

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**Drink 2 A Day Worth Living LLC dba The Drinkery**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:44 IV liquidated damages

**Employer:** Drink 2 A Day Worth Living LLC dba The Drinkery, 39 E Broadway, Derry,  
NH 03038

**Date of Hearing:** September 28, 2016

**Case No.:** 53185

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserted she is owed \$1,038.50 in unpaid wages for hours worked during her employment. She argued that her proof she was not paid all hours worked lies with the fact that the employer did not keep accurate time records as required by law. She further sought liquidated damages.

She strenuously objected to the employer's September 26, 2016, submission of documents for the September 28, 2016, hearing, as she did not receive them at least two business days prior to the hearing, as required by Department rule.

The Hearing Officer accepted the documentation over the objection of the claimant.

The employer initially denied the claimant was not paid for all time worked, and in fact was over paid by \$295.58. However, after additional research on their point of sale (POS) system, they found additional sales related records which provided some information on time worked. They prepared a check for \$112.15 to err on the side of caution for hours she may have worked, not that they have proof that she worked.

Further, there was no willful or intentional withholding of the \$112.15, nor any other wages to the claimant.

**FINDINGS OF FACT**

The claimant worked for the employer from December 18, 2014 through April 26, 2016, when she resigned her position.

She argues she is due \$1,038.50 in unpaid wages for hours worked during her employment. She calculated this amount from the payroll records and schedules she received from the employer when she requested a copy of her personnel file.

The claimant argues her evidence “rests on the absence of theirs” and admits that this claim is “absolutely impossible to prove, for either of us.”

She further admits she was disingenuous in her written communications with the employer after her separation from employment, regarding her desire to return to her position with the employer. She only did so in an attempt to retrieve information from the employer, not because she genuinely wanted to return to her job.

The claimant did not divulge that she had received a check from the employer in the amount of \$112.15 at any point during the hearing. After the hearing had closed, she asked what she should do with the check she received from the employer. The Hearing Officer referred her to a Labor Inspector following the hearing.

The employer admits they were not retaining the actual time worked records after processing payroll. They had believed the records were being archived to a cloud based payroll program through their POS system; however, the records were being permanently deleted.

Both parties agree the records provided for the wage claim and subsequent hearing could be inaccurate.

Though RSA 279:27 and LAB 803.03 require that every employer of employees shall keep a true and accurate record of the hours worked by each, including time work began and ended including any bonafide meal periods, and shall maintain the records for four years; lack of records does not mean the claimant automatically prevails.

Other than one specific date which the claimant referenced in a text on February 19, 2016, that she was asked to work a double shift on the upcoming Sunday, or February 21, 2016, the claimant did not articulate individual days or hours she worked without receiving pay, outside of her personal audit of the employer's records.

The claimant did not contemporaneously maintain any record of her own to show hours worked, to compare with the payroll records and schedules produced by the employer.

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that she was not paid for all hours worked. The Hearing Officer finds that the claimant failed to meet that burden of proof as her story is only as credible as, not more credible than, the employer's. The claimant, therefore, fails to prove by a preponderance of the evidence that she is owed the claimed wages.

Because no wages are found to be owed, no liquidated damages can be awarded.

However, even if wages had been found to owed, the employer would not have been found to be liable for liquidated damages.

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 claimant did not present any testimony regarding the liquidated damages portion of her claim. She did attempt to elicit responses from the employer on cross examination towards this claim. She also asserts the employer's failure to maintain records is proof of intent.

Both parties agree the employer failed to maintain records statutorily required by this Department. No credible or persuasive testimony or evidence was provided to show the employer purposely failed to maintain any records to willfully and without good cause fail to pay the claimant any wages.

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

### **DISCUSSION**

The burden of proof lies with the claimant in these matters. The claimant has the burden to prove by a preponderance of the evidence that the claimed wages are due. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The claimant failed to meet that burden.

The parties clearly had underlying issues outside of the jurisdiction of this Department. These issues were not discussed nor were they considered for this Decision.

The claimant took significant issue with the employer's failure to maintain records statutorily required by this Department. Any violations of statutes maintained by this Department are handled through a separate inspection process and the remedy for violations are dictated by RSA 273:11-a, not through the wage claim process. Failure to maintain records does not produce a default Decision in favor of the claimant.

The claimant also objected to the employer's September 26, 2016, submission of documents for the September 28, 2016, hearing, as she did not receive them at least two business days prior to the hearing, as required by Department rule.

Lab 204.07 Conduct of Hearing.

(a) The party requesting the hearing shall be responsible for compiling all written evidence to be considered by the hearing officer. This compilation shall be indexed,

tabbed, paginated and in chronological order within each tabbed section. The final compilation shall be submitted to the hearing officer at the time of the hearing. Members of the department of labor staff or the hearing officer shall waive the provision upon a finding that a party cannot comply due to lack of financial or technical resources.

(b) All parties to a dispute subject to the provisions of this chapter shall disclose to all the other parties all medical evidence that is to be introduced at the hearing no later than 5 business days prior to the date of the scheduled hearing. Parties who are introducing non-medical evidence shall make all other parties aware of such evidence and submissions no later than 2 business days prior to the scheduled hearing.

Under section (b) the parties are required to exchange non-medical documentation no later than "2 business days" prior to the hearing. The claimant argues she did not receive the documentation forty-eight hours prior to the hearing therefore she did not have enough time to review all the records to prepare for the hearing. She argued that "the rules are in place for a reason."

The Hearing Officer accepted the documentation over her objection. This is acceptable pursuant to Lab 204.06 Waiver or Suspension of Rules by the Hearing Officer. The hearing officer, upon the motion of any party, or on his or her own initiative, shall suspend or waive any requirements or limitation imposed by this chapter when the suspension or waiver:

(a) Appears to be lawful; and

(b) Is more likely to promote the just, accurate and efficient resolution of the pending dispute than would adherence to the particular requirement or procedure.

Further, neither the Department nor the Hearing Officer held the claimant responsible for the requirements of Lab 204.07 (a) to compile all evidence for consideration at the hearing.

### **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 this Department finds that the claimant failed to prove by a preponderance of the evidence that she is owed the claimed wages, it is hereby ruled that 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.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: October 12, 2016

Original: Claimant  
cc: Employer

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