

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

ALL SAFE INC.

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:48 I illegal deductions

Employer: Allsafe Inc, 399 South Main St, Manchester, NH 03102

Date of Hearing: June 23, 2015

Case No. 50139

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on March 30, 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 June 3, 2015.

The claimant testified that he worked for the employer for nineteen years. He was an hourly employee and he recorded his hours by handwritten time cards. The claimant testified that his time cards did not reflect a lunch period and yet he was only paid for forty hours a week even though the time cards showed nine hours a day for a total of 45 hours per week. The claimant is asking for premium pay for the last three years of employment for the lunch periods lost. The Wage Claim is for \$24,090.00 for the last three years.

The claimant testified that he asked about the lunch hours in the past and was told that he would be "taken care of" at retirement. There was no settlement at his retirement and so he filed the Wage Claim. The claimant provided testimony that he did take time away from his work site but he continued to work while going to get lunch, walking his dog, running errands and when eating with family and friends he remained at his work station and performed work.

The claimant testified that he was always paid for the forty hours of work and if there was overtime involved, he was paid the premium pay rate. He also testified that he did have a lunch every day and the company would have a lunch for employees at various times. There

was a witness for the claimant, his daughter, who testified that she often had lunch with her father and that he was working the entire lunch break.

The claimant testified that he retired from the position on a medical stress retirement. Because he was not "taken care of" by the employer he filed the Wage Claim. The claimant feels that his time cards reflect nine hours of work a day and the Wage Claim does not reflect any time off for accrued leave or holiday.

The employer testified that he hired the claimant to work on the road and in the office. He stated that he always believed that the claimant was taking lunches and always paid him for the forty hours of work per week unless there was some overtime worked. The employer testified that there was a very liberal lunch policy in place, you were given a lunch break and at times when there was no work, you could do anything that you wanted. The employer always paid the forty hours per week no matter how much time was taken. The employer testified that the claimant did not complain about lunch breaks during his tenure with the company.

The employee who processed payroll worked four hours a day during the time of the Wage Claim. She testified that the claimant always had lunch and took his lunch breaks at his work station instead of the provided break area. She further testified that the claimant never mentioned the lack of a lunch break, to her, and the payroll always reflected the forty hours of pay per week.

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 275:48 I No employer may withhold or divert any portion of an employee's wages unless:

(a) The employer is required or empowered to do so by state or federal law, including payroll taxes.

(b) The employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner, as provided in subparagraph (d) or for any of the following:

- (1) Union dues;
- (2) Health, welfare pension, and apprenticeship fund contributions;
- (3) Voluntary contributions to charities;
- (4) Housing and utilities;
- (5) Payments into savings funds held by someone other than the employer;
- (6) Voluntary rental fees for non-required clothing;
- (7) Voluntary cleaning of uniforms and non-required clothing;
- (8) The employee's use of a vehicle under RSA 261:111, III;
- (9) Medical, surgical, hospital, and other group insurance benefits without financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded;
- (10) Required clothing not covered by the definition of uniform;
- (11) Legal plans and identity theft plans without financial advantage to the employer when the employee has given his or her written authorization and deductions are duly recorded; and
- (12) For any purpose on which the employer and employee mutually agree that does not grant financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded. The withholding shall not be used to offset payments intended for purchasing items required in the performance of the employee's job in the ordinary course of the operation of the business. Nothing in this subparagraph shall prohibit a charitable organization from withholding from an employee's wages a voluntary contribution to such charitable organization.

(c) The deductions are pursuant to any rules or regulations for medical, surgical, or hospital care or service, without financial benefit to the employer and openly, clearly, and in due course recorded in the employer's books.

(d) Upon an employee's written request, an employer may deduct the following items from the employee's wages, provided that the employer shall provide a written itemized accounting of such requested deductions to the employee at least once per month:

(1) Voluntary contributions into cafeteria plans or flexible benefit plans, or both, as authorized by section 125 or section 132 of the Internal Revenue Code.

