

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]

v.

Snow Building Construction

Case No. 103034

DECISION OF THE HEARING OFFICER

APPEARANCES:

[REDACTED] Claimant
Jessica Davis, Harry Snow, for Employer

NATURE OF DISPUTE:

RSA 275:43 V — Weekly, Unpaid (Vacation Pay/Sick Pay/Personal Day) PTO

RSA 275:44 IV – Employees Separated from Payroll Before Pay Days , Liquidated Damages

DATE OF HEARING:

September 7, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on July 13, 2022, alleging that he was owed \$1,064.00 in unpaid paid time off (PTO). Notice of the claim was sent to the employer. The employer responded July 21, 2022. The claimant requested a hearing. The hearing notice was issued August 9, 2022.

FINDINGS OF FACT

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

The claimant is a man who resides in New London, New Hampshire. The employer is a construction contractor based in New London, New Hampshire. The claimant's wage claim and testimony were that he was employed for over 2 years by the employer as a carpenter and was paid \$19.00 per hour. The claimant's wage claim documentation and testimony indicate that the claimant believes he is owed 56 hours in vacation time for a total of \$1,064.00. Payroll records indicate the claimant was paid \$18.00 per hour at the time of his separation from the employer.

The claimant's wage claim and testimony were that he gave two weeks' notice, with his last day to be June 3, 2022. The claimant was paid weekly by check. The

claimant and employer testified that the employer had a paid time off (PTO) policy whereby full time employees were eligible to accrue 2 weeks' vacation, or 80 hours, after 2 years of employment. The claimant worked for the employer for 2 years and 5 months.

The employer's PTO policy submitted by the claimant provided that terminated employees will receive all compensation to which they are entitled including accrued but unused vacation pay. The claimant was paid vacation time in 2020, 2021 and 2022.

The claimant testified that he was owed 56 hours vacation time. The claimant submitted payroll documentation that showed he had used 24 hours vacation time in 2022. The documents indicated the claimant had no accrued unused vacation time at separation from the employer. The claimant argued against the accuracy of the payroll records. Under questioning by the hearing officer the claimant acknowledged the definition of "accrued" meant "accumulated over time".

The employer's response to the Department explicitly states that the claimant was hired as a full time employee. However, the employer attempted to testify that the claimant was not a full time employee because he had not averaged 40 hours per week during his tenure with the employer. Under cross examination by the claimant the employer acknowledged that other employees averaging less than 40 hours per week were paid PTO. The employer paid the claimant PTO in 2020, 2021 and 2022.

At this point the hearing was concluded.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proving by a preponderance of the evidence that he 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:

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...

In this matter the claimant credibly testified that he was owed PTO by the employer. However, his testimony that he was owed 56 hours PTO is not credible. The claimant's assertion that he is owed 56 hours vacation time is not supported by documentation and cannot be verified.

The claimant appeared to misunderstand the meaning of the word “accrued”. In this case the claimant was eligible to accrue 80 hours per year, or 6.66 hours per month. The claimant worked 5 months of the year, leaving on June 3, 2022. The claimant had accrued 33.3 hours during those 5 months and used 24 hours, leaving a balance of 9.33 hours. The claimant was paid \$18.00 per hour, not \$19.00 as alleged in his wage claim.

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).

The employer had a policy of paying accrued unused PTO to departing employees. The employer had a policy of paying PTO to employees working less than 40 hours per week. This policy was used by the employer in the claimant’s prior 2 years of employment.

It is found that the claimant is owed 9.66 hours accrued unused PTO at \$18.00 per hour, or \$173.88.

Under RSA 275:44 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).

Because more than 10 days have elapsed since the claimant left the employer and has not been paid the claimant is entitled to an amount equivalent to the unpaid wages as liquidated damages. It is found the claimant is owed \$173.88 in liquidated damages.

DECISION

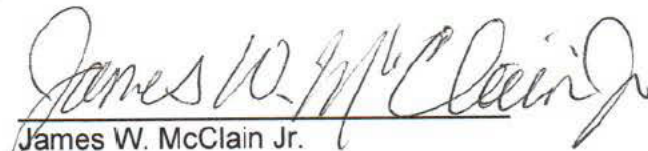
Based on the testimony and evidence presented, this Department finds the claimant has met his burden to prove by a preponderance of evidence that he is owed additional wages for 9.33 hours of unused PTO or \$173.88 before taxes and the equivalent amount in liquidated damages.

It is hereby ruled that this Wage Claim is **valid in part**.

The employer is directed to send a check payable to ██████████ in the amount of \$173.88, less all applicable taxes, within 30 days of the date of this decision. The employer is also directed to send a second check in the amount of \$173.88 for the liquidated damages.

October 3, 2022
Date of Decision

JWM/js


James W. McClain Jr.
Hearing Officer