

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████ ██████████

v.

Q Restaurant Holdings, LLC d\b\ a Popeye's

DECISION OF THE HEARING OFFICER

Appearances:

Nature of Dispute: RSA 275:43 I Weekly, Unpaid Wages
RSA 275:43 V Weekly, Unpaid Vacation Pay

Claimant: ██████████ ██████████

Employer: Q Restaurant Holdings, LLC d\b\ a Popeye's

Date of Hearing: September 20, 2018

Case No.: 57494

BACKGROUND AND STATEMENT OF THE ISSUES

The employer is a franchisee of the Popeye's Nashua, New Hampshire location. The claimant worked there as a general manager.

The claimant formerly worked six (6) years for the employer when he was a franchisee, under a separate franchise agreement, of a number of Popeye's locations in the greater Boston area.

The current issue concerns alleged unpaid vacation time upon separation for which the claimant is seeking a total of \$2,884.60.

The employer holds the claimant is not owed the vacation balance he claims because of his alleged poor performance that led to the employer terminating his employment.

On the basis of the claimant's assertions he is owed unpaid wages he filed a Wage Claim with the Department on July 10, 2018. A Notice of Wage Claim was forwarded to the employer on July 12, 2018. The employer's objection was received on July 30, 2018; a Notice of Employer's Objection was forwarded to the claimant on the July 30, 2018. The claimant requested a hearing on August 9, 2018 and Notices of the Hearing was forwarded to the parties on August 28, 2018. Accordingly, a Hearing was held at the Department on September 20, 2018

FINDINGS OF FACT

The claimant most recently began working for the employer at the Popeye's Nashua location coinciding with its opening in May of 2017. He received a salary of \$75, 000.00 per year and was paid biweekly. The claimant testified the employer offered the same benefits as when he was a franchisee for Popeye's in the Greater Boston area. His benefits included two weeks of paid vacation after one year of employment. The claimant testified he worked fourteen (14) months for the employer.

The claimant testified he asked the employer to use vacation time on numerous occasions including in December 2017 for time off during July 2018 and was denied. The claimant testified he asked again in early June 2018 for time off in July 2018 and was denied again, then soon after fired on June 17, 2018.

The claimant testified that after he was let go, two (2) managers were able to take vacations in July 2018.

The employer testified the he approved the claimant's request in December 2017 for his use of vacation in July 2018 and that it was the claimant who afterwards withdrew his request. The employer testified that the claimant's second request in early June 2018 to use vacation in July 2017 was not accommodated due to staffing shortages.

The claimant argued he earned the vacation pay-out for all the time and effort he put into establishing the Popeye's Nashua location.

The employer testified that due to the claimant's alleged poor performance and poor condition of the Nashua location which then resulted in the claimant's employment being terminated, the claimant did not deserve a vacation pay-out.

The claimant testified he authored the employee policy handbook in use when the employer was a franchisee in the Greater Boston locations and that the employer endorsed its use at the Nashua location.

Neither party offered a copy of the policy referenced above or any other documentation or testimony addressing under what conditions the vacation benefit could be used or the employer's requirements for an employee to be eligible for a pay-out upon separation.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that he 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 testified he put a great deal of time and effort into the Popeye's Nashua location, the question of whether the benefits sought relates to whether there is a legal entitlement to those benefits.

The employer explained in detail the status of the restaurant in May and June of 2017 including the circumstances leading up to his termination of the claimant's employment. Whether the employer's actions were legitimate or not does not enter into the analysis of the claimant's eligibility for a pay-out of the vacation time.

There is no New Hampshire Labor Law that requires employers to offer paid vacation (or any other benefit) to employees. However, if vacation (or any other benefit) is offered, the employer is required to comply with RSA 275:49. This statute reads in-part: III. Make available to his or her employees in writing or through a posted notice maintained in a place accessible to his or her employees employment practices and policies with regard to vacation pay, sick leave, and other fringe benefits; and with Lab 803.03 (b) which reads in-part: Every employer shall 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 employee's expenses, pension and all other fringe benefits per RSA 275: 49.

It is the employer's compliance with RSA 275:49 that enables an objective assessment as to whether, or not, an employee is entitled to any particular benefit.

RSA 275:43 V states in-part that vacation pay, when such a benefit is a matter of **employment practice or policy, [emphasis added by this writer]** or both, shall be considered wages pursuant to RSA 275:42, III, **when due [emphasis added by this writer]**. Vacation time only becomes wages "when due." "When due" is a reference to the relevant contingencies specified in the employer's policy.

The employer acknowledged that he didn't maintain a policy that includes the specifics of the vacation benefit. However, just because the employer is not in compliance with RSA 275:49 III does not necessarily mean the claimant is entitled to his vacation balance, the claimant's burden remains to prove by a preponderance of evidence that he is owed a pay-out.

Absent a written policy regarding the employer's vacation policy this Hearing Officer was left with attempting to ascertain the employer's prior practice in similar circumstances. Neither party provided testimony addressing the employer's prior practice regarding the status of an employee's vacation benefit at separation.

The claimant did not provide credible testimony or evidence speaking to the employer's policy or prior practice in regard to the status of his vacation benefit when he was let-go. Thus, the claimant was unable to demonstrate by a preponderance of evidence that he is owed a pay-out of his vacation time.

Therefore, this Hearing Officer finds the claimant was unable to meet his burden to prove by a preponderance of evidence that he is owed additional wages in the form of accrued vacation time.

DECISION

Based on the testimony and evidence presented, and as RSA 275:43 I requires that an employer pay all wages due an employee at no cost to the employee and as RSA 275:43 V regards vacation pay to be wages when due and as this Department finds that the claimant did not prove by a preponderance of evidence that he is owed unpaid wages in the form of vacation pay, it is hereby ruled that this Wage Claim is invalid.

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Hearing Officer

Date of Decision: October 19, 2018

Original: Claimant

Cc: Q Restaurant Holdings, LLC d\b\ a Popeye's