

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

Transformco Sears
CASE #62033

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Catherine Miller, representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (Unpaid vacation/Personal time)

DATE OF HEARING: March 16, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage complaint on January 20, 2021, alleging unpaid hourly wages and accrued vacation pay due on separation. Notice of claim was sent to employer on January 21. Notice of hearing was sent on February 23. By email dated March 11, the claimant notified the Department that the claim for unpaid hours was withdrawn. 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 witnesses Catherine Miller and Joseph Haberland, exhibits offered by both parties, 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 true, and those statements are treated herein as part of the testimony in the case.

Claimant is [redacted] and lives in Danbury. He has a bachelor of science degree, awarded in 2017. He worked as a property maintenance technician and then as an appliance repair technician for Sears for about a year

and a half. He was working in Northern California. In 2019, after Sears declared bankruptcy, Transformco purchased many of its assets and operations, including the appliance repair business. Claimant became an employee of Transformco.

In or around October of 2019, claimant decided to move to New Hampshire. He was granted a transfer to the employer's operations in New Hampshire. He sold his California home on October 17, 2019. He took three weeks off to move. On November 20, 2019, he texted his new local supervisor, David Cox, to let him know that he had arrived and was ready to work (claimant's exhibit). His official start day as a New Hampshire employee was December 1, 2019. At some point during the following year, he was assigned to a new supervisor, Joseph Haberland.

In December 2020, claimant found a better job opportunity and gave two weeks' notice. His last day at work was December 29, 2020. He worked through the end and did not use any vacation days. As documented on his last paystub (claimant's exhibit), he had an accrued vacation balance of 46.15 hours. At his hourly rate of \$22.00, this had a cash value of \$1,015.30.

Claimant did not receive a cash payout for the accrued vacation time. He believed he was entitled to one, so he filed the instant claim.

In response to the claim, the employer submitted documents showing that, incidental to its purchase of Sears' assets and operations, it had changed a number of personnel policies. One of the provisions of the new policy was that separating employees were not allowed to cash out their unused accrued vacation time upon separation from the company, unless such a benefit was required by the law of the state where they worked. Prior to this change, the company had a practice of paying out accrued but unused vacation.

Claimant testified that he did not learn of this change in policy until he received the employer's response to his wage claim. He testified that, had he known about it, he would have taken his unused, accrued time before separating from the company.

According to employer's Standard Accrual Vacation Policy 4-14A, "Associates who resign and request to take a vacation during the notice period may take only accrued vacation pay prior to their vacation." (Employer's exhibit.)

Catherine Miller, 54, is a senior employment paralegal for the employer at its headquarters in Hoffman Estates, Illinois. She testified that in October 2019, the company began notifying all its associates, including service technicians, that new management was making a number of changes to company policies. Most of the changes, including the change to vacation payout on separation, would take effect on February 2, 2020. Vacation time earned after that date would be subject to the new policy.

Ms. Miller testified that the company sent the following text message to all service technicians via their company issued mobile devices (iPhone):

Transformco will be making changes to the vacation policy with effective dates of 11/3 and 2/2/2020. Changes apply across all associates and relate to vacation carryover, vacation payout at termination, maximum vacation accumulations, vacation earning for part-time associates and "borrowing" vacation. Please review the attached link and reach out to your Tech Manager regarding any questions. - Erin Mullin Link: <https://rebrand.ly/7yutyj>

(Employer's exhibit.) The foregoing message was copied into an email sent by Erin Mullin, senior director of HR. According to that email, it was sent out on October 15, 2019 via text message to all technicians in every state where the employer had employees and it ran for an entire week ending October 22.

Claimant admitted that in October 2019, he had a company issued iPhone, but denied seeing the message.

Ms. Miller also testified that the company conducted meetings from October 2019 to January 2020, at which the agenda included notification of the new policies. Claimant admitted to participating in some monthly meetings but denied that the new policies were discussed.

Ms. Miller testified that the company's employee benefits portal contained full information advising employees of the upcoming change, including a frequently asked question section. Included in this information was a table showing how the various changes affected employees in various states. For New Hampshire, the table indicated that vacation accrued before February 2, 2020 would be paid out at termination, but vacation accrued after that date would not be paid. The employee benefit portal was accessible from company-issued iPhones, and the iPhones had easy-to-use apps for that purpose.

Claimant testified that he never looked for the vacation policies on the company's employee portal; he said the site was difficult to use and it contained a plethora of PDF documents. However, he testified that he was able to navigate through other areas of the portal to find benefits information he needed.

