

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Third Time Inc dba Miller Auto Group

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages/bonus
RSA 275:43-b unpaid salary
RSA 275:48 I/II illegal deductions
RSA 275:44 IV liquidated damages

Employer: Third Time Inc. dba Miller Auto Group, PO Box 1010, Lebanon, NH 03766

Date of Hearing: April 17, 2017

Case No.: 54815

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of his wage claim, that he was due \$1,000 in unpaid bonus and \$2,000 for two weeks of unpaid salary. He further sought liquidated damages.

The claimant amended the claim to include \$1,980 in illegal deductions from his wages for damage to a car and the bill to tow the vehicle, and liquidated damages.

At the hearing, the claimant amended the claim for the \$1,000 in bonus to \$525 and the claim for illegal deductions to \$1,910.

The employer denies the claimant is due any draw against bonus. They further deny he is due any bonus pursuant to the written policy. They deducted monies pursuant to a document signed by the claimant which authorized the employer to make deductions from his wages up to \$1,000 for any damage to vehicles and an agreement for the claimant to pay for the outrageous tow fee of \$910.

As they believe the claimant has been paid all wages to which he was entitled, they have not willfully and without good cause withheld any wages, rendering the claim for liquidated damages invalid.

FINDINGS OF FACT

The claimant worked for the employer from 2016 through January 16, 2017, when he resigned his position via text without notice.

The claimant argues he is due \$525 in unpaid bonus. He argues that fifteen cars were sold for which the employer should have received \$350 per car, totaling \$5,250. He alleges he is due 10% of that balance, or \$525.

The employer argues the claimant is not due any bonus under the written policy. The February 4, 2016, policy states that any employee eligible for a monthly bonus needs to be active at the time the bonus is dispersed or the bonus is forfeited. Further, if an employee terminates employment without a three week notice, the bonus is forfeited.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly notified the claimant of the policy and practices regarding the eligibility of bonuses, and that he needed to be an active employee at the time of the payment of bonuses and that termination both forfeit any bonus payment.

The claimant terminated his employment and did not provide a three week notice, as required by the written policy.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed bonus under the written policy of the employer.

The claimant argues he is due \$2,000 in unpaid salary/wages, \$1,000 for each of two weeks January 9 through 15 and January 16 through 22, 2017. He worked sixty four hours between January 9 and 16, 2017, and did not receive wages.

The employer argues the claimant did not receive a salary but a draw against his bonus for the month. The bonuses are calculated the month following the month in which the bonuses were earned. As the claimant did not finish the month of January, no bonus is due pursuant to the written policy as he was not employed at the time the bonus was paid.

The claimant agreed, upon examination by the Hearing Officer, that he indeed received a \$1,000 weekly draw against commission, not a weekly salary.

RSA 275:42 VII. The term "draw against commission" means a compensation method under which an employee receives, at least once each month, a draw payment of not less than the minimum wage, representing an advance against anticipated commission earnings. Draws shall be reconciled against commissions monthly unless otherwise agreed, in writing, by employer and employee. If the reconciliation results in an amount payable to the employee, payment shall be made in accordance with this chapter. If the reconciliation results in a negative balance, the balance may, by written agreement between employer and employee, be carried over into ensuing time periods; however, if a final reconciliation results in a negative balance, it shall not be recoverable from the employee.

There was no written agreement between the claimant and the employer that negative balances could be carried over into ensuing time periods. The Hearing Officer

finds that the claimant should have been paid his draw for the two weeks of January 9 through 15 and January 16 through 22, 2017 in the claimed amounts of \$1,000.00 per week, or \$2,000.

The employer made deductions from the claimant's wages \$1,000 for damage to a demo vehicle and \$910 for the fee to tow the vehicle.

He agrees that he signed a document stating he would be responsible for the first \$1,000 of damage. He also acknowledges he agreed to the deduction of \$910 for the tow fee. However, he now argues that he discovered that this was illegal through another employee who filed a similar claim through this Department.

The employer argues that the claimant did sign an authorization for the deduction of \$1,000 for damage he admits was done to the vehicle and there was a verbal agreement for the cost of the tow. They argue the claimant allowed an unauthorized driver to use the demo vehicle, and subsequently used a non-authorized vendor to tow the vehicle, who charged an exorbitant cost.

She further argues they actually have a \$5,000 deductible for damage, but only charged the claimant for \$1,000. The claimant was aware of and had the contact information for the tow truck driver they use, and chose not to call him.

RSA 275:48 Withholding of Wages. –

I. No employer may withhold or divert any portion of an employee's wages unless:

(a) The employer is required or empowered to do so by state or federal law, including payroll taxes.

(b) The employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner, as provided in subparagraph (d) or for any of the following:

(12) For any purpose on which the employer and employee mutually agree that does not grant financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded. The withholding shall not be used to offset payments intended for purchasing items required in the performance of the employee's job in the ordinary course of the operation of the business. Nothing in this subparagraph shall prohibit a charitable organization from withholding from an employee's wages a voluntary contribution to such charitable organization.

The claimant's signature on the acknowledgement that he would be responsible for the first \$1,000 of damage he caused to a vehicle does not meet the requirements under RSA 275:48 I(b)(12). This deduction does create a financial advantage to the employer, to recoup \$1,000 from an employee, whose wages are captive to the employer.

The employer did not procure a written authorization for the deduction for the \$910 tow truck fee. Further, this deduction does create a financial advantage to the employer, to recoup \$910 from an employee, whose wages are captive to the employer.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed \$1,000 in illegal deductions for the damage to the vehicle and \$910 for the deduction for the tow truck fee.

The claimant argues the employer should be held 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".

Because no bonus found to be due, no liquidated damages can be assessed for these portions of the claim. However, even if the bonus had been found to be due, the employer presented credibly that they held a genuine belief that the claimant had been paid all wages due. Therefore, the Hearing Officer would have found the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good case failed to pay him all bonus due because the employer had a genuine belief that the wages were not owed.

The claim for the two week of draw in the amount of \$2,000 (\$1,000 + \$1,000) was found valid through this hearing.

The employer credibly testified they believed they were lawful not paying these wages because they believed the claimant did not finish the month for the calculation for draw against their bonus program.

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 they had paid all wages due.

The claim for illegal deductions in the amount of \$1,910 (\$1,000 + \$910) was found valid through this hearing.

The employer credibly testified they believed they were lawful in making these deductions from the claimant's wages.

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 they deductions were lawful.

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 he was not paid all wages/draw due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$2,000 (\$1,000 + \$1,000).

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 was not paid all wages/bonus due, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:48 I allows an employer make deductions from wages due an employee which accrue to the benefit of the employee, and as this Department finds that the deduction for vehicle damage and tow truck fee provided the employer a financial advantage, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$1,910 (\$1,000 + \$910).

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 \$3,910 (\$2,000 + \$1,910), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: April 25, 2017

Original: Claimant
cc: Employer

MJD/das