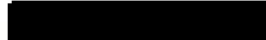


STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

United Parcel Service, Inc.

CASE #102033

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
J. Day Peake, III, Esq., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 273:43, V — Weekly (unpaid vacation pay)
RSA 273:43, V — Weekly (sick pay)
RSA 275:44, IV — Employees separated from payroll
before paydays (liquidated damages).

DATE OF HEARING: August 11, 2022 (record held open until August 29,
2022)

BACKGROUND AND STATEMENT OF THE ISSUES

The claim was filed on April 25, 2022. The claimant alleged that the employer owed him wages for sick leave taken due to COVID, plus a separation payout of sick pay and vacation pay. He also seeks an award of liquidated damages for the employer's failure to pay him his final wages within three days of his termination and for his delay in receiving his wages for the period in which he was on quarantine. The hearing notice was sent on July 18, 2022. At the conclusion of the hearing, the record was held open for submission of supplemental materials and closing arguments.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, exhibits offered by both parties, and matters of record in the Department file. During the course of the hearing, the claimant acknowledged under oath that his written submissions to the Department were true and accurate to the best of his

knowledge and belief, and the factual allegations contained therein are treated as part of the testimony.

The claimant is 42 years old and lives in Hudson. He has an associates degree in photography and was a photographer before starting to work for the employer in October 2014 as a delivery driver.

He was paid by the hour on a weekly basis. Pay periods ran from Sunday to Saturday and payday was the following Friday. Claimant was paid by direct deposit. During the period of time relevant to the instant claims, claimant's hourly rate was \$37.61. In addition to hourly earnings, the employer contributed \$248.00 per week to his pension account and \$496.48 per week in health insurance premiums.¹

According to the employer's post-hearing submission,

In response to the COVID-19 pandemic, which hit the nation in mid-March 2020, UPS and the Union negotiated relief for UPS employees who were diagnosed with COVID-19 or who were required to quarantine because an immediate family member was diagnosed with COVID-19. UPS agreed to pay employees up to two weeks (10 days) of emergency paid leave at the employee's daily guarantee if the employee was diagnosed with COVID-19, living with someone with COVID-19, or quarantined by a government agency, medical professional or UPS. UPS also agreed to make regular pension and health and welfare contributions for any hours of emergency paid leave.... To apply for emergency paid leave, UPS employees were required to fill out an Emergency Leave Employee Request Form and email it to covid19pay@ups.com. UPS cautioned that the approval process could take 5-7 business days from the time the email was submitted.

Employer's post-hearing submission at 3.

For the two weekly pay periods starting Sunday, March 15, 2020 and ending Saturday, March 28, 2020, claimant was out of work due to COVID symptoms and a doctor's note advising him to self-quarantine. He missed a total of two weeks (10 workdays). The pay history submitted by the employer at the hearing documents that the claimant did not receive wages for either week: After a paycheck on pay date Friday, March 20, there is a two-week gap, with the next paycheck issued on Friday, April 10.

On Friday, April 24, the claimant completed a request for emergency paid leave (EPL) for the time he missed while on quarantine in March. The employer approved the request the next day. On Friday, May 1, in addition to his regular paycheck, the company paid the claimant for eight 8-hour days at his regular hourly rate, \$300.88 per day; these entries were described as "adjustment late pay." At the hearing, the employer's attorney represented that these amounts represented the EPL payments that the claimant was due for eight of the days he

¹ The employer's pension and health contributions are not shown on either of the two paystubs submitted in evidence by the claimant; however, the employer did not contest that these were included in the claimant's weekly compensation.

missed while on quarantine, specifically, March 18–20 and March 23–27. The employer's attorney further represented that claimant was not paid EPL for March 17 and 18 because these two days were not compensable: claimant was not scheduled to work on 17th and the 18th was recorded as an unpaid sick day. In its post-hearing submission, the employer added the following with regard to the two unpaid days:

[Claimant] did not receive Emergency Paid Leave for March 16–17, 2020. March 16 had been coded as a previously scheduled day off and March 17 as a scheduled sick day. These codes were interpreted at the time as exclusions to EPL. However, upon further review, and in the spirit of compromise, UPS will promptly tender this amount to [claimant]. UPS maintains that its failure to pay [claimant] Emergency Paid Leave for that two-day period was not willful or intentional and should not result in an award of liquidated damages.

