

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Lin Bi dba China Bistro aka Oriental Gardens

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:44 IV liquidated damages
RSA 275:42 I/II employer/employee relationship

Employer: Lin Bi dba China Bistro aka Oriental Gardens, 89 Lake St.,
Laconia, NH 03246

Date of Hearing: April 30, 2015

Case No.: 49665

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts she is owed \$6,337.26 in unpaid wages for hours worked between May 2012 and June 2014. She states that she received only tips from customers but did not receive an hourly rate from the employer. She further seeks liquidated damages.

The claimant provided pictures of Facebook and other material showing her name as proof she was at the venue.

Mr. Bi denies the claimant was an employee of his establishment. She approached him to work as an independent contractor. He felt badly for her and allowed her to do some work as a shot girl and then as a bartender. The bartenders were required to stay after closing to clean up. She often left early stating she was not an employee and did not have to stay.

The claimant also performed work for some of the DJ's and promoters within the club, in addition to the work she performed for him. Further, she did not work anywhere near the number of hours she is claiming for him.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

It is noted that on its face, the appearance of this relationship is one of a prime contractor and subcontractor. The Hearing Officer finds it is more likely than not that the claimant represented herself as an independent contractor during the relationship.

Mr. Bi (hereafter "the employer") admitted the claimant did not meet all of the criteria to be considered an independent contractor under both the criteria which expired August 26, 2013 and the criteria effective August 27, 2013.

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criteria to be considered an independent contractor.

The claimant worked for the employer from May 2012 through November 2014. The employer began paying her an hourly rate in June 2014.

The claimant argues she worked from 8:00pm to 2:00am on Thursdays, Fridays, and Saturdays between May 2012 and June 2014. She did take a month off in April 2014 because it was slow. She also worked greater hours during the Laconia Bike Week. She did not maintain contemporaneous records of hours worked, but estimated based on a regular schedule.

The employer admitted that the claimant did perform some work for him, but not nearly the hours that she is claiming. The establishment is open from 9:00pm to 1:00am. The employer provided credible testimony that the claimant never showed up more than five minutes prior to her shift. She often left at closing time stating she was an independent contractor and did not have to stay. She also worked for some of the DJ's and promoters who operated in the establishment during the time frame she is claiming.

RSA 279:27 requires an employer to maintain a true and accurate record of all hours worked by employees. The employer failed to comply.

The claimant did not present persuasive testimony or evidence that she worked the hours she is claiming. The Hearing Officer is unable to recreate the calculations presented by the claimant to show the amount of wages she is claiming. By her own admission she is using a general schedule, with a few exceptions, to calculate the wages owed.

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that she was not paid for all hours claimed. The Hearing Officer finds that the claimant failed to meet that burden of proof as her story is only as credible as, not more credible than, the employer's. The claimant, therefore, fails to prove by a preponderance of the evidence that she is owed the claimed wages.

Because no wages are found to be owed, no liquidated damages can be awarded.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that her assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The claimant did perform some work for the employer. However, she did not provide credible or persuasive testimony or evidence to show she is due the wages she is claiming.

The Hearing Officer finds the claimant did not meet her burden in this claim.

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 she is owed the claimed wages, it is hereby ruled that the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: May 19, 2015

MJD/kdc