

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v

GREAT AMERICAN DINING
COMMON MAN CLAREMONT INC.

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 275: 37 equal pay

Employer: Great American Dining, PO Box 581, Ashland, New Hampshire 03217

Date of Hearing: August 13, 2015

Case No. 50651

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on June 8, 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 July 24, 2015.

The claimant testified that she started her employment with the employer as a Line Cook at an hourly rate of \$12.00. After a period of three months the claimant was promoted to a position of Sous Chef at a salary of \$32,000.00 a year.

The position of Kitchen Manager became vacant and the claimant asked to be considered for the position. The employer put the claimant into a provisional position to see how it would work out and there was an agreement to give \$2,500.00 increments every quarter that the claimant held the job. After a year in the provisional position the claimant assumed the position of Kitchen Manager at a rate of \$43,000.00 a year.

In January of 2013, the claimant's salary was raised to \$44,289.00 per year. In January of 2014 the claimant received a raise to \$45,830.00. This raise was announced in August of 2014 but it was retroactive to January of that year. Also, in August of 2014 the claimant was

raised to a salary of \$48,500.00. The claimant terminated her service to the company in April of 2015.

The claimant maintains that she is due \$10,000.00 because of the time she spent getting to the top of her scale and the time at least two other male employees took to get to the top or to start. The claimant testified that she had more experience than either of the two other Kitchen Managers. She should not have had to work one year in a trainee position or Interim Kitchen Manager. The claimant points out that the person she replaced was making \$46,000.00 when he left and she had to start at \$32,000.00 for work in the Interim position.

The claimant also pointed out that the person, who took her place, when she resigned, was hired as an Assistant Kitchen Manager for \$32,500.00 and in June 2015 he was hired at a starting rate of \$45,000.00. The claimant feels that this is unfair and gender discrimination as she had more experience than either the person she replaced or the person who took her place.

The employer testified that there are set scales for the various size restaurants in the Great American Dining family. Restaurants are rated by an assigned dollar amount and the wage scale is based on the set scale for that restaurant.

The claimant was hired at an hourly rate and a short time later took a salaried position at an agreed upon wage rate. When the Kitchen Manager left his position the employer testified that they were not prepared to name a new Kitchen Manager. The claimant was offered the position on an interim basis and she accepted the position. After a year of review the claimant was placed into the position of Kitchen Manager in a full time position.

During her employment the claimant never stated that she was underpaid and did receive various wage increases within the grid established for the restaurant she was working at. The claimant did receive wage increases that brought her up to \$48,500.00 and did receive several bonus payments during her tenure.

The claimant, at the time of her separation from employment was paid at a higher rate than her predecessor. She was also paid a higher rate than the person who took her place when she left employment.

There was no testimony on the experience factor and how that played into the establishment of where an employee was placed on the wage scale. The claimant did give her history and the employer verified that the raises were given in accordance with the established pay grid for the restaurant where work was performed.

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-b Payment of Salaried Employees. –

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 explains the workings of the salary wage plan.

RSA 275:37 Equal Pay. –

I. No employer or person seeking employees shall discriminate between employees on the basis of sex by paying employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions, except where such payment is made pursuant to:

- (a) A seniority system;
- (b) A merit or performance-based system;
- (c) A system which measures earnings by quantity or quality of production;
- (d) Expertise;
- (e) Shift differentials;
- (f) A demonstrable factor other than sex, such as education, training, or experience.

II. An employer who is paying wages in violation of this section shall not reduce the wage rate of any other employee in order to comply with this section.

This is the section(s) of the law that deal with the practice of Equal Pay.

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 she did not meet this burden. The claimant has made the claim under RSA 275:37 and there is no violation of this provision of law violated.

The employer was credible in their testimony that there are wage grids in place throughout the organization. These grids are based on the size of the establishment based on earnings. The employer pointed out that they review applicants and place them in position for which the applicant qualifies or in a position where the employee can work into a full time position.

The employer has provided records that show female and male employees and their wage package. The statistics do not show that there is a marked difference in the wage structure of the sexes. The employer also showed that the claimant was evaluated after being placed in a wage grid that moved her to the full time position. At the end of her employment the claimant was earning more than the person who held the position prior to her taking the position and she was making more than the person replacing her once she resigned.

The claimant seems to hold her claim on the basis of total seniority in the restaurant business. There was no evidence that the employer disregarded the basic seniority element. It appears that all candidates met the minimum qualifications when placed in the position of Kitchen Manager.

It is apparent that the claimant worked within the established system and successfully moved through the ranks of a kitchen employee. The claimant never complained about her position or her wage structure while working for the employer.

The Wage Claim is invalid because there is no proof that the employer held the claimant back based on gender. The employer had a wage grid in place and followed it based on the employee's qualifications and a management review. 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 she was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

There is no decision or order for any violation of RSA 275:37.

Thomas F. Hardiman
Hearing Officer

Date of Decision: September 10, 2015

TFH/kdc