

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Melissa Morest dba MCM Merchandising

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages and commissions
RSA 275:43 V unpaid employee expenses
RSA 275:42 I/II employer/employee relationship

Employer: Melissa Morest dba MCM Merchandising, 139 Governors Rd, Farmington
NH 03835

Date of Hearing: January 12, 2016

Case No.: 51717

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts she is owed \$550 for fifteen demonstrations of the Kirby vacuum system between September 21 and 25, 2015; \$100 for referrals provided to the employer between September 21 and 25, 2015; \$227.11 for promised gas reimbursements; and \$100 for additional referrals provided to the employer during a special promotion.

The claimant raised the issue of RSA 275:44 IV, liquidated damages, for the first time at the hearing.

This issue was not noticed for the hearing nor can issues be added without the consent of all parties. Melissa Morest dba MCM Merchandising declined to hear this issue at the hearing.

Melissa Morest dba MCM Merchandising denies the claimant was an employee and further, that she is owed any money. She did offer the claimant \$100 because she felt bad that she had not made any money.

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.

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 in (e) or (f). The claimant did not hold herself out to be in business for herself and did not have any recurring business liabilities or obligations. The claimant was not responsible for the satisfactory completion of work, and she could not be held contractually responsible for failure to complete the work.

The claimant worked for Melissa Morest dba MCM Merchandising (hereafter "the employer") from September 16 through October 2, 2015. She participated in orientation and training September 16 through 18, 2015, and signed the Dealer Commission and Payment Info Agreement, Independent Dealer Consultation Form, Voluntary Training/Orientation form, Seven Day Outside Sales/Option Independent Dealer Agreement, No Control Agreement, and Kirby Independent Dealer Agreement between September 16 and 22, 2015.

The claimant argues she is due \$550 for fifteen demonstrations of the Kirby vacuum system for the week of September 21 through September 25, 2015.

The employer disagrees stating the claimant only performed thirteen demonstrations during her entire employment.

The claimant and her witness Mr. Pettis provided credible testimony that the claimant performed fifteen demonstrations of the Kirby vacuum system during the week of September 21 through September 25, 2015. Pursuant to the Seven Day Outside Sales/Option Independent Dealer Agreement, in relevant part, "Where the Dealer satisfies the terms and conditions set forth herein, the Dealer will be paid **Five Hundred Fifty Dollars (\$550.00)** for said **Fifteen (15)** demonstrations during said seven-day period.

The Hearing Officer finds the claimant proved by a preponderance of the evidence she is due the claimed wages in the amount of \$550.

The claimant argues she is also owed two referral bonuses, each in the amount of \$100.

The employer argues the bonuses are discretionary and as the referrals were not legitimate, i.e. disconnected numbers, names did not match phone numbers. As such they chose not to pay any bonus.

RSA 275:49 I, II, and III require an employer to notify employees of the rate of pay at the time of hire and prior to any changes, and to make available to employees in writing or through a posted notice all fringe benefit policies. Lab 803.03 (b) specifically requires that an employer provide employees with a written or posted detailed description of employment practices and policies pertaining to bonuses, among other benefits.

The employer properly notified the claimant, in writing, of their practices and policies pertaining to bonuses.

The bonus program reads, in relevant part, "Gas Bonuses/3, 4, and 5 in a week bonuses/cash, check and credit card bonuses: Are based on 75 referrals for the week and are given at the discretion of MCM Merchandising. IMPORTANT: BONUSSES ARE NOT COMMISSION AND ARE NOT REQUIRED BUT ARE GIVEN AT THE DISCRETION OF MCM MERCHANDISING. DEALER MUST BE CURRENT, ACTIVE AND IN GOOD STANDING WITH MCM MERCHANDISING, AND ALL QUALIFICATIONS MUST BE MET AS DESCRIBED TO RECEIVE BONUSSES."

The Hearing Officer finds that the referral bonus section of the Dealer Commission & Payment Info does inform the claimant that her bonus was discretionary and "not a certainty". The employer exercised their discretion in choosing not to pay the bonus.

The Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that she is owed the claimed bonus under the employer's practices and policies contained in the Dealer Commission & Payment Info Agreement.

The claimant argues she is due \$227.11 in gas reimbursements. She alleges the employer told her during orientation to save her gas receipts and they would reimburse her for that expense.

The employer argues they do not provide a gas reimbursement for dealers. They notified the claimant she should save her gas receipts for tax purposes, not for any reimbursement plan by the employer.

RSA 275:49 I, II, and III require an employer to make available to employees in writing or through a posted notice all fringe benefit policies. Lab 803.03 (b) specifically requires that an employer provide employees with a written or posted detailed description of employment practices and policies pertaining to bonuses, among other benefits.

The employer did not notice the claimant of a gas reimbursement policy. The claimant may have misunderstood the conversation regarding the retention of gas receipts.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed gas reimbursement expenses

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 that the claimant proved by a preponderance of the evidence that she is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$550.00.

As RSA 275:43 I requires that an employer pay all wages, including bonuses, due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she was not paid all wages/bonuses due, it is hereby ruled that this portion of the Wage Claim is invalid.

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 she was due any employee expenses, it is hereby ruled that this portion of the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$550.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: January 13, 2016

Original: Claimant
cc: Melissa Morest dba MCM Merchandising, 139 Governors Rd, Farmington
NH 03835

MJD/mjd