

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

AGM Landscaping, LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 - b unpaid salary
RSA 275:43 V unpaid vacation

Employer: AGM Landscaping LLC, 63 Emerald Street, #611, Keene, NH
03431

Date of Hearing: December 4, 2017

Case No.: 56098

BACKGROUND AND STATEMENT OF THE ISSUES

The current issue concerns the matter of unpaid salary and unpaid vacation time.

In August 2014 the claimant began working for the employer's landscaping business mowing lawns. Approximately a year later the employer promoted her to foreman of his mowing business. At this time her compensation changed from an hourly rate of pay to salary including a week of vacation time each year.

The claimant left the employer following a dispute over wages. She holds the employer owes her for docked wages and a week of vacation time.

The employer argues the claimant has been paid in-full.

On the basis of the claimant's assertion she is owed unpaid wages the claimant filed a Wage Claim with this Department on September 15, 2017. A Notice of Wage Claim was forwarded to the employer on September 20, 2017. An objection to the wage claim was received from the employer on October 13, 2017; a Notice of Employer's Objection was forwarded to the claimant on October 13, 2017. The claimant requested a hearing on October 24, 2017; accordingly a hearing was held on December 4, 2017.

FINDINGS OF FACT

The claimant worked for the employer from August, 2014 through August 31, 2017.

The claimant earned a salary \$562.50 per week and paid weekly. The claimant received 40 hours of vacation benefit per year.

On August 23, 2017 the claimant was absent from work. The employer reduced her salary for the period (8/21/17 through 8/27/17) by 1/5 (one-fifth) to reflect her day's absence; paying her a gross amount of \$450.00 instead of her usual weekly salary of \$562.50.

The claimant had a balance of eight (8) hours of vacation when she left the company.

DISCUSSION AND CONCLUSIONS

The parties agree to the number of hours the claimant worked during the week in question. The claimant argues she should be paid her salary in-full for the week; the employer holds he should not be required to pay the claimant for a day she did not work.

The employer acknowledged that in the past he had paid the claimant her full weekly salary for weeks during which she was absent for a day. He explained he had done so because the claimant had completed the remainder of the scheduled work for the week following her absence.

As a salaried employee, the claimant is owed her salary, in full, for any pay period in which she performs any work (RSA 275:43-b).

The Hearing Officer finds the claimant proved by a preponderance of evidence she is due the difference of her usual salary (\$562.50) per week and the amount she was paid (\$450.00) or \$112.50.

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. 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. This statute allows an employer to determine their policy concerning vacation, including *if* any payment is due at the employee upon separation

Both parties agree the claimant received a week of vacation each year. The employer concedes he has no written policy concerning benefits as required by the above statue, specifically the status of accumulated vacation upon separation – one of the apparent reasons for this claim.

RSA 275:43 V states that vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, **when due** [emphasis added].

The Hearing Officer finds that the employer was not in compliance with the requirements of RSA 275:49 when he did not inform the claimant, in writing, of his practices and policies regarding vacation pay.

However, the Hearing Officer also finds that this does not automatically guarantee the claimant the claimed wages. The Hearing Officer finds that the claimant testified as credibly, not more credibly than the employer. Neither party presented convincing evidence. It was clear neither party had a clear understanding as to what could reasonably be expected as to the payment of vacation pay upon separation. The claimant did not have an expectation grounded in facts, based upon more than an assumption, to prove she is owed additional wages.

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that she is owed the additional wages. 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 Hearing Officer finds that the claimant failed to meet this burden. The claimant, therefore, fails to prove by a preponderance of the evidence that she is owed the claimed vacation time.

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 RSA 275:43 V considers vacation time 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 owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is invalid.

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 remainder of her salary, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$112.50.

The employer is hereby ordered to send a check to this Department, payable to Nancy Gonsalves, in the total of \$112.50 less applicable taxes within 20 days of the date of this Order.

David M. Zygmunt
Hearing Officer

Date of Decision: January 3, 2018

Original: Claimant
cc: Kirke Parsons, AGM Landscaping, 63 Emerald Street, #611
Keene, NH 03431

DMZ/nm