

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

BERLIN EMERGENCY MEDICAL SERVICES

Case No. 62147

DECISION OF THE HEARING OFFICER

Appearances: Mr. ██████████ claimant, on his own behalf, Pro Se
Attorney Gil Abramson, on behalf of the employer,
Berlin Emergency Medical Services

Nature of Dispute: RSA 275:43 I – Weekly, Unpaid Wages
RSA 275:43 V – Weekly, Unpaid Paid Time Off (PTO) / Unpaid
Severance Pay
RSA 275:44 IV – Employees Separated from Payroll before Pay
Days, Liquidated Damages
RSA 275-E2 I(a) – Protection of Employees Reporting Violations,
Illegal Discrimination For Protected Reporting
Interest

Witnesses: ██████████ claimant, on his own behalf
Scott Lees, on behalf of Berlin Emergency Medical Services
Morgan Phillips, on behalf of Berlin Emergency Medical Services
Theodore Proctor, on behalf of Berlin Emergency Medical Services

Date of Hearing: August 9, 2021 & August 31, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

On the basis of the claimant's assertions that he was illegally discriminated against after a protected reporting and that he was owed unpaid wages, he filed a Whistleblower's Complaint and Wage & Hour Claim with the Department of Labor on January 4, 2021 and February 5, 2021, respectively. A pre-hearing conference was held on May 18, 2021. Notices of Hearing were forwarded to all parties on June 7, 2021 and a consolidated hearing, under Administrative Lab Rule 203.08, was scheduled.

A hearing was held at 8:30am on August 9, 2021 at the New Hampshire Department of Labor Headquarters in Concord, New Hampshire. All parties appeared

via the video conferencing platform Webex. Video testimony was provided by Mr. ██████████ claimant, on his own behalf, as well as Mr. Scott Lees, on behalf of the employer, Berlin Emergency Medical Services.

Finally, it should be noted that at the end of the scheduled time for the August 9, 2021 formal hearing, additional time was required. Therefore, the hearing was continued. The continued hearing was held on August 31, 2021 at 12:30pm via Webex and concluded in a timely manner. Video testimony was provided by Mr. Morgan Phillips (converted to telephonic due to poor sound quality) and Mr. Theodore Proctor, on behalf of the employer, Berlin Emergency Medical Services.

FINDINGS OF FACT

Mr. ██████████ ("the claimant") was employed as an EMT by Berlin Emergency Medical Services ("the employer") in 2020.

In the summer of 2020, the claimant moved near the employer to satisfy residency requirements for the job. Soon after, the claimant was notified that another company purchased the employer, effective December 1, 2020; the claimant decided to stay on and work for the new employer. The claimant's rate of pay was increased from \$14.50 per hour plus a health insurance stipend to over \$17 per hour.

The new owner, "Butler," had an Employee Handbook, sections of which were submitted into evidence. Notably, neither side submitted the employer's policy regarding paid time off, or severance pay. A section titled, "Direct Deposit" was submitted into evidence and stated, in part, "this policy applies to all Butler Medical employees, effective September 1, 2016, all newly hired and rehired employees, as a condition of employment, are required to participate in Butler Medical's direct deposit program, unless subject to an exemption set forth later in this policy." (Page 9)

Additionally, sections regarding "Timekeeping, Callouts, and Attendance," "Corrective Action," "Mobile Devices," "Tobacco Product Use and E-cigarettes," and other sections were submitted into evidence. (Page 1-14)

The "Corrective Action" section specifically stated, in bold, "Butler Medical Transport management reserves the right to apply corrective action steps at any time, up to and including termination, according to the severity of the action without regard to the recommended steps." (Page 8)

The claimant was dissatisfied with Butler's management and had many concerns; specifically, safety (snow and fatigue), nonresponsiveness of the employer, the employer's conflict of interest policy, and another employee's termination. The claimant was also concerned that the employer instituted a mandatory drug test, which he initially refused, and then later consented to "under duress." Ultimately, the claimant passed the employer's drug test. Additionally, the claimant was concerned that there were cameras installed in the ambulances.

