

STATE OF NEW HAMPSHIRE

DEPARTMENT OF LABOR

[REDACTED]

v.

Estate of [REDACTED]

and

Spectrum Property Services, Inc

Nature of Dispute: RSA 275:43 I - unpaid wages
RSA 275:44 IV – liquidated damages

Employer: Estate of [REDACTED] / Spectrum Property Services, Inc.
[REDACTED]

Date of Hearing: August 14, 2018

Case No.: 57205

BACKGROUND INFORMATION

The claimant performed various administrative duties for the company including banking, bookkeeping as well as payroll. The company was a landscaping business

The claimant alleges she worked for the company from 2015 until April 2017, and earned a monthly salary of \$1,300.00.

The claimant alleges she is owed salary for the month of January, 2017 in the amount of \$1,300.00.

The owner of the company passed away on January 15, 2017; his estate is now being administered by his sister.

The estate disputes that the claimant worked at all during the month of January, 2017.

In addition to a month's salary the claimant seeks liquidated damages and attorney's fees.

On the basis of the claimant's assertions she is owed a month's salary and is due liquidated damages and attorney's fees she filed a Wage Claim with the Department on

May 17, 2018; a Notice of Wage Claim was forwarded to the Estate on June 27, 2018. The Estate's objection was received by the Department on July 6, 2018; a Notice of Objection was forwarded to the claimant on July 9, 2018. The claimant requested a Hearing on July 17, 2018. Notices of Hearing were forwarded to the parties on July 26, 2018. Accordingly a Hearing was held at the Department on August 14, 2018.

The estate's attorney [REDACTED] made a discovery request prior to testimony for records relating to a disability claim filed by the claimant in May, 2016. The claimant's attorney [REDACTED], previously provided the first page of the disability determination to counsel and the Department but she did deny counsel's request for the remainder of the record.

Attorney [REDACTED] sought an Order from this Hearing Officer for the remainder of disability claim file arguing the Estate would be able to determine if the claimant's benefit exceeded the limit imposed by the Social Security Administration, if the claimant was restricted from conditions at the work location and to determine what date she reported to the Social Security Administration as having last worked as the Estate disputes the claimant worked at all during the period claimed.

Attorney [REDACTED] responded by pointing to the determination letter in her exhibit where the claimant's benefits are outlined. She argued the rest of the file contained confidential and HIPPA protected information that is not relevant to the Wage Claim

The Hearing Officer took Attorney [REDACTED]'s request under consideration; the request is denied.

FINDINGS OF FACT

[REDACTED] was the former owner of the business. He underwent surgery in the early hours of December 2, 2016 however he never left the hospital. He passed away on January 15, 2017. His sister [REDACTED] was appointed the Administrator of his Estate on May 19, 2017.

The claimant had no ownership interest in the business.

The claimant testified that she was a longtime girlfriend and life partner with Mr. [REDACTED] until December 1, 2016 when he was admitted for surgery.

The Estate argues that the relationship came to end around Thanksgiving 2016.

The claimant testified she continued to work for the business until April 2017 when an Administrator was appointed.

It is the claimant's testimony she was a salaried employee paid \$1,300.00 monthly calculated on the basis of \$7.50 per hour for forty (40) hours per week.

The claimant testified the last time she was paid it was for the month of December, 2016.

The Estate provided an audio recording of a voice mail Mr. [REDACTED] left for his sister [REDACTED]. He had recorded the voicemail during the evening of December 1, 2016, and just prior to, his surgery during the early morning hours of December 2, 2016.

The claimant's counsel objected to the playing of the audio at Hearing on the basis its content has nothing to do with the Wage Claim and further, Mr. [REDACTED] sister [REDACTED] was not present to verify its authenticity. The Hearing Officer overruled counsel's objection and allowed the recording to be played.

On the recording Mr. [REDACTED] assigns responsibility to his sisters to settle his matters if something were to go wrong with his surgery. He directs his sisters to exclude the claimant from any consideration.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that she is owed 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 claimant holds she was a salaried employee and as a salaried employee she is entitled to a full month's salary for working a portion of the month of January 2017.

RSA 275:43-b states in-part: "A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer."

The claimant provided one pay stub as an exhibit in support of her position that she was a salaried employee. The claimant testified it was for the last period she received any wages and it covered the pay period from December 1, 2016 through December 31, 2016 and she argues it demonstrates her pay to have been a salary of \$1,300.00 per month.

The pay stub used as an exhibit does not support the claimant's testimony; it reflects a pay period ending December 26, 2016 with a rate-of-pay of \$7.50 per hour for forty (40) hours of work. The claimant argues that the hourly rate of \$7.50 was used as a base amount from which the payroll company could calculate her monthly earnings. This Hearing Officer is not persuaded.

An email from the claimant to the payroll company sent on December 9, 2017 requests they "put my pay back to where it was. 7.50/hr 40 hrs/wk (sic)." The claimant testified she always was paid a monthly salary of \$1,300.00. The claimant's email to the payroll company indicates other arrangements.

The claimant had access to and possession of company emails and bank statements. They are contemporaneous with the period claimed. She argues her documented response to the emails is proof that she did work during the period and the activity reflected on the bank statements are a reflection of her actions.

Administrative Rule LAB 803.04 states: For the purpose of determining "all wages due" for hours worked in accordance with RSA 275:43, I, the department of labor, under the authority provided by RSA 275:54, incorporates the "Wage and Hour Publication 1312, Title 29 Part 785 of the Code of Federal Regulations, United States Department of Labor ", reprinted May 2011 as specified in Appendix II.

The Code of Federal Regulations Part 785 defines hours worked. Subpart C paragraph 785.11 states in part, "Work not requested but suffered or permitted is work time."

In this case the claimant was not directed by Mr. [REDACTED] to perform work for the business nor could he permit or suffer her to work as he was profoundly incapacitated following the surgery and at the times the claimant holds she worked. Even if the claimant performed activities related to the business during the period this Hearing Officer does not consider those activities to be "work" as defined by statute. Whatever activities she performed on behalf of the business were at her own initiative, not at the direction of, permitted by or made to suffer by Mr. [REDACTED]

The claimant failed to provide credible evidence and testimony to support her claim. This Hearing Officers finds the claimant did not meet her burden to prove by a preponderance of evidence she is owed a salary for the month of January, 2017.

As this Hearing Officer finds this Wage Claim to be invalid, Liquidated Damages are not considered.

The claimant's attorney requested attorney's fees; even if the claimant prevailed attorney's fees cannot be awarded by the Department as they can only be awarded by "a court of competent jurisdiction" per RSA 275:53. The New Hampshire Department of Labor is an agency under the executive branch of government, not the judiciary.

DECISION

Based on the evidence and testimony presented and as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:43-b requires employers to pay salaried employee their full salary for any pay period in which such employee performs any work and as this department finds the claimant did not prove by a preponderance of evidence that she is owed a month's salary without regard to the number of days or hours worked and as the Department finds the claimant failed to meet her burden to prove by a preponderance of evidence she is owed the claimed wages in the form of unpaid salary it is hereby ruled this Wage Claim is invalid.

[REDACTED]
Hearing Officer

Date of Decision: September 13, 2018

Original: [REDACTED]

Cc: [REDACTED]