

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

█  
v.

DUNKIN DONUTS

Case No. 101093

DECISION OF THE HEARING OFFICER

**Appearances:** █ the claimant appeared Pro Se.  
Michelle Motta-DeLeon appeared for the employer in her capacity  
as owner

**Nature of Dispute:** RSA 275:43 V - Weekly, Unpaid Vacation Wages

**Claimant:** █

**Employer:** Dunkin Donuts (via Franchisee Attomer Donuts, Inc.)

**Date of Hearing:** April 12, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on February 15, 2022, asserting that she is due unpaid wages in the amount of \$5,269.49 for unpaid vacation time earned between 2013-2016, as well as in 2018.

The employer was notified by the Department of Labor (DOL) via mailing dated February 16, 2022. The response from the employer received on February 24, 2022 noted an objection to the claim. This hearing was then scheduled accordingly for review of the claimant's claim for unpaid wages. Formal hearing was held at the Department of Labor in Concord, New Hampshire on April 12, 2022 with all parties present.

FINDINGS OF FACT

Ms. █ is a 48-year-old female who was hired by the employer in 2010 and worked at various Dunkin Donuts Franchise locations in Merrimack, Nasua, Hollis, and Brookline. She also worked at Captain Corner in Nashua (now closed) which was a convenience store owned by the same people who operated the Dunkin Donuts locations she worked at. Ms. █ is originally from Ecuador and prefers to speak Spanish whenever possible.

On or about May 22, 2019 Ms. ██████████ was informed that her mother was terminally ill and very close to passing away. She was told by her family she needed to come back to Ecuador to see her and then attend the funeral. She advised Joel DeLeon (another owner) of the situation and that she would be coming back. She did tell Mr. DeLeon that she was not sure when she would be back but hoped it would be within a few weeks. She flew out to Ecuador on May 23, 2019. Her mother's funeral was on May 25, 2019. Following the funeral, she stayed to help clean her mother's house and go through her personal effects.

While the claimant was out of the country, she did not have a way to contact her employer and keep them updated. As the employer was not receiving any updates on when she would be returning, the decision was made to terminate ██████████ employment with Dunkin Donuts.

Ms. ██████████ returned to the United States on June 17, 2019. On June 19, 2019, the claimant called to let her employer know she was ready to come back to work. She spoke with Theresa (one of the managers) who told her she needed to speak with Ms. Motta-DeLeon or Mr. DeLeon. Theresa informed Ms. ██████████ that Ms. Motta-DeLeon was particularly upset as Ms. ██████████ had not paid her portion of health insurance premiums. She was not told that she had been terminated at this time.

Ms. ██████████ made numerous attempts to contact Mr. DeLeon to arrange a time to come in and speak to him to no avail. This was complicated by the fact that Ms. ██████████ does not have her own telephone and can only borrow one from her boyfriend or other friends to make calls. She was eventually able to go to one of the stores at the same time as Mr. DeLeon and her rehire date was July 10, 2019.

Ms. ██████████ testified that she was unaware that she had been terminated at all. (The Employer disputed this and indicated that Ms. ██████████ was required to complete new hire paperwork).

Submitted with the employer's objection to the wage claim was a portion of the employee handbook. The section titled "Vacation" states:

"Full time employees (over 35 hours) are eligible for paid vacation time following 12months of continuous employment. Vacation is earned on each anniversary of employment. There will be no partial accruals for partial years of service. Employees will be eligible for the following weeks of vacation as follows:

- - - After 12 months of employment - 1 week vacation
- After 36 months of employment - 2 weeks vacation
- After 120 months of employment - 3 weeks vacation

The amount of vacation pay will be determined by averaging the hours you worked per week during the previous year. You will be given a vacation voucher with the amount of hours earned and the amount of weeks you are eligible for.

**If you lose this vacation voucher, you will lose your vacation time. Treat this voucher like cash.** (Emphasis in original).

If you choose to take the vacation time you **will not** have any remaining vacation time, thus, if you need time off, you must request it under the Leave of Absence policy. (Emphasis in original).

Employees may take vacation earned during the prior service year any time after his/her anniversary date, subject to the Managers approval of request.

Vacation voucher must be turned in and redeemed before termination from employment. In the event that an employee is terminated, then the vacation pay expires and will not be paid. If the employee quits, then the vacation voucher must be submitted with the written 2 week notice. The employee must work the entire 2 weeks to be paid the vacation. After the 2 weeks, then up to 3 weeks of accrued vacation time will be paid."

Ms. ██████████ also testified that she was never given a copy of the Employee Handbook, nor even shown a copy. Ms. Motta-DeLeon testified that it is their policy to have a copy of the Handbook at every store which is available to the employees at any time. When asked if the Handbook is available in Spanish, Ms. Motta-DeLeon responded that no one had ever asked for this so one was not provided. She further explained that they do not typically hire people who only speak Spanish as their business is mostly focused on customer service.

At the hearing, Ms. ██████████ presented her vacation vouchers which indicated she had earned two weeks of vacation from 2013-2016 as well as 2018. Ms. Motta-DeLeon confirmed that these were valid, and that per a review of ██████████ employment record prior to hearing, she had not taken her vacation. When asked if vacation can be rolled over if unused Ms. Motta-DeLeon would allow one week to roll over. Meaning that on the date of ██████████ departure she would have had three weeks of vacation available to her.

Ms. ██████████ voluntarily left her employment following a COVID-19 infection which was severe enough to prevent her from returning to work as of the date of this hearing.

### **DISCUSSION AND CONCLUSIONS**

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that she is owed unpaid 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 issue in this case is whether bonus payments are wages, if so, were wages owed and due to the claimant.

The claimant argued that she was owed this time as she had earned it and never used it. She also argued that she should be paid as the reason she was gone so long

was reasonable and understandable. The claimant argued she is owed the pay because she worked for the employer for nearly ten years without taking a vacation.

The employer argued that the claimant did not communicate with them for three to four weeks after leaving. Building on this the employer argued that the claimant forfeited her accumulated vacation when she was terminated based on a lack of contact. The employer argued that the claimant had been instructed on the policies regarding vacation time and had an Employee Handbook available to her at any time in the store.

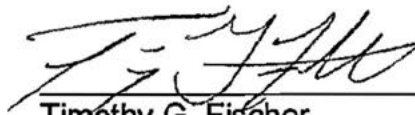
In this case the main issue seems to be that the claimant did not say the words: "I want to use my vacation time." And turn in her vouchers when she departed for her mother's funeral. Additionally, she was not asked if she wished to do so by her employer. Had such a conversation happened it is more likely than not that the conflict which arose out of the claimant's lack of ability to communicate with the employer which resulted in her termination never would have happened.

However, said conversation did not happen and the claimant was terminated from her employment. Furthermore, the Employee Handbook indicated that all vacation time is forfeit if an employee is terminated. While the claimant alleges she was not given a copy of the Handbook, nor shown a copy to review, she did have access to a copy of it any time she was working.

Based upon a preponderance of the evidence, it is determined the claimant has not met her burden and is not entitled to the claimed vacation pay.

### **DECISION**

Based on the evidence and testimony presented, the claimant has not shown by a preponderance of the evidence that wages for unused vacation days were due. The claimant's request for payment of unpaid wages is therefore denied.



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Timothy G. Fischer  
Hearing Officer

Date of Decision: May 3, 2022

TGF/nd