Another point of contention was the employer's requirement to use direct deposit; the claimant believed that New Hampshire Statute required all employers to provide their employees with the option of receiving paper checks. The claimant did complain to the employer via text message about not having the option to receive paper checks. (Page 95)

One morning, the claimant was scheduled for an 8:00am shift. He woke up around 8:20am and texted the employer that he was not going to come into work based on their overworked policy, a "safety timeout". The claimant explained that this was not a no call, no show because he did notify the employer that he could not work (the claimant acknowledged that the notification was 20 minutes late), and the claimant also noted that he was simultaneously at home and available for work if needed.

On December 19, 2020, the claimant texted the employer, concerned that he was not getting enough hours on the schedule. Additionally, the claimant did not want to work weekends; he requested that the employer not schedule him on weekends. Importantly, the claimant stated that he did not refuse to work weekends.

As of December 28, 2020, the claimant had not received any of his paper paychecks. The claimant called the Department of labor to complain about the employer. The claimant's last full shift was Wednesday, December 30, 2020. The claimant articulated that he told a coworker that he reported the employer to the DOL for refusing to utilize paper checks, and believed that the video/audio cameras inside the ambulance captured this interaction.

The following morning, December 31, 2020, the claimant emailed the employer requesting a cash out payment of all accrued paid time off (PTO). This was denied.

On Friday, January 1, 2021, the claimant was at home, on-call, when he received a voicemail from Mr. Phillips explaining that there was a patient transfer and that the claimant was needed; however, the claimant did not receive a follow-up call. The claimant articulated that he thought he "may" be called in; however, as there was no follow-up call, he did not report to work.

On Saturday, January 2, 2021, the claimant reported to work. He was called into an office with Mr. Lees and Mr. Phillips and confronted about his no call, no shows. The claimant did not believe there was a patient transfer that actually occurred that day; therefore, he did not believe he had no call, no showed. The claimant was sent home and told he was being put on suspension. Later that morning the claimant called Mr. Lees, and his employment was terminated; the claimant was fired.

Ultimately, the claimant was terminated on January 2, 2021, after he told his coworker about calling the DOL and after complaining to the employer about their direct deposit policy. The claimant articulated that the employer has a probationary policy with corrective training and that he believed these policies should apply to him.

On January 4, 2021, the claimant filed a Whistleblowers' Protection Act Claim.

In mid-January 2021, paper checks began appearing in the claimant's mailbox. The checks appear to be appropriately dated and postmarked; they simply arrived at the claimant's mailbox in a delayed manner due to the Post Office. (Page 39-49)

On February 5, 2021, the claimant filed a Wage Claim with the Department.

Additional grievances of the claimant's included the employer cell phone policy, which bars the use of cell phones in the building, the employer tobacco policy, and the employer's non-compete clause. The claimant believed the other employees were in violation of these policies.

Mr. Scott Lees provided testimony on behalf of the employer; he is the Senior Operations Manager. Mr. Lees articulated that full-time employees need to be available for work seven (7) days per week, and that the days of the week worked by each employee rotates. Mr. Lees acknowledged having a discussion with the claimant regarding his desire not to work weekends. Mr. Lees articulated that the reasons given to him by the claimant were that he needed to take care of his dog, and accommodate his girlfriend's schedule. Mr. Lees determined that these were not acceptable reasons to be unavailable during weekends. Further, Mr. Lees explained that if an employee is scheduled to work at 8:00am, they must notify the employer that they cannot work *before* the start of the scheduled shift. Moreover, Mr. Lees believed that the claimant no call, no showed for two (2) twelve (12) hour shifts, both on January 1, 2021. Ultimately, Mr. Lees decided to terminate the claimant's employment based on his inability to work weekends and the two (2) no call, no shows. Mr. Lees explained that the handbook allows the employer to terminate an employee under such circumstances and that he felt termination was merited due to the claimant's above referenced behaviors.

Mr. Lees further explained that he knew the claimant was dissatisfied with their direct deposit policy but was unaware that he had contacted the Department of Labor. Additionally, Mr. Lees acknowledged placing cameras in the ambulance for safety reasons; however, he was only able to listen to five (5) second "events" such as an ambulance running a stop sign, etc.

