

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Empire Today LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 | unpaid wages/commissions
RSA 275:48 | illegal deductions

Date of Hearing: November 8, 2018

Case No.: 57883

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$14,110.70 in unpaid commissions for installations to be installed after he separated from employment. He also seeks 70 square yards of the HOMEFRESH carpet product, which he intended to donate to charity, for winning a contest during the spring of 2018.

Empire Today LLC argues the claimant is barred from bringing this claim by the doctrine of res judicata. At the hearing, they offered a Motion to Dismiss based on this claim.

The Hearing Officer advised that the Motion to Dismiss would be addressed in the Decision and proceeded with the hearing.

Empire Today LLC's argued that the claimant had previously filed a claim on August 16, 2018, and that all wages that could have and should have been litigated, should have been done so at that time.

The claimant agreed that at the time he filed the August 16, 2018, claim, he was aware of the wages he intended to file in the second claim.

Empire Today LLC paid the previous wage claim without a hearing. As the employer chose to pay the wages on demand by the claim, the claim was not litigated. Therefore, the current claim is not found to be barred by the doctrine of res judicata or University of N.H. v. April 115 N.H. 576 (1975).

The Motion to Dismiss is respectfully denied.

This hearing Decision follows.

FINDINGS OF FACT

The claimant is the principal of the company Zephyr Solutions Inc. His relationship with Empire Today LLC is under this company name, not his individual name. It is noted that Empire Today LLC had erroneously made checks payable to Zephyr Solutions LLC, which the claimant cashed.

The claimant made no argument that he was an employee of Empire Today LLC. He solely argued that he had scheduled installations which should have completed at some point after his relationship with Empire Today LLC severed on June 2, 2018. Further, the \$14,110.70 claimed is based on his revenue from the previous years during the same timeframe, not on the actual contracts or installations he scheduled.

Empire Today LLC argued, though their written objection, that the claimant was not an employee and that the claim was barred by res judicata.

As previously noted, this claim is not barred by res judicata.

Empire Sales LLC previously submitted a contract among Today Sales LLC, [REDACTED] and Zephyr Solutions Inc. which was effective January 30, 2017. These are the only agreements regarding the terms and conditions of sales and payments presented among the parties. The parties also executed an Arbitration Agreement on January 30, 2017.

Under Section 8 (C), upon termination or expiration of this Agreement for any reason, the Sales Rep understands that if the Sales Rep is not available to complete a particular In-Home Sale, any commissions will be deemed not to have been earned.

The agreement defines an "In-Home Sale" as a sale by the Sales Rep of Goods to a Buyer in which the closing, negotiation and execution of the Company's Purchase Order for such sale substantially occurs in some place other than a retail establishment, regardless of where the sale was initiated, and provided the resulting transaction is not cancelled by the Buyer during any applicable right of rescission period afforded to Buyer.

It also defines "Purchase Order" as the transactional paperwork, including the Company's purchase order, by which Buyer purchases Goods from the Company. Such term includes any applicable or required financing paperwork used by the Company or a third-party to assist Buyer in making his or her desired purchase of Goods.

The claimant did not present credible testimony or evidence to show that he scheduled any installments which were completed and for which he might now be due a commission. He also did not submit documentation to show he met the criteria set for in agreement for the In-Home Sales or Purchase Orders.

The written plan, previously submitted, reads, in relevant part, "Upon Associate's employment termination, direct hire/perm commissions will only be earned and paid on invoices paid by client (s) as of the termination date. Commission for any invoices sent to client but not received payment as of the Associate's termination date shall not be paid to the Associate."

The New Hampshire Supreme Court, in Bryan K. Galloway v. Chicago-Soft, Ltd. 142 NH 752, established a "general rule" regarding commission sales that states, "a person employed on a commission basis to solicit sales orders is entitled to his commission when the order is accepted by his employer. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped. This general rule may be altered by a written agreement by the parties or by the conduct of the parties which clearly (*emphasis in original*) demonstrates a different compensation scheme".

The employer's written commission plan clearly alters the general rule and demonstrates a different compensation scheme.

The claimant did not present any testimony or evidence that he is an employee of Empire Today LLC.

CONCLUSIONS

The Hearing Officer finds the claimant failed to prove he was an employee of an employer. Therefore, no wages can be found to be due.

Even if the claimant had been an employee, he did not meet his burden to prove by a preponderance of the evidence he made the sales claimed or is due the commissions he claims because he did not provide persuasive testimony and evidence to show he had done so.


Further, the written policy among the parties clearly shows they agreed to a compensation which alters the general rule, therefore, he would not be due the commissions claimed.

The parties signed an arbitration agreement for issues arising as to the terms of the agreement. RSA 275:50 and 275:51 V afford a claimant specific rights and privileges when he believes unpaid wages are due. 9USC2, the Federal Arbitration Act (FAA), which Circuit City Stores, Inc. v. Adams 532 U.S. 105 (2001), found to include employment agreements containing an arbitration clause such as the claimant's, is preemptive of RSA 275:51 V. Under this holding of Circuit City Stores, Inc. v. Adams, the Federal Arbitration Act holds that an employment agreement which contains an arbitration clause to be "valid, irrevocable, and enforceable." This conclusion is bolstered by Barclay Perry and James Johnston v. Kenneth Morgan Thomas 482 U.S. 483 (1987), in which the court opined "...under the effect of the Supremacy Clause, the State statute must give way", discussing the preemptive effect of the Federal Arbitration Act.

The claimant would be preempted from his right to file this Wage Claim with the New Hampshire Department of Labor pursuant to RSA 275:51 V, and is required to comply with the arbitration clause contained in his Arbitration Agreement.

DECISION

Based on the testimony and evidence presented, as RSA 275:51 V affords the Wage Claim process to employees of employers only, it is hereby ruled that the Wage Claim is invalid due to a lack of jurisdiction by this Department.


Hearing Officer

Date of Decision: November 19, 2018

Original: Claimant
cc: Company
Company's Attorney