

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Cross Country Mortgage Inc

DECISION OF THE HEARING OFFICER

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

Employer: Cross Country Mortgage Inc, 6850 Miller Rd, Brecksville, OH 44141

Date of Hearing: May 11, 2016

Case No.: 52503

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of her wage claim, that she was owed \$2,516.00 in unpaid paid time off (PTO) which she claims was due upon her termination. She subsequently amended her claim to seek liquidated damages.

At the hearing, she clarified she also is seeking liquidated damages on her final pay check which she alleges was paid six days later than allowed by law.

The employer argues the past practice and written policy state PTO pay is not paid out at separation of employment. As they are not required to pay out her earned PTO, they are not liable for liquidated damages.

Further, the claimant resigned and did not return to work. She received her pay on the next regular payday.

FINDINGS OF FACT

The claimant and her husband worked for the employer, opening this location for the employer in August 2015, as the only two employees in the office. She worked as a sales assistant from August 3, 2015 through February 1, 2016, and reported to her husband, the branch manager.

On February 1, 2016 at 11:22am, the claimant tendered her written resignation, previously submitted, via email, to Michelle Novak in the corporate Human Resources Department, stating she was "providing a two weeks notice and will be resigning from

my position as Loan Officer Assistant with CCM. Please let me know if I can provide any assistance with the transition. I would be glad to provide support as needed.”

At the same time, the claimant submitted a request for PTO time for the two week notice she offered. The employer initially approved the request, but ultimately did not pay the PTO on this request as she resigned and did not return to work.

The employer paid the claimant for hours worked on the next regular pay day, February 12, 2016.

The claimant argues the employer terminated her employment on February 1, 2016, and therefore, the wages were due within seventy-two hours of that date, or February 4, 2016.

The claimant admitted she did not have any conversations regarding her separation with anyone at the employer other than her husband, the branch manager, who also resigned the same day. The claimant maintains that her access to “the system” shutdown on February 1, 2016.

At no time did the employer state that her employment was terminated. The employer did not provide any response to her resignation email, other than to allegedly remove her access to “the system.”

RSA 275:44 Employees Separated From Payroll Before Pay Days. –

I. Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours.

II. Whenever an employee quits or resigns, the employer shall pay the employee's wages no later than the next regular payday, as provided under RSA 275:43, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the employer shall pay all wages earned by the employee within 72 hours.

The claimant failed to prove the employer terminated her employment. She resigned effective February 1, 2016, with no intent to return to the office after that date, but did request to receive PTO pay for the two week notice she provided. The employer did not in any method notify her she was terminated.

The employer paid the claimant for all hours worked on the next regular pay day, as required by RSA 275:44 II. Therefore, no liquidated damages are due.

The claimant also argues she is due payment for her accrued PTO time as the written policy does not specify that payment is not made for PTO time for New Hampshire employees at the time employment terminates.

The employer argues the written policy does contain a clause which states accrued but unused PTO is not paid unless required by state law, and New Hampshire does not have any laws that require the payment of PTO time when employment terminates.

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 did provide a written policy regarding PTO pay policies, which the claimant agrees she received.

The written policy, previously submitted, provides a general description of Paid Time Off, and then has two separate sections specifically for Ohio employees and California employees.

The employer argues a paragraph at the end of the Ohio employee section which states "accrued but unused PTO is not paid unless required by state law" is meant for all employees, not just the Ohio employees.

The Hearing Officer does not find the plain reading and placement of and within the written notification to specifically notify a New Hampshire employee of the policies and practices regarding PTO time.

The employer did not establish a credible past practice which has not paid employees accrued but unused PTO time upon separation.

While the employer is correct that there are no statutory requirements for employer to pay out accrued but unused PTO time at separation, RSA 275:49 and Lab 803.03 (b) requires all of the policies and practices to be noticed to the claimant in writing, including whether or not accrued but unused PTO time is paid out at the time of the employee's separation.

The written policy does not inform the claimant as a New Hampshire employee that she would not be paid for PTO pay at separation. Because the written policy does not specifically inform the claimant that she would forfeit these benefits at separation, the Hearing Officer finds that the claimant is now due the claimed PTO 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 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 her all wages due in the time required because the employer had a genuine belief that the PTO pay was not owed.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that her 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 met her burden in this claim for unpaid PTO pay. She failed to meet that burden in her claim for liquidated damages.

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 PTO pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$2,516.00.

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 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.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$2,516.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: May 16, 2016

Original: Claimant
cc: Employer

MJD/aph