(2) Voluntary payments by the employee for the following:

- (A) Child care fees by a licensed child care provider.
- (B) Parking fees.
- (C) Pharmaceutical items, gift shop, and cafeteria items purchased on site of a hospital by hospital employees.

(3) Voluntary installment payments of legitimate loans made by the employer to the employee as evidenced by a document that includes the following:

- (A) The time the payments will begin and end.
 - (B) The amounts to be deducted.
 - (C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
- (4) Voluntary payments for the recovery of accidental overpayment of wages when the following conditions are met:
- (A) The recovery is agreed to in writing.
 - (B) The deduction for the overpayment begins one pay period following the date the parties execute the written agreement.
 - (C) The written agreement specifies:
 - (i) The date the recovery of the overpayment will begin and end.
 - (ii) The amount to be deducted, which shall be agreed upon by the employer and the employee but which shall, in no event, be more than 20 percent of the employee's gross pay in any pay period.
 - (iii) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
- (5) Voluntary payments for the recovery of tuition for non-required educational costs paid by the employer for the employee to an educational institution when the specific deduction is authorized in writing prior to the deduction as evidenced by a document that includes the following:
- (A) The time the payments will begin and end.
 - (B) The amounts to be deducted.
 - (C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
- (6) Voluntary payments for the employee's use of a health or fitness facility that is sponsored by the employer for the benefit of its employees and that is located within the employer's facility or workplace, or operated by a private health and fitness facility that offers discounted memberships of 50 percent or more to all employees of the employer, as evidenced by a document that includes the following:
- (A) The time the payments will begin and end.
 - (B) The amounts to be deducted.
 - (C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
- (e) The employee requests in writing that deductions may be made for contributions to a political action committee from the employee's wages.
- (f) The employer has a written request from the employee, made at the time of the original request without coercion or pressure, that authorizes the employer to deduct from the employee's final wages at the termination of employment any amount the employee may owe for voluntary payments for vacation pay, paid time off pay, earned time pay, personal time pay, annual pay, sick pay, sick dependent pay, and bereavement pay made pursuant to a written employment policy as required by RSA 275:49, III, when the payments have been requested and paid to the employee in advance of eligibility.

This part of the law points out that deduction cannot be made from wages unless approved by the employee and used for the benefit of the employee.

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 at the hearing shows that the claimant was paid an hourly rate for forty hours in the work week. The testimony also shows that if there was overtime during the work week, it was paid as a premium pay. The claimant recorded his start time each day and his end time for the day. In his nineteen years of employment he did not record a lunch hour or any breaks that may have occurred during the workday. Upon retiring for a stress related retirement, the claimant stated that he had a verbal agreement that he "would be taken care of" by the employer. When this did not happen, the claimant filed the Wage Claim for the last three years of employment.

The employer provided credible testimony that the claimant was allowed a lunch break and was not paid for the lunch break. There was no testimony that stated the claimant did not receive a lunch period. In fact the employer stated that there was an area that could have been used for lunches but the claimant often stayed in his own area after going out to get a lunch or having a lunch with friends and/or relatives.

A witness for the claimant stated that she often ate lunch with the claimant and that he often continued to perform duties while on lunch break. There was also testimony that the claimant was allowed to run personal errands and even walk his dog during the work day.

The employer was credible in his statement that there was no promise or deal to "take care of the claimant upon retirement". The claimant never complained to the employer about the lunch breaks and as far as the employer knew, the claimant was getting the lunch break. The employee who processed the payroll testified that she paid the eight hours a day based on time cards that showed a starting and ending time. She stated that there was always a forty hour weekly pay.

The Hearing Officer finds that the claimant did not bear his burden to show that there are wages due and owing. The testimony shows that there was a lax policy of taking breaks but that the practice was to pay for a full forty hour work week and this was done without question. 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: July 15, 2015

TFH/kdc