

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]
V

Reliable Softworks LLC and Michael Baron individually

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages and commissions
RSA 275:43 V unpaid vacation pay/flex time pay
RSA 275:44 IV liquidated damages
RSA 275:42 I/II employer/employee relationship
RSA 275:42 V, personally liability of corporate officer/manager

Employer: Reliable Softworks LLC and Michael Baron individually, 399 E Industrial Dr, Manchester, NH 03109

Date of Hearing: March 8, 2017

Case No.: 54480

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$34,768.00 in unpaid commissions from July 3, 2014 through May 26, 2016; and \$2,652.88 for 110.36 hours of unpaid flex/vacation time at a rate of \$24.00 per hour. He further seeks liquidated damages, and asserts that Michael Baron should be held personally liable.

Reliable Softworks LLC (hereafter "Reliable") and Michael Baron individually deny the claimant is due any commissions or flex/vacation time after he became an owner of the company. There was no agreement for commission and the claimant had used all flex/vacation time available. Further, Reliable and Michael Baron individually hold a genuine belief that no wages are due.

FINDINGS OF FACT

The claimant began an employment relationship with Reliable on July 23, 2012. He became one of the owners of the company on March 25, 2014. He argues he is due commissions and flex time pay.

Reliable argues that because the claimant was an owner that he is not an employee.

This Department must first determine whether the claimant was an employee of this employer. 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 New Hampshire Supreme Court, in W. Bradford Caswell v BCI Geogenetics Inc. 121 NH 1048, opined "The question in this case is whether an officer of a corporation is an "employee" within the context of a back pay claim under RSA ch. 275. We hold that he is." and "Nowhere does RSA 275:42 V bar one in the position of the plaintiff [vice president and officer of the corporation] from being an employee for purposes of pay or hours protection under RSA ch. 275. We find no ambiguity in the use of the word "employee" and accordingly answer the question in the affirmative."

Caswell is distinguishable from the instant case because he did not have any ownership of the corporation, as the claimant did. Neither party presented any case law on this issue of an employee who has an ownership in the LLC and who is also an employee.

The Hearing Officer finds that the claimant meets the definition of employee as he was permitted, required, or directed by any employer, Reliable, in consideration of direct or indirect gain or profit, to engage in any employment, under RSA 275:42 II.

The claimant argues he had verbal agreement with the employer, upon hire, that he would receive a 10% commission on all sales. He alleges he is due \$34,768.00 for commissions between July 3, 2014 and May 26, 2016.

Reliable agrees the conversation occurred, however, there was a delay in payments because the company was not profitable. The business is a startup company. The claimant continually asked for remuneration. As the company did not have the funds to pay the claimant any additional money, Reliable offered the claimant ownership in the company as a means to pay off financially in the future. The claimant received shares of the company at no cost to him. The goal of this company was to eventually

sell off to a larger company and receive a large financial payoff, referred to as the “end game.”

The parties tell differing accounts of the claimant’s ownership in Reliable. The claimant felt he remained an employee with an ownership component in the company. Reliable believed the claimant became an owner of the company and ceased his employee role and any expectation of commissions.

Reliable agrees that commissions were paid from July 23, 2012 through July 2, 2014, after the claimant became an owner in March 2014. The parties originally discussed the payment of “old commissions” in March 2014, and the claimant became an owner. Reliable agreed to pay the “old commissions”, and the claimant agreed to a schedule over time. March through July was a “crunch time” for Reliable and they did not begin the payment of commissions immediately. Because of this delay, Reliable agreed to pay commissions through the date of July 2, 2014, when the “old commission” payments began.

Reliable argues that the claimant asked for commissions many times after July 2, 2014, and the response each time was “we don’t have commissions”.

The claimant argues he continued to send sales reports to Reliable, however, received no response.

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 he was not paid all commissions due. The Hearing Officer finds that the claimant failed to meet that burden of proof as his 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 he is owed the claimed commissions.

The claimant argues he is due \$2,652.88 for 110.36 hours of flex time pay at \$24.00 per hour.

Reliable argues that the claimant used all the flex time allotted.

The claimant agrees that Reliable provided an employee handbook, however, it was titled Baron’s Major Brands, another of Mr. Baron’s companies, and alleges he was told it was not the handbook to use.

He further alleges that he was performing work on some of the days that Reliable has him marked as using flex time. He offered no evidence other than his testimony.

Reliable provided credible evidence, previously submitted, that the claimant used more than his allotment of flex time.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed flex time pay.

Because no wages, commissions or flex time pay, 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 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.

The claimant sought personal liability of this claim for Michael Baron under RSA 275:42 V. As no wages, commissions or flex time pay, are found to be owed, personal liability could not be assessed.

However, even if wages, commissions or flex time pay, had been found to be due, personal liability could not be assessed in this case.

RSA 275:42 V holds that, "For the purposes of this subdivision the officers of a corporation and any agents having the management of such corporation who knowingly permit the corporation to violate the provisions of RSA 275:43, 44 shall be deemed to be the employers of the employees of the corporation".

Reliable Softworks LLC is not a corporation, but a limited liability company. Therefore the provisions of RSA 275:42 V do not apply and Michael Baron cannot be held personally responsible under this statute.

RSA 275:51 V does not authorize this Department to award attorney's fees or costs. This is distinct from RSA 275:53 III that allows "costs of the action, and reasonable attorney's fees", but by a "court of competent jurisdiction". The New Hampshire Department of Labor is an administrative agency and a part of the executive branch of government. The Department is not a "court of competent jurisdiction". Therefore, no fees or costs can be awarded through this decision.

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 he is owed the claimed commissions/wages, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V considers flex time 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 he is due any flex time pay, it is hereby ruled that this portion of 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.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 23, 2017

Original: Claimant
cc: Employer

MJD/das