

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Epoch Corp and Marc Reich, individually

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages/commissions
RSA 275:43 V unpaid employee expenses
RSA 275:43 V unpaid severance pay
RSA 275:49 fringe benefit
RSA 275:44 IV liquidated damages
RSA 275:42 V, personally liability of corporate officer/manager
Interest

Employer: Epoch Corp, 107 Sheep Davis Rd. PO Box 235, Pembroke, NH 03275
Marc Reich, 34 Oak Bluff, Avon, CT 06001

Date of Hearing: September 2, 2015

Case No.: 50699

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of his wage claim, that he was due \$14,000.45 in unpaid wages and \$45.00 in unpaid employee expenses. He further sought liquidated damages on wages paid late, in the amount of \$92,057.94, and asserts that Marc Reich should be held personally liable.

At the hearing, he amended the claim to \$45.00 in unpaid employee expenses for the transfer of the title of a Lexus automobile from the company to him individually, liquidated damages on wages paid late, in the amount of \$92,057.94, and asserts that Marc Reich should be held personally liable.

The employer, Epoch Corp., argued, through their written objection, that the claimant had been paid all but a \$15,000 portion of his wages and that the claimant was in breach of his contract. The claimant has since received the approximate amount of \$15,000 as payment for the wages. Further the company ceased production and delivered its final home on June 24, 2015. The company has no assets.

The attorneys for the employer noted they are being paid through an insurance policy to fund legal fees only. There are no assets or funds left with the employer.

Marc Reich argues he is not and has never been, an officer of this corporation or an agent having the management of this corporation, and therefore cannot be deemed to be the employer of the employees of this corporation, pursuant to RSA 275:42 V.

FINDINGS OF FACT

The parties began an employment relationship in 2005 during the purchase of Epoch Corp. The claimant was a shareholder of the purchasing company. He also held a separate role as an employee in the role of CEO. Ironwood Equity Fund LP assisted with the funding of the purchase. Marc Reich is a principal of Ironwood Equity Fund LP (hereafter Ironwood) and as they assisted in the funding of the purchase of Epoch Corp, he held a Board of Director's position with Epoch Corp.

In October 2013, the employer terminated the claimant's employment role, but he maintained his shareholder status.

During the claimant's employment, he and another management employee voluntarily chose to defer their wages because there was not enough money to pay the employees and keep the business running.

Over the course of his employment, he deferred:

- \$36,505.79 in wages, \$19,230.80 of which were due in 2013. The claimant was unable to articulate when the balance of the wages were due;
- \$40,000 in bonus earned in 2006 and awarded in 2007;
- \$5,321.15 in vacation pay due upon separation in 2013; and
- \$10,231.15 in accrued payments for benefits not taken.

The wages have been paid in full as of the date of the hearing.

The claimant argues the employer should be held liable for liquidated damages as the employer failed to pay the wages within the prescribed timeframe in RSA 275:44.

The claimant is barred by the statute of limitations for any wages due prior to June 15, 2012, pursuant to RSA 275:51 V. which states that a wage claim may be filed by an employee or by the department on its own motion no later than 36 months from the date the wages were due and RSA 508:4 I Personal Actions which states that except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

The claimant's argument that because he agreed to defer his wages that should change the statute of limitations, is not persuasive. The Legislature chose this language and time frame, and provided no exceptions.

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" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

Black's Law Dictionary, Sixth Edition, defines "financially able" as: solvent, credit worthy, able to pay debts and expenses as due. See also solvency.

Black's Law Dictionary, Sixth Edition, defines "solvency" as: ability to pay debts as they mature and become due. Ability to pay debts in the usual and ordinary course of business.

The parties agree that Epoch Corp was never solvent. Ironwood funded the initial purchase and provided ongoing funding to keep the business alive. Ironwood provided the ongoing funding as a loan, with the expectation of repayment. Epoch was not able to stay in business, much less repay the funding to Ironwood. The business closed and delivered its last product on June 24, 2015.

The Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all wages due in the time required because the employer did not have the financial ability to pay the wages.

As no liquidated damages are found to be due, Marc Reich cannot be held personally responsible.

However, even if the claimant had prevailed on the claim for liquidated damages, he did not prove that Marc Reich could be held personally responsible under RSA 275:42 V.

RSA 275:42 V holds that for the purposes of this subdivision the officers of a corporation and any agents having the management of such corporation who knowingly permit the corporation to violate the provisions of RSA 275:43, 44 shall be deemed to be the employers of the employees of the corporation.

Mr. Reich did not hold an officer position with Epoch Corp. Mr. Reich did hold a Board of Directors seat as a principal of Ironwood, which funded the sale and ongoing investments. In this position, he interacted with the management of Epoch Corp, however, he did not have the management of the corporation. He did not permit the corporation to violate the provisions of RSA 275:43 or 275:44 as these decisions were not within his control.

Therefore, the Hearing Officer would have found that the claimant failed to prove by a preponderance of the evidence that Marc Reich could be held personally responsible under RSA 275:42 V.

The claimant also argues he is due \$45.00 that he paid for the transfer of the title of Lexus automobile from the company to him individually.

RSA 275:43 V holds that the 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.

RSA 275:57 states that an employee who incurs expenses in connection with his or her employment and at the request of the employer, except those expenses normally borne by the employee as a precondition of employment, which are not paid for by wages, cash advance, or other means from the employer, shall be reimbursed for the payment of the expenses within 30 days of the presentation by the employee of proof of payment.

The claimant paid for the expense for the acquisition of an automobile from the employer. This expense for the transition of a company vehicle to personal property is not an expense that normally arises out of employment or for the benefit of the employer. The claimant legally took possession of the vehicle in an agreement with the employer. The fee is not due to the employer, but a state agency. The fee required was not paid for the benefit of the employer, but rather for the benefit of the claimant to utilize the vehicle.

The Hearing Officer finds this payment by the claimant does not meet the criteria to be considered an employee expense that is reimbursable by the employer.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that he is due the claimed employee expense.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that his 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 Hearing Officer finds the claimant failed to meet his 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 RSA 275:43 V considers the payment of employee expenses to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed employee expenses, it is hereby ruled that this portion of the Wage Claim is invalid.

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.

Melissa J. Delorey
Hearing Officer

Date of Decision: October 1, 2015

MJD/kdc