

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

High Energy Ozone LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 275:44 IV liquidated damages

Employer: High Energy Ozone LLC

Date of Hearing: August 13, 2018

Case No.: 57397

BACKGROUND AND STATEMENT OF THE ISSUES

This hearing was consolidated with another claim against the same employer. Separate decisions have been issued for each case.

The claimant originally asserted, through the filing of his wage claim, that he was owed \$6,124.88 in unpaid salary, \$731.14 in unpaid employee expenses, and \$1,776.75 in unpaid vacation pay. He further sought liquidated damages.

At the hearing, the claimant reported he received payment in full for the unpaid salary and employee expenses. He wished to continue with the claim for unpaid vacation pay and liquidated damages. He amended the claim for vacation pay to \$1,853.58, due to a miscalculation.

The employer denies he is due vacation pay because their written policy does not state that it is paid out and their practice is not to pay out vacation pay upon separation, therefore, no liquidated damages can be assessed.

FINDINGS OF FACT

The claimant worked for the employer from August 28, 2017 through June 20, 2018, when he separated from employment.

The claimant argues he is due vacation pay in the amount of \$1,853.58 for seven days of accrual, upon his separation from employment. He argues that he has an employment contract that grants vacation days off, and he had never seen the employee handbook to which the employer has referenced, prior to this claim.

The employer argues that nowhere in the employment contract does it state that vacation days are paid out upon separation, nor has it been their practice to do so. Further, the employee handbook, of which the claimants were aware, states no pay in lieu of time off. They sought the advice of counsel as to whether vacation payments were due to the claimants, and were advised they are not.

The employer made no argument as to the number of days or amount claimed.

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.

The claimant provided credible testimony that he had never seen the employee handbook. The employment agreement is silent on the treatment of vacation pay at separation from employment.

The employer did not maintain on file a signed notification from the claimant as required by Lab 803.03 (f)(6).

In light of the claimant's credible testimony and the employer's failure to have a signed notification from that claimant acknowledging the written vacation policy, the Hearing Officer finds the claimant was not notified or aware that he would forfeit any vacation pay at separation of employment.

The employment agreement does not inform the claimant that he would not be paid for this benefit at termination. Because the employment agreement does not specifically inform the claimant that he would forfeit vacation pay at termination, the Hearing Officer finds that the claimant proved by a preponderance of the evidence that he earned, and is now due, the claimed vacation pay in the amount of \$1,853.58.

The claimant seeks liquidated damages. While he acknowledges the employer had cash flow problems, he argues that the employer paid the rent on the building when they could have paid him.

The employer maintains that they believe the claimant is not due vacation pay under their written policy and the advice of counsel. Further, they had significant cash flow problems and were not able to meet many obligations.

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".

Black's Law Dictionary, Sixth Edition, defines "financially able" as: solvent, credit worthy, able to pay debts and expenses as due. See also solvency.

Black's Law Dictionary, Sixth Edition, defines "solvency" as: ability to pay debts as they mature and become due. Ability to pay debts in the usual and ordinary course of business.

It is clear from the credible testimony of all parties that the employer had significant cash flow issues due to low sales and aged accounts receivable. Based on the testimony the Hearing Officer finds the employer was not solvent during the period in which these wage were due.

Therefore, the Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all wages due in the time required because the employer did not have the financial ability to pay the salary and expenses when due and that the employer held a genuine belief that the vacation pay was not due to the claimant.

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 pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that he is due the claimed vacation pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$1,853.58.

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 \$1,853.58, less any applicable taxes, within 20 days of the date of this Order.

[REDACTED]
Hearing Officer

Date of Decision: August 23, 2018

Original: Claimant
cc: Employer

MJD/nm