

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]

v.

Remedy Therapy Services

Case No. 101769

DECISION OF THE HEARING OFFICER

APPEARANCES: [REDACTED] Claimant, telephonically
Attorney Sean Kelly, Nicole Scott, Senior Human
Resources Representative for Employer, telephonically

NATURE OF DISPUTE: RSA 275:43 I – Weekly, Unpaid Wages
RSA 275:43 V — Weekly, Unpaid (Vacation Pay/Sick
Pay/Personal Day) PTO

DATE OF HEARING: June 14, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on April 6, 2022, alleging that she was owed \$5,007.36 in unpaid wages, sick and personal time. Notice of the claim was sent to the employer on April 8, 2022. The employer responded May 13, 2022. The claimant requested the hearing the same day. The hearing notice issued May 25, 2022. The claimant submitted exhibits June 9, 2022.

FINDINGS OF FACT

The following findings are based on testimony and matters of record in the Department file.

The claimant is a [REDACTED] who resides in Portsmouth, New Hampshire. The employer is a third-party provider of physical therapy services based in Cleveland, Ohio. The claimant's workplaces were in Portsmouth and Rochester, New Hampshire. The claimant testified that she was employed as a contract physical therapist for almost 1 year by the employer full-time and was paid \$48.00 per hour biweekly via direct deposit. The claimant and employer agreed the claimant was employed from November 19, 2020 to September 30, 2021.

The claimant testified that her last day with the employer was September 30, 2021 because the employer's contract with the facilities where she worked was not renewed. She was effectively laid off. The claimant's wage claim is for 100 hours she claimed to have worked off the clock and 4.32 hours in paid time off (PTO). The wage

claim reads that the 100 hours represents lunch breaks she worked through and hours off the clock to complete paperwork. The claimant testified that the 100 hours is a low estimate and that the employer should be able to document exactly how many hours she worked off the clock by looking at her computer use. The claimant acknowledged she did not record the dates or number of hours she worked off the clock.

The claimant initially testified that she was told she was not meeting productivity standards and that she had to work off the clock to meet productivity standards. Under questioning by the hearing officer, the claimant subsequently acknowledged she was not told she had to work off the clock and did not request overtime from the employer but *decided* to work extra hours to meet productivity standards so that she would not lose her job.

The employer's exhibits include the company's overtime and PTO policies, the claimant's signed document acknowledging receipt of the policies, the claimant's time records and e-mails from the director of operations and regional director of operations. The claimant did not dispute the record.

Regarding the claim for overtime, the employer's policy is that employees are "paid 1.5 times their regular rate of pay for hours in excess of 40 hours a workweek...*All overtime must be approved by the employee's direct Supervisor. Any time incurred without approval may result in disciplinary action*" (emphasis added). Again, the claimant testified she did not request overtime from the employer but decided to work extra hours to meet productivity standards so that she would not lose her job.

The claimant's timecards submitted by the employer indicate the claimant was paid overtime in 26 of the 46 weeks she was employed. The Senior Human Resources Representative testified to the authenticity of the time sheets. The e-mail from the director of operations indicates that the claimant was not told she had to work off the clock, did not request or allocate overtime and did not request to be paid for the overtime she allegedly worked. The e-mail reads,

"Hello,

We would never have told an employee to work off the clock, if she did it was on her own doing, and we were unaware. I would be curious why she didn't allocate that time or let us know her concerns of not being paid for that time.

As for the PTO, if I remember correctly, Crosby's final call was not to pay out PTO with this offboarding."

Regarding the paid time off (PTO) policy, the document reads, "[T]he goal of this policy is not to have employees accumulate a "bank" of unused time off...Employees may not elect to cash out PTO". To cash out unused PTO "[T]herapy employees are required to give at least four (4) weeks written notice when *resigning* from the Company" (emphasis added). The e-mail from the regional director of operations indicates that the claimant was told by the regional director of operations that PTO would not be paid and reads in relevant part,

"Hello everyone, I can personally attest to the fact that it was not agreed to pay out PTO for these buildings. I remember this because I actually had a phone conversation with this

employee particularly because she was stating she would refuse to complete any offboarding documentation if PTO was not going to be paid out.

I took over this building about month (sic) before it offboarded, *but she was not forced to work off the clock and in fact on one of my site visits she was spoken to about clocking out for lunch from the RDO that was training me* (emphasis added).

As for the beginning of August I'm not sure. I will look back in my emails to see if I have any correspondence between myself and the DOR but it was such a short period of time I doubt there will be."

The claimant argued that the company did not provide enough advance notice to allow the claimant to give 4 weeks' notice to cash out her 4.32 hours of PTO. Alternatively, the claimant argued that she would have used her PTO if she had known she was to be laid off. Under questioning by the hearing officer, the claimant acknowledged that she was aware she was a contract employee and that her contract was for one year.

At this point the hearing was concluded.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proving by a preponderance of the evidence that she is owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon "reliable, probative, and substantial evidence," Department Rule Lab 204.07(n).

RSA 275:43 I requires that an employer pay all wages due an employee within 8 days of the expiration of the work week.

RSA 275:43 I provides, in pertinent part:

- I. Every employer shall pay all wages due to employees within 8 days after the expiration of the work week if the employee is paid on a weekly basis, or within 15 days after the expiration of the work week if the employee is paid on a biweekly basis...

Here the claimant was paid all owed wages as indicated by the timesheets submitted by the employer. The claimant failed to request overtime or allocate overtime under the employer's policy. The claimant initially testified she was told to work off the clock. Considering the employer's evidence and testimony, that assertion is not credible. The claimant testified she worked through lunch breaks and after hours to complete documentation that should have been completed during working hours. There is no evidence whatsoever to corroborate those assertions. It is found that the claimant is not owed wages.

Under RSA 275:43 V, "Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, *when such benefits are a matter of*

employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due" (emphasis added).

In this matter the claimant credibly testified that she was employed by the employer. However, her testimony that she was owed PTO is not credible. The claimant's assertion that the employer's PTO policy guaranteed PTO regardless of accrual or separation status is not supported by documentation. The policy allows for payout of unused PTO in only one circumstance. The claimant did not meet that condition. The employer's documentation confirms that PTO was not to be paid out at the claimant's work facility. The claimant's assertion that the employer's PTO policy allowed for payment of awarded and unused PTO upon layoff is not supported by documentation and is not credible.

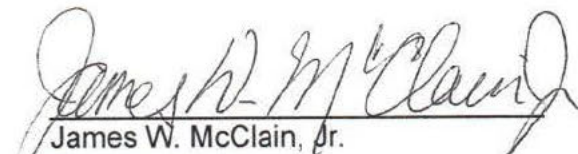
The claimant has not shown that she was owed PTO to be paid out upon separation. Therefore, it is found that the claimant is not entitled to wages or paid time off.

DECISION

Based on the testimony and evidence presented, this Department finds the claimant has not met her burden to prove by a preponderance of evidence that she is owed additional wages or PTO.

It is hereby ruled that this Wage Claim is **invalid**.

July 7, 2022
Date of Decision


James W. McClain, Jr.
Hearing Officer

JWM/nd