Joseph Haberland, 48, is a technical manager for the employer. He was the claimant's supervisor starting sometime in 2020, after the policy change had gone into effect. He testified that he had not previously supervised other service technicians and so was not particularly knowledgeable about the policy changes.

Mr. Haberland testified that, when the claimant gave his written notice in December, the claimant indicated he planned to work through to his last date, because he could cash out his unused vacation days when he left. Not being aware of the company's policy regarding payouts, he did not contradict the claimant in this regard; however, neither did he express his agreement with the claimant's plan.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wages, *i.e.*, unused vacation time on 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.

"[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 not contested that, prior to February 2, 2020, the employer had a practice of paying out unused vacation pay upon separation from employment, in New Hampshire and elsewhere. It is also not contested that this policy changed on that date, such that unused vacation pay was forfeited upon separation in every state where the law did not require such a benefit. The employer's written policy, and its written advisories to employees in advance of the change, specifically stated that the no-payout policy would apply to employees working in New Hampshire.

Against this backdrop, the claimant argued that he never received notice of the change in policy while he was an employee, thus, the company could not apply it to him.

The claimant's testimony that he was ignorant of the policy until after he filed the instant claim is credited. Had he been aware of it, it seems likely that he would have used the 46.15 hours (about a week and a day) as vacation time after giving notice, as this practice was allowed by company policy. Instead he chose to work through to the end.

On the other hand, it is found that the employer took reasonable steps to inform its employees of the upcoming change in policy: a text advisory sent to all technicians on company-issued iPhones every day for a week starting October 15, 2019; monthly meetings leading up to the implementation of the policy in February 2020; and advisories on the employee information portal which was accessible from company-issued iPhones.

In light of this evidence, some fault is attributed to the claimant for not becoming aware of the policy, either before it was implemented or during the 10

months that he worked for the employer after the new policy went into effect. The claimant admitted that he had successfully navigated the employee portal to access information on other benefits he was interested in, just not the policy regarding unused vacation time on separation.

Ms. Miller agreed that the employer had not produced any documentary evidence showing that the claimant actually received any of these notifications. In this regard, Department administrative rule Lab 803.03 (Notification and Records) provides that:

(b) 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.

(c) Pursuant to RSA 275:49, every employer shall inform his or her employees in writing of any change to such employee's rate of pay, salary, or employment practices or policies as referred to in Lab 803.03 (a) and (b) prior to the effective date of such change.

(f) Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:

(6) Maintain on file a signed copy of the written notifications, signed by the employee and provided to each employee as required by Lab 803.03 (a), (b), and (c) above.

(Emphasis added.)

Compliance with this rule gives an employer a ready means of resolving good-faith disputes such as the present one. But an employer's failure to follow this rule does not relieve the claimant of his burden of proving entitlement to vacation pay or any other benefit. In particular, non-compliance (or absence of evidence of compliance) does not give a claimant carte blanche to demand benefits never envisioned by policy or practice.

On the facts of this case, where the employer's previous policy was to provide vacation pay on separation, and the claimant, apparently ignorant of the change in policy, relied on the old policy to his detriment, it is found that the employer's failure to prove compliance with Lab Rule 803.03(f)(6) is grounds to deem the change in policy ineffective as to the instant claim. Applying the previous policy, the claimant was entitled to a payout of his unused vacation time.


DECISION

RSA 275:49 III requires the employer to make available to employees, in writing or through a posted notice, employment practices and policies with regard to vacation pay. Lab 803.03 (c) requires the employer to inform employees in writing of any change in vacation pay practices or policies prior to the effective date of the change. Subparagraph (f)(6) requires the employer to obtain and maintain on file a written

acknowledgment by each employee that he or she received notice of a change in vacation practices or policies. The employer failed to obtain such an acknowledgment or maintain a copy of it. The claimant testified credibly that he did not have actual notice of the change in policy, and relied to his detriment upon the policy formerly in effect. Under these circumstances, it is ruled that the claimant remained subject to the old policy. Under the terms of that policy, he was entitled to a vacation payout of his 46.15 hours at his hourly rate of \$22.00, totaling \$1,015.30.

The employer is hereby ordered to send a check to the Labor Department, payable to _____, in the amount of \$1,015.30, less applicable deductions, within 30 days of the date of this Order.

April 06, 2021
Date of Decision



George A. Stewart, Hearing Officer

GAS/sw