

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

Subway

Case No.: 101052

DECISION OF THE HEARING OFFICER

Appearances: [REDACTED] Claimant

Employer: Michelle Ford, Jessica Mahoney – representing Employer

Nature of Dispute: RSA 275:43 I – Weekly, Unpaid Wages

Date of Hearing: April 11, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The current issue concerns the employer's alleged failure to pay the claimant all the wages due to her. Specifically, the claimant asserts that she is owed wages for an upward adjustment of her hourly wage.

The claimant filed a Wage Claim with the Department on February 9, 2022, for \$252.36 in unpaid wages. A Notice of Wage Claim was forwarded to the employer on February 14, 2022. The hearing request date was March 11, 2022. Hearing Notices were forwarded to the parties on March 15, 2022.

FINDINGS OF FACT

The claimant worked as a sandwich artist for the employer from November 2021 to January 2022 in West Lebanon, New Hampshire. She had previously worked for the employer at an hourly wage of \$13.00 per hour, resigning in October 2021. She returned to the employer after being informed by her former manager that the employer was now offering \$16.00 per hour. The claimant testified that she resigned from another job to return to the employer at the higher wage.

The claimant testified that her first paycheck in December 2021 reflected an hourly rate of \$13.00 per hour. She testified that she asked for the wage to be adjusted and that when it was adjusted with her last check in January 2022, the hourly rate was \$15.00. At that point the claimant resigned from the employer and has since found another job.

The claimant testified that she calculated her hours at the \$13.00 rate and the \$15.00 rate to a calculation of her hours at \$16.00 per hour. The difference was the amount of her wage claim, or \$252.36.

The claimant submitted a copy of a text message from the store manager dated January 16 to the claimant that reads:

"Angel Chase: Michelle has sent the request for pay change to trefor to change it to \$16 so sorry just found out Michelle has covid again that's why she never got back to me" (sic).

"[T]refor" refers to Trefor Benbow, the franchise owner and "Michelle" refers to Michelle Ford, the employer's Chief Operating Officer testifying at the hearing.

The claimant submitted a copy of a text message from the store manager dated February 5 that reads:

"Anyone need a job please stop in at west lebanon subway and fill out an application all shift available and open availability for weekends \$16.00 an hour"(sic).

The employer filed a response to the wage claim. The employer's COO testified that the wage claim never reached her and she had not seen it. The Department finds that the employer had been properly noticed. The COO testified that the store manager does not have the authority to give raises, that raises are processed through the hierarchy including the COO and area manager and that ultimately the franchise owner approves all raises.

The COO then testified that the claimant's hourly wage had not been changed because the claimant separated from the employer in October 2021 and returned November 2021 and had not been deleted from the system. *The COO testified that "there was no reason" to change anything about the claimant's employee information because she had separated and returned.*

The COO and area manager then testified that the claimant's raise was delayed because both of them were out sick with "covid" at various points. There is a text in evidence that the area manager wrote that she would have the store manager give the claimant a payout for the wage claim. When the claimant asked when that would occur, the area manager wrote "I'm out with covid right now let me message her and have her get back to you".

The employer's representatives testified that the delay in processing the wage change was due to the peculiarities of their system and the fact that the COO and the area manager were out sick with "covid".

At this point the hearing was concluded.

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 employer's representatives testified that the delay in processing the claimant's increased wage rate was due to the corporate hierarchy and the fact that they both were out sick with "covid". The employer's representatives then testified that there

was no reason to give the claimant her raise because she had recently separated from the company and then returned less than two months later. Neither explanation was persuasive.

The employer advertised a \$16.00 hourly wage. The claimant took the job for that reason. The store manager, the area manager and the COO were aware of the claimant's request. The COO's April 3, 2022 e-mail in response to the Department is disingenuous and reads in relevant part,

"I am aware of the matter due to the hearing notice....Basically, I'm just concerned that I must appear at a hearing due to an employee not receiving a wage increase at the speed of liking. Upon B. Corter's last paycheck she received the wage she requested."

These statements are demonstrably false. The text messages submitted indicate that the COO was aware of the claimant's request on January 16, 2022, well before the hearing notice. The claimant's last paycheck was at an hourly rate of \$15.00, not the \$16.00 rate she requested, and the employer offered. Therefore, the COO's statements were untrue when she made them to the Department. The comment about "speed of liking" is gratuitous.

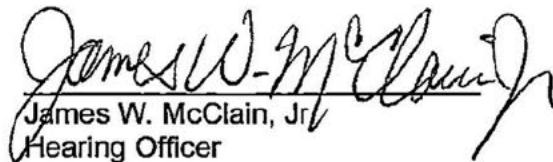
Employee's rate of pay must be documented in writing. See *Lab 803.03*. In this case it is determined that the employee was hired at \$16.00 per hour. The employee's pay did not reflect the \$16.00 per hour. The employee contemporaneously notified the employer of the disparity in pay. The employer assured the claimant they would correct the error. The claimant is entitled to the difference between the wages received and the wages earned at \$16.00 per hour. The request for \$252.36 in wages is found valid.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, this Department finds that the claimant proved by a preponderance of the evidence that she was not paid her full wages.

It is hereby ruled that the Wage Claim is **valid** in the amount of \$252.36.

The employer is hereby ordered to send a check to this Department, payable to ██████████ in the total of \$252.36, less any applicable taxes, with a statement of such deductions within 30 days of the date of this Order.


James W. McClain, Jr.
Hearing Officer

Date of Decision: April 26, 2022

Original: Claimant
cc: Employer

JWM/nd