

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]

v.

Earth's Harvest, LLC.

Case No. 102140

DECISION OF THE HEARING OFFICER

Appearances: [REDACTED] Claimant

Employer: Ron Stock, Employer

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

Date of Hearing: June 9, 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 gratuities she was not paid.

The claimant filed a Wage Claim with the Department on April 27, 2022 for \$2,000.00 in unpaid wages. A Notice of Wage Claim was forwarded to the employer on April 29, 2022. The employer responded May 3, 2022. The hearing request date was May 3, 2022. Hearing Notices were forwarded to the parties on May 17, 2022.

FINDINGS OF FACT

The employer is a restaurant with takeout service in Dover, New Hampshire. The claimant worked as a front of the house employee for the employer from November 2020 to January 5, 2022. The claimant testified that she resigned because gratuities were improperly distributed by the employer.

The claimant testified that gratuities were pooled and the portion of gratuities allotted to the front of house staff were distributed equally until a new manager was hired in April 2021. The gratuities were distributed weekly. At that point the claimant began to notice that her gratuities were much less than she had typically received.

The wage claim and testimony indicates that the restaurant took in \$300.00 to \$500.00 per day in gratuities. The claim, the claimant's testimony and the employer's response indicate that the new manager controlled the counting and distribution of the gratuities, was taking gratuities, concealed that fact and the amount of gratuities she was taking from the staff. The claim and testimony were that the employees were required to

sign the tip sheet acknowledging the amount of gratuities received. The claim and testimony were that the manager's name did not appear on the tip sheet so it is unknown how much the manager was taking. The claim and testimony were that the company laptop was left open and the claimant was able to discern that the manager had taken \$500.00 in gratuities during at least one week. The claim and testimony were that the manager was also coming to work on her days off and taking gratuities on her days off.

The claimant testified that she asked the employer several times to rectify the situation and nothing was done. The claimant testified that the Department's Inspection Division was contacted about the issue. There is an e-mail from a wage inspector in the file.

The claimant testified that after the Department was contacted a meeting was held and the manager was no longer allowed to take gratuities. The claimant testified that the manager then screamed at her and berated the claimant as having caused the manager to lose the gratuities. The claimant testified that the manager retaliated by cutting her work hours.

The claimant testified that the misallocated tips were not redistributed. The claimant testified that when she received her W-2 form for 2021 the allocated tips on the form were far more than she had earned. *The claimant testified that the \$2,000.00 figure in her wage claim was in all probability much lower than what she should have earned, based on the allocated tips on her W-2 form.* At that point, the claimant testified she resigned from the employer.

The employer filed a response to the wage claim. The employer's response indicated that the gratuity distribution formula was 75% to the front of house employees and 25% to the back of the house employees, *that the system was in place before and after the claimant was employed by the employer and that the manager was in complete and total control of the counting and distribution of the gratuities.*

At hearing, the employer attempted to justify the manager's receipt of gratuities by testifying that the manager was a manager in name only and performed all the duties of a front of house employee. The employer then testified *under cross examination from the claimant* that the manager in name only was in fact a manager because someone was needed to perform managerial tasks, such as scheduling front of house employees' hours.

The employer's written response to the Department and testimony to the hearing officer was that eventually he was made aware that the gratuity distribution system did not comply with New Hampshire law, presumably after being told so by the Department's Inspection Division. The employer's written response to the Department and testimony to the hearing officer was that according to the noncompliant system in place, he found no irregularities in the distribution of the gratuities and did not feel it was his responsibility because "[E]arth's Harvest and its owners were never involved in in the tip collection and distribution and *only were involved to the extent of reporting the tips on payroll... We acknowledge in retrospect that we had made mistakes that we were unaware of the changes in the law regarding tip sharing and eligibility*" (emphasis added).

The employer testified that the mistakes were acknowledged only after another employee complained about the system. When the hearing officer pointed out that the claimant had voiced the same concerns, the employer responded that the difference was that the second employee informed him it was illegal for the manager to take gratuities.

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.

RSA 275:43 I requires that an employer pay all wages due an employee within 8 days of the expiration of the work week and provides, in pertinent part:

"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."

New Hampshire law is clear that tips are considered wages and are the property of the employee who earns them. RSA 279:26-b Tip Pooling and Sharing states:

I. Tips are wages and shall be the property of the employee receiving the tip and shall be retained by the employee, unless the employee voluntarily and without coercion from his or her employer agrees to participate in a tip pooling or tip sharing arrangement.

II. No employer is precluded from administering a valid tip pooling or tip sharing arrangement at the request of the employee, including suggesting reasonable and customary practices, and mediating disputes between employees regarding a valid tip pooling or tip sharing arrangement.

III. Nothing shall preclude employee participants in a tip pool from agreeing, voluntarily and without coercion, to provide a portion of the common pool to other employees, regardless of job category, who participated in providing service to customers.

The employer acknowledged in writing and testimony that the claimant was not paid all of the gratuities she earned in a timely fashion from April 2021 to January 5, 2022. The employer first tried to justify this by testifying that the manager was not really a manager and therefore was justified in taking gratuities, without examining whether the system complied with New Hampshire law, which he eventually acknowledged did not.

The employer's response and testimony were that the system was in place before and after the claimant's employment. Therefore, the claimant did not consent to the tip pooling system. It was imposed on the claimant and the other employees.

After acknowledging that the system did not comply with the law and that the manager had complete and total control of the gratuities, not only did the employer fail to rectify the situation, the employer reiterated at hearing that he did not feel it was his responsibility and that it was inappropriate for him to be questioned on the issue because Earth's Harvest and its owners "only were involved to the extent of reporting the tips on payroll".

In other words, Earth's Harvest and its owners were only involved to the extent of allocating tips to employees that they had never received under the system and only

changed that system until they "learned" or were "informed", most likely by the Department, that they system did not comply with New Hampshire law.

These statements will not allow the employer to evade responsibility in this case. The employer knew for months that the claimant had concerns about the gratuity distribution and did nothing about it except to proclaim that he had investigated himself and found nothing wrong. Upon either the Department or another employee informing the employer of the illegality of the system, the employer finally changed it.

The employer acknowledged enabling and participating in the gratuity compensation scheme. Once the employer knew it was wrong, he not only did not indemnify the claimant but allowed the system to continue. It seems clear and likely that the employer had no intention of changing the system until he was contacted by the Department's Inspection Division.

The claimant has still not been paid.

The employer's defense was not persuasive. The claimant is found to be credible and her testimony is adopted. The claimant is entitled to \$2,000.00 in unpaid wages.

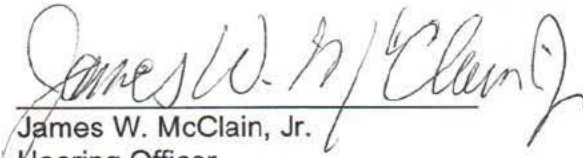
DECISION

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 \$2,000.00.

The employer is hereby ordered to send a check to this Department, payable to ██████████ in the total of \$2,000.00, less any applicable taxes, with a statement of such deductions within 30 days of the date of this Order.

Date of Decision: July 1, 2022


James W. McClain, Jr.
Hearing Officer

Original: Claimant
cc: Employer

JWM/nd