Mr. Morgan Phillips provided testimony on behalf of the employer; he is the Operational Supervisor, and his job supports Mr. Lees. Mr. Phillips started in this position beginning in early-November 2020; however, he first met the claimant in March 2020. Mr. Phillips explained that there is a negative impact on the business if an employee calls out of a shift late or no call, no shows; other employees are needed to cover the shift and must carry a larger burden. Mr. Phillips explained that the claimant was unable to work weekends, called into work late, and had two (2) no call no shows on January 1, 2021; therefore, his employment was terminated

Mr. Theodore Proctor provided testimony on behalf of the employer; he is the Risk Manager for the employer. Mr. Proctor explained that the cameras set up in the ambulances are both Wi-Fi routers which track GPS coordinates, and cameras with audio and video capabilities. While the cameras record constantly, management is only able to request one (1) minute segments of video footage, which is only stored for 40 to 50 hours before it is taped over. Certain actions, such as running a red light, trigger events which provide 6 to 15 seconds of audio/video footage; management can then request an additional 60 seconds of video or 40 minutes of "hyper lapse" without audio.

Ultimately, The claimant requested a determination that the employer violated the New Hampshire Whistleblower's Protection Act and requested damages in the amount of \$5,460.00 for "all unpaid wages due, including what would have been earned on date of suspension damages; continued full time employment on my terms." Additionally, The claimant requested \$6,862.43 in unpaid wages comprised of: \$875.00 in unpaid paid time off (PTO) for "approximately 50 hours of PTO earned when fired," \$332.99 in "other" because the employer "willfully refused to comply with RSA 275:44, unlawfully withheld final check, finally issued one week late," \$2,827.22 in unpaid severance pay for "lost wages as unemployed for one month," \$2,872.22 in liquidated damages for "pain and suffering," and interest.

DISCUSSION AND CONCLUSIONS

Whistleblowers' Protection Act:

New Hampshire Statute governing the Whistleblower's Protection Act is 275-E:2 Protection of Employees Reporting Violations, which states, in part:

I. No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because:

(a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

Regarding the Whistleblower Claim, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. [he] engaged in an act or acts protected by the statute;
2. [he] suffered an action proscribed by the statute (retaliation); and
3. there was a causal connection between the protected acts [he] engaged in and the action [he] suffered as a result of that/those protected act/s.

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). In response to the employer's rebuttal, the

claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that his assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to his protected act/s.

The claimant argues that he called the Department of Labor complaining about the employer, and told his supervisor that the employer's direct deposit policy was in violation of Statute before being terminated. The claimant notes that he believed that he was a good employee, and that the employer had no legitimate proffered reason to terminate his employment. The claimant asserts that this is a clear violation of the New Hampshire Whistleblower's Act. The claimant requests an Order that the employer compensate him in the amount of \$5,460.00 for "all unpaid wages due, including what would have been earned on date of suspension damages; continued full time employment on my terms."

The employer argues that the claimant bears the initial burden of proof in this matter. Additionally, the employer asserts that they had no knowledge of the claimant either contacting the DOL prior to his termination. Further, the employer notes that they accommodated the claimant's requests and issued him paper checks. The employer argues that the claimant was appropriately terminated due to an unwillingness to work weekends, along with two (2) no call, no shows. The employer requests that the claim be denied in its entirety.

Overall, the claimant's arguments are not found to be persuasive.

Ultimately, it remains unclear that the claimant has met his prima facie burden in this matter, specifically that he complained about a violation of rule or law (the employer's direct deposit policy) and then suffered retaliation (termination of employment) with a causal connection between the protected act and the retaliation. However, even if it is determined that the claimant did meet his prima facie burden of proof, the claimant still would not prevail in this matter.

Once the claimant has established a prima facie case of retaliation, the burden of proof shifts to the employer to demonstrate that the actions taken (termination of employment) were for a proffered legitimate, non-retaliatory reason.

In this matter, all of the employer's witness provided credible testimony that the claimant's employment was terminated for a non-retaliatory reason; specifically, the claimant was unwilling to work weekends and no call, no showed to at least one (1) shift. Ultimately, this behavior had a negative impact on the employer and the employer decided to terminate the claimant for these reasons. While the Employee Handbook does have sections titled "Timekeeping, Callouts, and Attendance," and "Corrective Action," the employer is not bound by these rules. First, under the corrective action

section there is a specific carve-out articulating that the employer is not required to follow the steps outlined; additionally, New Hampshire is an at-will employment state.

