

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

**V**

**Dr. William Marsh**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid vacation pay, sick leave pay, and employee expenses  
RSA 275:44 IV liquidated damages  
RSA 275:48 I/II illegal deductions  
RSA 279:21 VIII unpaid overtime pay

**Employer:** Dr William Marsh, 742 Pleasant Valley Rd, Wolfeboro, NH 03894

**Date of Hearing:** February 9, 2017

**Case No.:** 54406

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts she is owed \$10,703.00 as follows:

- \$4,143.45 57.5 hours x three years x \$24.02 per hour unpaid wages;
- \$1,537.28 \$24.02 x eight hours x eight days;
- \$1,921.60 \$24.02 x eight hours x ten days;
- \$400.20 230 miles per year x three years x \$0.58 per mile;
- \$141.20 for illegal deductions for AFLAC which were not remitted properly; and
- \$21.62 and an undetermined amount for unpaid overtime.

She further seeks liquidated damages.

The employer denies the claimant was not paid for all time worked. He argues there was no policy or practice to offer accrued paid vacation or sick pay. She is not due any overtime for November 9, 2016, as she was working at her new employer's office becoming acquainted with their systems, not for him. He further argues he did not have a practice to pay mileage for employees. He does not believe that she performed the work she is claiming after hours for trips to the post office as she was often missing during the day for trips to the post office.

He agrees she may be due \$70.60 for an AFLAC payment which he is agreeable to remitting to her.

### **FINDINGS OF FACT**

The claimant worked for the employer for various periods from 1998 through November 30, 2016, when the practice was sold.

The claimant argues upon her most recent employment with the Dr. Marsh beginning September 2008, that he verbally granted her five weeks of paid vacation and two weeks of sick pay annually for her use.

Dr. Marsh disagrees with the claimant, arguing the vacation pay and sick pay were provided only when an employee was out on vacation or out due to sickness. No program or policy existed for any accruals to an employee's benefit.

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 and sick leave 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 written policy provided by the employer does not provide any accrual of vacation or sick time.

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 promised an accrual of vacation and sick leave pay. 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 vacation and sick leave pay.

The claimant argues she is due \$21.62 for 1.8 hours of overtime worked on November 9, 2016, and an undetermined amount in overtime pay over the course of her employment. She argues the employer refused to provide her time records so that could calculate these amounts.

The employer argues the claimant worked for her new employer, the purchaser of the employer's practice, on November 9, 2016. He did pay her vacation hours for that day, in fairness as he sold the practice, but he did not pay her for time physically worked for his benefit on that day. He also argues that he did not refuse her any time records, but that the time clock did not work properly and had been broken, rendering it impossible to retrieve the information she sought.

RSA 279:21 Minimum Hourly Rate. – Unless otherwise provided by statute, no person, firm, or corporation shall employ any employee at an hourly rate lower than that set forth in the federal minimum wage law, as amended.

Tipped employees of a restaurant, hotel, motel, inn or cabin, or ballroom who customarily and regularly receive more than \$30 a month in tips directly from the

customers will receive a base rate from the employer of not less than 45 percent of the applicable minimum wage. If an employee shows to the satisfaction of the commissioner that the actual amount of wages received at the end of each pay period did not equal the minimum wage for all hours worked, the employer shall pay the employee the difference to guarantee the applicable minimum wage. The limitations imposed hereby shall be subject to the following exceptions:

VIII. Those employees covered by the introductory paragraph of this section, with the following exceptions, shall, in addition to their regular compensation, be paid at the rate of time and one-half for all time worked in excess of 40 hours in any one week.

The claimant did not physically work hours for the employer in excess of 40 during the week ending November 18, 2016.

She could not articulate specific dates or pay periods in which she worked overtime and did not receive all wages due, for any other time periods.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed overtime wages.

The claimant argues she is due mileage payments for her daily trips to the post office. She acknowledges she did not receive any notice from the employer that she would receive mileage payments. However, she believes she should receive mileage payments because going to the post office was part of her job.

The employer argues there was no offer or policy to pay mileage payments for any reason.

As the employer did not provide notice to the claimant that she would receive mileage payments, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed mileage payments/employee expenses.

The claimant argues the trips she took to the post office were off the clock at the end of the day. She argues she is due 57.5 hours per year for the maximum of the three years of the statute of limitations.

The employer disagrees that the claimant worked off clock for any hours. He argues she was often missing from work during the day, when she was punched in on the clock, for trips to the post office. Further, he never directed her that she should not be punched in for trips to the post office.

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 all wages due. 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 be due, the claimant failed to prove by a preponderance of the evidence liquidated damages were due.

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 testimony that he does not believe the claimant is due any further 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.

The claimant argues she is due \$141.20 for two monthly payments of \$70.60 for premiums for her AFLAC policies. She alleges the employer deducted \$70.60 from two pay checks for the premium for these policies, but did not send the payments to AFLAC and the policies lapsed. The claimant argues the policies lapsed in September 2016; however payments for October and November 2016 were withdrawn from her wages.

The employer agrees the claimant is due for one monthly payment of \$70.60, not two months' worth.

The claimant's argument that there were two additional withdrawals of \$70.60 for October and November 2016, after her policies lapsed in September 2016, were persuasive. It is noted the employer made a payment to AFLAC on October 21, 2016, however, that payment only paid the policies through September 2016.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that the claimant is due the claimed \$141.20 in illegal deductions.

The claimant sought 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 employer provided credible testimony that he did not knowingly withhold the AFLAC premiums and it was upon review for this claim that he acknowledged a payment was due.

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 her 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 she is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V considers vacation pay and sick leave pay 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 is due any vacation pay or sick leave pay, 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 not paid all employee expenses due, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 I requires that an employer pay all wages due an employee and RSA 279:21 VIII requires an employer to pay time and one half of an employee's regular rate of pay for all time worked in excess of forty hours, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she is owed the claimed unpaid overtime wages, it is hereby ruled that this portion of the Wage Claim is invalid.

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 was not paid all wages due including the illegal deductions of AFLAC payments, it is hereby ruled that the Wage Claim is valid in the amount of \$141.20 (\$70.60 + \$70.60).

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 \$141.20 (\$70.60 + \$70.60), less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: February 23, 2017

Original:      Claimant  
cc:              Employer

MJD/das