

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

DeStefano & Associates Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid employee expenses
RSA 275:43 unpaid vacation pay
RSA 275:44 IV liquidated damages

Employer: DeStefano & Associates Inc, 2456 Lafayette Rd, Portsmouth, NH 03801

Date of Hearing: December 29, 2015

Case No.: 51767

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$1,250.00 in unpaid wages due between October 5 and October 9, 2015, \$118.75 in unpaid mileage expense, and \$935.00 in unpaid vacation pay. He further seeks liquidated damages on these wages as well as his final paycheck of \$1,250 as he was laid off on October 2, 2015, and did not receive these wages until October 16, 2015, the next regular payday and an expense check of \$138 which he received on October 19, 2015.

The employer argues the claimant has been paid for all wages due on time. The claimant did not raise any issues with his mileage until after he left employment. The employer previously submitted a check in the amount of \$365.83 for any discrepancies in the amount paid per mile for the claimant's mileage. They argue he received payment for all vacation due for his last week ending October 9, 2015. No liquidated damages are due because "we don't not pay our employees."

FINDINGS OF FACT

The claimant worked for the employer from March 2015 through October 2, 2015, when he was laid off.

The parties disagree as to whether the claimant's start date was March 17 or March 24, 2015.

The employer provided the claimant with a letter dated October 2, 2015, stating the claimant was laid off due to lack of work effective October 2, 2015. The letter also stated that the claimant would continue to receive his salary through October 9, 2015.

The claimant argues he did not receive his final pay check for the pay period of October 3, 2015 through October 9, 2015, as stated in the October 2, 2015 letter. The claimant received check number 9858, dated October 16, 2015, showing a pay period of October 3, 2015 through October 16, 2015, in the amount of \$1,250 gross. He argues this check actually represents payment for the pay period prior because the pay period dates on his checks have always been incorrect. He now argues in the alternative that if check 9858 is considered correct payment for October 3, 2015 through October 9, 2015, then he is due the first week he worked.

The employer argues the check shows the correct pay period dates and is the correct payment for the pay period of October 3, 2015 through October 9, 2015, and that he has been paid for all pay periods since his start date.

The Hearing Officer finds the employer provided credible testimony and evidence, previously submitted, that the claimant received the proper payment for October 3 through October 9, 2015 with check dated 9858.

The claimant did not show persuasive testimony or evidence that he did not receive payment for October 3 through October 9, 2015, or in the alternative, did not receive payment for his first week of work.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed salary for the week of October 3 through October 9, 2015, or alternatively, his first week of work.

The claimant had initially filed a claim for \$484.58 in unpaid mileage reimbursement as the employer had incorrectly paid mileage at \$0.51 and \$0.56 per mile instead of the \$0.57 per mile the employer had noticed they would pay him.

The employer previously submitted a check in the amount of \$365.38 as reparations. They also noted the claimant had never raised the issue of any incorrect mileage payments until after his separation from employment. They deducted \$40 from this payment for an overpayment on a vehicle allowance as they paid the full allowance for the week ending October 2, 2015, but he only physically worked a portion of the week. They now argue the claimant is supposed to deduct thirty miles daily before he submits for reimbursement of mileage.

The claimant seeks the balance of \$118.75 for the mileage reimbursement, which is inclusive of the \$40.00 overpayment deduction for the vehicle allowance.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding payment of employee expenses. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed

description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly noticed the claimant of the travel expense policy. The policy reads, "The employee will be expected to provide transportation to commute to the office. If the work is outside the office, the employee will be reimbursed at the prevailing IRS rate for business travel, for mileage in excess of the mileage for his commute to the office. Expenses are reimbursed at cost. An allowance of \$100/wk will be provided as a base to assist with personal vehicle use."

The employer's argument the claimant should have deducted thirty miles per day is not persuasive, as no information was provided whether or not this deduction had already been made or the claimant's actual commuting mileage.

The claimant provided credible testimony and evidence, previously submitted, showing his mileage reimbursement expenses.

The employer is precluded from making the \$40.00 deduction from the claimant's wages for accidental overpayments without the proper documentation in place, pursuant to RSA 275:48 I (d)(4).

The Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed mileage reimbursement expenses, including the overpayment deducted by the employer, totaling \$118.75.

The claimant argues he is due \$935 for 3.74 days of vacation pay, payable upon his separation.

The employer argues they used his vacation time to pay his final week of salary. Further, he had used vacation time for October 1 and 2, 2015, as he did not appear to work, but received his full salary.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer's written policy reads, in relevant part, "The company will pay for two weeks of paid vacation, which accrues at .83 days per month beginning after the second full month of employment. One day per week will be added for each complete year of employment after three years. The maximum will be three weeks. The vacation time accrued must be used within one year of the date of accrual or the time will be forfeited."

The employer's policy does not notify the claimant he will forfeit his vacation pay if he separates from employment within one year of the accrual date of the vacation time.

The employer expressly notified the claimant in his October 2, 2015, notice of layoff that "as discussed we will pay your salary thru 10/9/15." They paid the claimant one week of salary. At no time did they notify the claimant that this payment represented a payout of his vacation pay.

The employer's argument that the claimant did not appear for work on October 1 or 2, 2015, for which they could use vacation pay is not persuasive. The employer's written policy does not notify the claimant that his vacation bank will be used in the event an employee does not appear for work.

Further RSA 275:43-b requires that an employer pay a salaried employee their full salary for any pay period in which the employee performs any work. It also allows employers to make deductions to a salaried employee's wages under certain circumstances, but none of those exceptions apply to the facts of this case.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed vacation pay in the amount of \$935.00.

The claimant asserts the employer should be liable for liquidated damages for \$1,250.00 in unpaid wages due between October 5 and October 9, 2015, \$118.75 in unpaid mileage expense, \$935.00 in unpaid vacation pay and his final paycheck of \$1,250 as he was laid off on October 2, 2015, and did not receive these wages until October 16, 2015, the next regular payday and an expense check of \$138 which he received on October 19, 2015.

RSA 275:44 III holds that when an employee for any reason whatsoever is laid off, the employer shall pay in full to such employee not later than the next regular payday, as designated under RSA 275:43, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

As no wages are found to be due for October 3 through 9, 2015, no liquidated damages can be assessed.

As the employer properly paid the claimant's wages in accordance with RSA 275:44 III for an employee who is laid off, no liquidated damages are found to be due.

As RSA 275:43 V finds employee expenses to be wages, *when due*, and RSA 275:57 I holds that employee expenses shall be reimbursed for the payment of the expenses within 30 days of the presentation by the employee of proof of payment. The claimant submitted his final expenses on October 4, 2015, and received payment on October 19, 2015, within the thirty days provided in the statute, when the wages are due. Therefore, the Hearing Officer finds no liquidated damages are due for the employee expenses paid on October 19, 2015, in the amount of \$138.00.

In this claim, the claimant prevailed on erroneous employee mileage reimbursements and vacation pay.

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".

The employer provided credible and persuasive testimony that they believed they had paid the claimant all wages due.

The Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good case failed to pay him all wages due in the time required because the employer had a genuine belief that the wages were not owed.

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 failed to prove by a preponderance of the evidence that he is owed the claimed wages, 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 proved by a preponderance of the evidence that he was not paid all employee expenses due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$118.75.

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 is due the claimed vacation pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$935.00.

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 timeframe 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 timeframe required by statute, 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 \$1,053.75 (\$118.75 + \$935.00), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: January 20, 2016

Original: Claimant
cc: DeStefano & Associates Inc, 2456 Lafayette Rd, Portsmouth, NH 03801

MJD/mjd