It is therefore found that, the claimant's termination was due to his unwillingness to work weekends along with no call, no showing to at least one (1) shift at work. This Whistleblower Claim is invalid.

Wage & Hour Claim:

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is owed and due \$6,862.43 in unpaid wages in the form of unpaid PTO / unpaid severance, liquidated damages, and interest. Proof by a preponderance of the evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

Regarding PTO pay / severance pay, the State of New Hampshire does not require employers to offer benefits to their employees and, if they do, does not require employers to implement specific terms or guidelines. However, if the employer offers benefits to employees, a thorough description of how employees earn them, how employees are able to use them, what happens to any accrual at separation, as well as any other stipulations the employer decides to include, are required pursuant to RSA 275:49. RSA 275:49 requires employers, in part, to inform employees in writing, as to their employment practices and policies with regard to vacation pay, personal time off (PTO) pay, severance pay, and other fringe benefits.

The employer is in compliance with Statute by providing employees with a written Employee Handbook. However, it is noted that neither party submitted into evidence the Employee Handbook policy regarding either PTO pay or severance pay.

RSA 275:43 V states, in part, that paid time off (earned time, vacation, severance, etc.) pay, when such a benefit is a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, **when due** [emphasis added]. PTO pay only become wages "when due". "When due" is a reference to the benefit guidelines specified in employer's policies.

Again, neither party submitted into evidence the Employee Handbook policy regarding either PTO pay or severance pay. Additionally, neither side provided testimony that it was the employer's practice to pay out PTO pay or severance pay upon termination of employment. The claimant has not demonstrated, by a preponderance of the evidence that he is owed and due unpaid PTO pay or unpaid severance pay.

Regarding liquidated damages, the claimant was terminated on January 2, 2021 and the employer issued the claimant a final check on January 15, 2021. (Page 37-38) This is a violation of RSA 275:44, which states in part, "I. Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours... 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.”

It is therefore found persuasive that the claimant is owed and due \$415.08 in liquidated damages, the amount of his final check, which was not issued within 72 hours of his termination. It should be noted that liquidated damages does not accrue interest and the claimant prevailed solely on liquidated damages.

Overall, it is the claimant’s burden to prove, by a preponderance of the evidence, that he is owed and due \$6,862.43 in unpaid wages in the form of unpaid PTO / unpaid severance, liquidated damages, and interest. Given the reasoning explained above, it is determined that the claimant has met his burden of proof in this matter with regard to \$415.08 in liquidated damages.

DECISION

Based on the evidence and testimony presented, it is found that the claimant did not meet his burden to prove by a preponderance of the evidence that he engaged in an act or acts protected by RSA 275-E:2(l)(a) and was retaliated against as a direct result; **it is hereby ruled that this Whistleblower’s Complaint is invalid.**

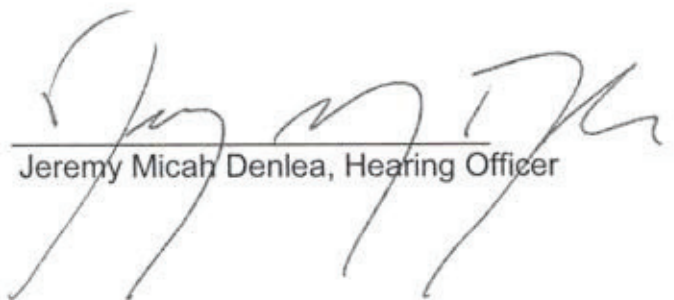
Based on a thorough review of the evidence and testimony presented, and as RSA 275:43 (I) requires that an employer pay all wages due to an employee, and RSA 275:44 governs liquidated damages, it is found that the claimant proved, by a preponderance of the evidence, that he is owed and due liquidated damages and it is hereby ruled that **this Wage Claim is valid in the amount of \$415.08.**

The employer is hereby ordered to send a check to the Department of Labor, payable to ██████████ in the total of **\$415.08 within thirty (30) days of the date of this Order.** Such is the Order of the Department.

September 9, 2021
Date of Decision

Original: Claimant
cc: Employer

JD/sw



Jeremy Micah Denlea, Hearing Officer