Employer's post-hearing submission at 4, n.3.

On May 8, 2020, claimant was terminated for dishonesty. He received his paycheck for the week ending May 9, 2020 on the next regular payday, May 15, 2020. According to a paystub he submitted for this pay period, his gross earnings were \$2,079.64. CI-Exh. 9.

This paystub also showed an unused vacation balance of 2 weeks (80 hours), an unused sick leave balance of 3 days (24 hours), and an optional-use time balance of one week (40 hours). Claimant never received a payout for this unused personal time after his termination on May 8, 2020.

Claimant successfully grieved the disciplinary termination pursuant to the union contract and he was reinstated on May 20, 2020. He returned to work on May 21, 2020. While the pay history shows a one-week gap in regular payments corresponding to the pay period ending May 13, 2020, claimant's regular payments resumed and on June 2 and 3, 2020 he received grievance awards.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was 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).

Claim for unpaid wages while on quarantine. The employer's documentary evidence showed that the claimant was paid on May 1, 2020 for eight of the ten days he missed while on quarantine. The claimant's testimony that he never actually received these payments is rejected. However, it was uncontested that the employer never paid the claimant for the first two days he

was on quarantine, March 16–17. The employer suggested that its decision not to pay for these two days was warranted, but it submitted no sworn testimony or documentary evidence to support that contention. Thus, it is found that the claimant is owed wages for those two days.

With regard to the employer's pension and health insurance contributions covering the quarantine period, the claimant's testimony that these payments were suspended and never paid was un rebutted. The employer submitted no documentary evidence showing that it paid these benefits while claimant was on quarantine. It is found that the employer owes the claimant for these benefits as well as for the two days' regular wages.

Claim for unpaid vacation and sick pay. Claimant argued that, upon his termination, he was entitled to a separation payout of his unused vacation, sick, and optional-use time, pursuant to CBA policies the employer was bound to follow. The employer did not contest that it was company policy to pay out unused vacation and sick time on separation, but argued that because the claimant successfully grieved the matter pursuant to the CBA, he was not actually terminated. The CBA, a copy of which the employer provided with its post-hearing supplement, supports this argument. The evidence also showed that the claimant's unused vacation and sick leave balances remained intact after his reinstatement.

With regard to benefits, RSA 275:43, V provides that

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.) "[W]hen due" is a reference to contingencies specified in the employer's policy that the employee must meet in order to be eligible for the benefit in question.

It is found that, because the termination did not actually become final until the conclusion of the grievance process, and the termination was reversed at the conclusion of that process, no separation payout of sick time or vacation time ever became due. Claimant was not obligated to pursue the grievance remedy;; however, by doing so, he became subject to the procedures set forth in the CBA.

Claim for liquidated damages. RSA 275:44 provides, in pertinent part,

I. Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours. * * *

IV. If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller. * * *

(Emphasis added.) A threshold predicate for an award of liquidated damages is that the claimant must have been discharged. In light of the above finding that the claimant was not finally terminated and was re-instated at the conclusion of the CBA grievance procedure, the claim for liquidated damages must fail, without need to assess whether the employer's failure to pay the wages due was willful and without good cause.

DECISION

Having reviewed the testimony, evidence, and arguments submitted in the case, it is found that the claimant met his burden of proving that he was owed wages for two days, March 16 and 17, 2020, plus the pension and health benefit contributions for the two pay periods March 15–21 and March 22–28, 2020, as follows:

16 hours at \$37.61/hr (3/16–3/17)	\$ 601.76
2 weeks pension contributions at \$248.00/week	\$ 496.00
2 weeks health insurance contributions at \$496.48/week	\$ 992.96
Total	\$2,090.72

His claim for unpaid wages is **valid** to that extent.

The claimant failed to prove that the employer owes him a separation payout for vacation or sick pay, or that he was discharged and not paid his final wages within the required statutory framework. Thus, his remaining claims for unpaid sick pay, vacation pay, and liquidated damages, are **invalid**.

The employer is hereby ordered to send a check to the Department, payable to ██████████ in the amount of \$2,090.72, less applicable deductions, within 30 days of the date of this Order.

September 12, 2022
Date of Decision


George A. Stewart, Hearing Officer

GAS/nd