the claimant. Some of the classes were fully paid and some were half paid. The claimant set her own hours and the hourly pay issue never came up. The claimant also had another full time job so she could only work two days a week. The claimant also used \$310.00 of product that she was never charged for the use.

The employer maintains that all wages, as agreed to, have been paid.

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:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's choice;
- (d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or
- (e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

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 275:44 IV 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 percent 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 is the part of the law that allows for a claimant to seek liquidated damages, up to the amount of the Wage Claim, if the Hearing Officer finds that the employer was willful and did not have good cause for their actions.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that there is a valid Wage Claim. The claimant has the burden to show that there are wages due and owing and she met this burden.

The claimant testified that she agreed to work for commissions. This happened and she did not make enough to cover the minimum wage law. The claimant said that she worked 120 hours and made \$109.81 in commissions. The employer said that they recorded 85 hours of work during the time of employment.

The Hearing Officer accepts the employer's record of work time and the commissions paid for the 85 hours of work equals a rate of \$1.29 per hour. There is an acceptance of a commission wage plan but the end result has to be above the minimum wage of \$7.25 per hour. In this case the commissions did not reach the minimum wage.

The claimant is due \$506.44 in wages to bring the commissions up to a level of the minimum wage.

There is no finding for liquidated damages (interest) because it is not found that the employer was willful and did not have good cause for their action.

DECISION AND ORDER

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.

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 Hearing Officer finds that the claimant proved that she was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$506.44.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$506.44, less any applicable taxes, within 20 days of the date of this Order.

Thomas F. Hardiman
Hearing Officer

Date of Decision: March 18, 2015

TFH/kdc