

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

AVIOR COMPUTING

DECISION OF THE HEARING OFFICER

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

Employer: Avior Computing Corp, 11 Perimeter Rd., Nashua, NH 03063

Date of Hearing: March 17, 2015

Case No. 49735

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on January 14, 2015. 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 19, 2015.

The claimant testified that he worked for the employer from 2011 until December 15, 2014. He was a salaried employee with commissions also part of his pay plan. The Wage Claim has been filed for \$17,500.00 in back pay and \$12,000.00 in accrued time. The parties also agreed to have the issue of liquidated damages be a part of the Wage Claim.

The claimant testified that from May of 2013 until August 30, 2013 his salary was reduced by \$17,500.00 because of a cash flow problem with the employer. In May of 2013 his wages were reduced \$10,000.00. In the next three months he was reduced \$2,500.00 per month. The claimant testified that although this was discussed at company staff meetings, he was under the impression that the wages would be made up in the future. He also stated that any change to his salary plan was never reduced to writing.

The claimant further testified that the employer did present an optional stock option to make up for the lost salary of the employees who were reduced. The claimant did not accept this offer and upon giving notice of his employment, he expected to be paid for the reduced wages.

The claimant also testified that part of his hiring agreement was that he was to accrue vacation time. At the time of separation the employee was to receive payment for any unused vacation time. The claimant stated that he is due \$12,000.00 in unused time. The claimant testified that when he started his employment he reported any leave time to a representative of the Chief Executive Officer and she recorded the time. After the representative left the employ of the company he reported all of his time in an electronic calendar that was available to all supervisory employees.

The claimant testified that he was never challenged on any time used or on any time records. He always followed the written policy that was in place during his employment.

The claimant is requesting liquidated damages because the company was willful and did not have good cause for their action(s). The claimant testified that he pointed out to company officials that there was not written change in his wage plan and that they had a time limit on the payout of any wages after termination. The company did not follow these directives and so liquidated damages are due.

The employer testified that they were a small startup company and that any hiring agreement said that the company reserved to change or modify the wage structure from time to time. The employer said that the issue of wage reduction was discussed at multiple staff meetings and at the quarterly board meetings. The employer testified that at some point they hoped to make any losses whole in the future but there was no guarantee of a pay back. The employer testified that this was known to all executives and accepted in lieu of lay-offs. All executive employees had a pay reduction and it was known from the staff discussions on the issue.

The employer testified that the management team was offered stock options but it was voluntary. Some of them took the options and some did not. The claimant did not take the stock options. There was never any discussion on a cash back policy.

The employer testified that no other employee asked for a pay put of Personal Time Off (PTO) upon separation from the company. It was the policy for management employees to come and go as they pleased. There was no policy in place for the payout of PTO and there was no review of the time used by the claimant. The employer stated that the claimant worked many short days and short weeks during his tenure with the company. There was shock when the time was requested.

The employer believes that because there was no willfulness on their part, the request for liquidated damages should be denied. They were a start-up company and going through some difficult times. When the employees were made whole, after the four month stretch of reduced wages, there was no demand by the claimant for back wages. This demand was made upon separation from employment. The company did try, in a good faith effort, to reward those who suffered any loss for the company benefit, by issuing stock options to those that wanted them.

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 275:43 V Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

This part of the law places an issue such as vacation time into the category of wages when the time is due and owing.

RSA 275:43-b 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 spells out the rules and regulations governing a salaried employee.

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.

The claimant is allowed to request a finding for liquidated damages, up to the amount of the Wage Claim, when the Hearing Officer finds that the employer was willful and did not have good cause for their action(s).

It is the finding of the Hearing Officer, based on the written presentations and the testimony of the parties, that the Wage Claim is valid in part and invalid in part. The claimant has the burden to show that there are wages due and owing and he did meet part of this burden.

The issue of wages being reduced is invalid. The claimant was aware that there were going to be changes and in fact received four months of payments at the reduced rates. The employer was credible in testifying that the plan was under consideration for some time and that the affected employees were aware of the plan. The employer was also credible in the fact that there was no agreement to repay the wages but that they would try over a period of time. In fact the claimant was returned to his set salary (\$180,000.00) after the reduction period. The employer said that the claimant never asked for an adjustment until he gave his notice.

The employer did offer a good faith gesture of issuing common stock to the affected employees but the claimant, as was his right, did not take the stock. This action is not found to be a measure to pay back salary lost.

In the issue of Personal Time Off, there is a written policy for the use and the payout of the time. The claimant was credible in his testimony that he processed time off in the manner prescribed by the employer. The claimant did follow the rules in reporting time off to a selected person and when that person left the employ of the company, there was no replacement policy. At that point the claimant kept his time off in an electronic calendar that was available to the management of the company.

The employer set up a process for taking leave and it was followed. The employer also raised the issue of some time here and there that employees took with the approval of the management. The claimant was credible in his testimony that this issue was never raised about his time off.

The fact remains that the claimant was a salaried employee and was not bound by hours. He worked the "many and the few" hours, in order to make his salary in a pay period. It is also found that the accrual schedule was established by the employer and the claimant worked for four years under time plan. The amount claimed by the claimant is accepted. The employer presented a formula that was first heard at the hearing.

The Wage Claim for accrued leave, in the amount of \$12,000.00 is valid.

The request for liquidated damages is invalid. The employer showed that there were cash flow problems in the company and the wages were reduced. The employer also stated that they never had a claim for accrued leave. They made their decisions based on past practice and a desire to keep the company in operation. There is no finding that the employer was willful and did not have good cause for their action(s).

The Wage Claim is valid in the amount of \$12,000.00.

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 RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that he was not paid all vacation pay due, it is hereby ruled that the Wage Claim is valid in the amount of \$12,000.00..

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$12,000.00, less any applicable taxes, within 20 days of the date of this Order.

Thomas F. Hardiman
Hearing Officer

Date of Decision: April 3, 2015

TFH/kdc