

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

Southside Diner

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages

Employer: Southside Diner, 156 Little Mill Rd., Sandown, NH 03873

Date of Hearing: July 6, 2017

Case No.: 55223

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted through the filing of a wage claim that she is owed \$980.00 in unpaid wages. The claimant adjusted the claim amount at hearing to \$896.50 for the period of January 22, 2017 through April 9, 2017.

The employer contends the parties had an agreement whereby, the claimant would work for tips only, with no promise from the employer the wages would be paid at a later date.

FINDINGS OF FACT

The claimant worked for the employer as a server from September 2016 through April 9, 2017.

The claimant worked only for tips for eleven (11) weeks from January 22, 2017 through April 9, 2017, for which she argues she is due \$896.50 calculated at \$3.26 for 275 hours.

The employer agrees the claimant worked for eleven (11) weeks under this agreement

Prior to January 22, 2017 the claimant was paid \$3.26 per hour plus tips.

The employer does not disagree with the claimant's testimony that she worked 275 hours during the eleven (11) week period, only that she was not to receive an hourly rate for those hours.

RSA 279 reads, in part: "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** [emphasis added]. 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."

A private agreement to withhold wages is prohibited under RSA 275:50 which reads: "I. Except as provided in RSA 275:53, no provision of this subdivision may in any way be contravened or set aside by private agreement. II. Except as provided in RSA 279, an employer and employee may not enter into any agreement, whether written, oral or other, that work may be performed for less than the applicable minimum wage."

The claim amount was calculated using \$3.26 as a subminimum rate multiplied by 275 (two hundred seventy five) hours worked, resulting in \$896.50 the claimant feels she is due. The employer's use of \$3.26 as a subminimum rate is in error.

Forty-five percent of the current minimum wage of \$7.25 is \$3.2625. RSA 279 prohibits the subminimum wage **from being less** [emphasis added] than 45 percent of the current minimum wage. Therefore, the hours claimed by the petitioner need to be recalculated using the correct subminimum rate of \$3.27. The correct calculation (275 x \$3.27) results in \$899.25.

As RSA 275:50 prohibits private agreements from preempting statutory authority and as RSA 279 prohibits employers from paying eligible workers less than 45 percent of the current minimum rate, and the claimant and employer agree the claimant worked for 11 (eleven) weeks for only tips, and the Hearing Officer finds the claimant's testimony credible regarding the total amount of hours she worked during the 11 (eleven weeks), the Hearing Officer finds that the claimant did prove beyond a preponderance of the evidence she is owed \$899.25.

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 wages, it is hereby ruled that the Wage Claim is valid in the amount of \$899.25 gross.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$899.25 less any applicable taxes, within 20 days of the date of this order.

David M. Zygmunt
Hearing Officer

Date of Decision: August 7, 2017

Original: Claimant
cc: Employer

DMZ/das