

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.
Avante USA, Ltd.
CASE #61887

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Joel Flaherty, representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (unpaid personal time off).

DATE OF HEARING: March 8, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on January 5, 2021, alleging the employer owes her for unused PTO after she was terminated. The total claim is for \$250.00. Notice of claim was sent to the employer on January 6, 2021 and an objection was received January 19, 2021. A hearing notice was sent on February 3, 2021. Both parties participated remotely by telephone under a standing order of the Department, necessitated by the COVID-19 state of emergency.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's representative, exhibits offered by both parties,¹ and matters of record in the Department file. During the course of the hearing, both parties acknowledged under oath that their written submissions to the Department were

¹ On March 1, 2021, claimant emailed exhibits to the Department but did not copy the employer. Department administrative rule Lab 204.07(b) requires that any documents to be relied upon at the hearing be submitted to the opposing party two business days prior to the hearing. Exhibits were: Text message conversations between herself and a company official, excerpts from the employee handbook, and a letter of termination. The employer's representative objected to admission of the text messages, as he did not have copies of them. The claimant was allowed to testify regarding the text messages; however, the text messages themselves were not admitted into evidence. Mr. Flaherty did not object to the termination letter or the handbook exhibits, and they were admitted.

true, and those statements are treated herein as part of the testimony in the case.

Claimant is 27 years old and lives in Manchester. After graduating from high school, she attended college and obtained qualification as a pharmacy technician. She has worked as a pharmacy technician, a customer representative, and a bartender. In November 2019, she was hired by the employer as a debt collector. She was paid \$16.00 per hour. She worked weekdays from 9:00 a.m. to 5:30 p.m. or 11:30 p.m. to 8:00 p.m., making telephone calls to debtors. She was paid biweekly on Wednesday.

On December 23, claimant was scheduled to work but she had car trouble. She testified that she used the company's designated telephone/text-messaging line to report that she would either be late or not able to come in at all. A company official (claimant testified it was Mr. Flaherty) responded, telling the claimant that he wanted her to come in if she could get her car started. She remarked to the company official that she had previously been written up or suspended for lateness, and consequently, she suggested she might just as well call out rather than come in and be sanctioned for lateness. The company official told her that if she did not come in that day, she would be suspended for one day starting the next day, December 24. After further text messages discussing her prior disciplinary sanctions, claimant decided to call out.

She testified that being suspended for December 24 meant that she would not get back in to work until Monday December 28. She got her car repaired that day and came to the office to pick up some personal property and request personal time off for Dec. 23 and 24. She logged into the company's computer and put in the PTO requests.

Later that day, she was notified by Mr. Flaherty that she was terminated for coming in to the office without permission and accessing the computer to request personal time off for the call-out day and the suspension day.

As of the date of her termination, claimant had two unused PTO days available. She asked the employer to include a payout for this time in her final paycheck. Instead, she was paid only for the days worked in the final pay period and not for her unused PTO.

Joel Flaherty, 52, is the president of the northeast division of the Texas-based employer. The company has 42 employees in New Hampshire. He testified that the claimant was terminated for gross misconduct, *i.e.*, coming on to the premises on a call-out day and accessing the computer system to request PTO for the call-out day (December 23) and the suspension day (December 24).

He testified that, pursuant to company policy, PTO days had to be requested 48 hours in advance and approved. Also, PTO could not be used for suspension days. Under the circumstances, claimant's PTO requests were not approved and therefore she was not paid for December 23 and 24.

Mr. Flaherty also testified that, pursuant to company practice and policy, employees were not entitled to a payout of unused PTO on separation from the company.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she was owed unpaid wages, in this case payment for PTO taken or payment of unused PTO upon separation. 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, 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.

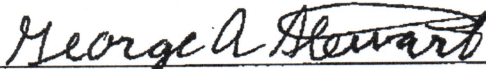
Claimant did not deny that, as a matter of policy or practice, the company did not pay unused PTO after separation, but she argued that her available PTO should have been applied to Dec. 23 and 24 in her last paycheck, as she requested. However, she did not deny that company policy required PTO to be approved before it could be taken and that PTO could not be used on a disciplinary suspension day. PTO was not approved for either day. Mr. Flaherty's testimony is credited as to the policy and the application of the policy in this case.

Based on the testimony and exhibits, it is found that the claimant failed to prove that she was entitled to PTO for the call-out day and the suspension day, or to a separation payout of her unused PTO.

DECISION

As RSA 275:43, V considers personal time pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she was due any personal time for days not worked December 24 and 25, and also not due a payout of personal time upon separation, it is hereby ruled that her Wage Claim is **invalid**.

April 5, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb