

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

█
v.

Vachons Heating, L.L.C.

CASE #102769

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Michael Vachon, representing the employer

NATURE OF DISPUTE: RSA 275:43, V — Weekly (unpaid sick pay)

DATE OF HEARING: August 25, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claim was filed on June 20, 2022. The claimant alleged that he is owed three days sick time, valued at \$720.00. Notice of the claim was mailed to the employer on June 22. The claimant requested a hearing on July 23. The employer objected to the claim on July 25. A hearing notice was sent on July 28, 2022.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's owner Michael Vachon and HR manager Michelle Vachon, exhibits offered by both parties, and matters of record in the Department file. Both parties affirmed under oath that their written submissions to the Department are true to the best of their knowledge and belief, and those statements are treated herein as part of the testimony in the case.

For ease of reference, labels were assigned to the parties' exhibits, as follows:

<u>Reference</u>	<u>Description</u>
Cl. Exh. 1	Final paycheck & paystub
Cl. Exh. 2	Claimant's narrative statement emailed to DOL on August 1, 2022
Cl. Exh. 3	A printout purporting to show state licensing information for Anthony C. Vachon
Cl. Exh. 4	Claimant's narrative statement emailed to DOL on August 24, 2022

- Er. Exh. A Employer's narrative statement emailed to DOL on July 25, 2022
- Er. Exh. B Doctor's note dated June 8, 2022
- Er. Exh. C Text messages between claimant and Mike Vachon
- Er. Exh. D Text messages between claimant and Michelle Vachon
- Er. Exh. E Text messages between claimant and Tina Vachon
- Er. Exh. F Affidavit of Tina Vachon

The claimant is 63 years old and lives in Milton. He has a couple of years of college. He has worked primarily in the field of HVAC. He started working for the employer in January 2022 as an HVAC technician.

He was paid \$30.00 an hour on a weekly basis. Pay periods ran from Saturday to Friday. Payday was the following Friday. The claimant generally received his paychecks in hand.

During the pay period that ended Friday, June 3, the claimant worked his normal hours. Over the following weekend, he notified the employer via text message that he would not be coming in to work the following week due to health issues, the upcoming birthday anniversary of his recently deceased father, and dissatisfaction with how the owner, Mike Vachon, was treating him at work. He was told via texts messages that if he missed more than three days, he would have to provide a doctor's note.

On Sunday night, Mr. Vachon texted the claimant and requested him to speak with the owner by telephone. Mr. Vachon indicated that he was not upset with the claimant; he wanted to discuss the work relationship and also the claimant's planned return date. The employer insisted that claimant call him by telephone rather than texting. The claimant did not call and instead communicated with the employer via text messages.

The claimant did not come in to work on Monday or Tuesday. Early Tuesday morning and again at mid-day, he was told via texting that if he did not call to speak with the owner, he would be terminated that same day. The claimant did not call in. (Asked at the hearing why he did not call, he stated that he chose not to speak with the employer by telephone because he was not on duty and preferred to communicate by texting.)

On Wednesday, the employer told the claimant via texting to return his uniforms and pick up his check that day. That morning the claimant went to see his doctor. Later in the day, he came into the office, turned in his work uniforms, and picked up his final paycheck. He also brought in a doctor's note dated June 8, 2022. It stated, in pertinent part:

Please allow [claimant] his medical leave as he was seen in our office for therapeutic reasons.

Cl. Exh. B.

As of the start of the last pay period during which he was employed, the claimant had five unused sick days. In his final paycheck, he was paid for two sick days. These corresponded to the two days he was out of work, June 6 and 7, before he was terminated on Wednesday June 8.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wage in the form of sick pay. 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).

Claimant argued that he was entitled to be paid for all five unused sick days. The employer countered that its sick-day policy did not allow a payout of unused sick days to an employee upon termination; claimant was paid for the two sick days he took prior to his termination and the other three were forfeited pursuant to company policy.

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.

Employers are required to provide written notice of their policies regarding benefits such as sick leave:

Every employer shall provide his or her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employee's expenses, pension, and all other fringe benefits per RSA 275: 49.

Administrative rule Lab 803.03 (Notification and Records).

The claimant testified that he was never shown a sick day policy or any other policy, and the employer did not contest that. However, in the context of a wage claim, an employer's failure to provide a written policy does not give a claimant carte blanche to define what those policies are. Rather, an employer's alleged non-compliance with these requirements is addressed by the Department through its Inspection Division.


In this case, it was the claimant's burden to prove that the employer had a practice or policy of paying out unused sick days upon an employee's separation. In the experience of the undersigned hearing officer, a policy of paying out unused sick time to employees upon their separation from employment is the exception rather than the norm. The bare fact that the employer allowed up to five days of sick leave per year does imply a policy of paying out unused sick time on separation from employment. The claimant offered no evidence that the employer had such a policy or practice. The employer's testimony that he never has provided a payout of unused sick days upon separation is credited.

It is found that the claimant was paid for the two sick days he took prior to his termination; he was not entitled to a payout of the three sick days left over after he was terminated.

DECISION

Having carefully reviewed the exhibits and testimony, it is found that the claimant did not meet his burden of proving that the employer owed him a payout for unused sick days upon his separation from employment. The claim is ruled **invalid**.

August 31, 2022
Date of Decision


George A. Stewart, Hearing Officer

GAS/nd