

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

v.

The Hot Yoga Studio  
CASE #62194

DECISION OF THE HEARING OFFICER

**APPEARANCES:** Claimant, self-represented  
Brooke Bayko, representing the employer

**NATURE OF DISPUTE:** RSA 275:43, I — Weekly (unpaid wages)  
RSA 275:44, IV — Employees Separated from Payroll  
before Pay Days (liquidated damages)

**DATE OF HEARING:** April 8, 2021

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed a wage claim on February 17, 2021, alleging that she taught yoga classes on three occasions in December 2020 but was not paid. She also seeks an award of liquidated damages. Notice of claim was sent to the employer on February 18, 2021. No objection was filed. The claimant requested a hearing and a notice of hearing was sent on March 24, 2021. Both parties participated remotely by video conference under a standing order of the Department, necessitated by COVID-19.

**FINDINGS OF FACT**

The following findings are based on the testimony of the claimant and Ms. Bayko, claimant's exhibits, and matters of record in the Department file. During the course of the hearing, the claimant acknowledged under oath that her written submissions to the Department were true, and those statements are treated herein as part of the testimony in the case.

Claimant is 32 years old and lives in [redacted], Massachusetts. She has a master's degree in special education and is a licensed elementary school teacher. She works full time as a teacher and has done so for seven years. She also completed a 200-hour yoga-training course and has a yoga-teaching certificate. She has taught yoga classes at a number of area studios.



Claimant started working as a yoga instructor for the employer in July 2020. She taught class on Mondays and Wednesdays, averaging seven to nine classes per month. During summer, she taught more frequently than that.

Claimant was paid monthly on the second of the month. Up until around October, she was paid \$30.00 per class; after that, \$35.00. Her monthly paystubs for the August through November 2020 showed gross earnings of \$432.00, \$249.00, \$245.00, and \$280.00, respectively. (Claimant's exhibit.)

Classes started at 5:30 p.m. and lasted an hour. Claimant lives about 20 minutes by car from the studio, which is located in Seabrook. She typically arrived at the studio at least a half-hour before class. If she needed a substitute, she would let the employer know by texting her, and the employer would teach the class. (The employer usually attended claimant's yoga classes as a participant.)

Claimant testified that she worked December 2, 7, and 9 (Wednesday, Monday, and Wednesday). She took the rest of the month off because she was self-quarantining in advance of Christmas. Also, she was getting a puppy on December 13.

Claimant testified that she was fired in early January 2021 over "political differences." Claimant did not receive her pay check for December by the regular pay day. In a text-message conversation with the employer on January 7, 2021, the employer asked her to return the studio key. Claimant responded that she would do so, "as soon as payroll comes through for December, for the 3 classes I taught." The employer responded that she would "do payroll when I get my key." (Claimant's exhibit.)

Claimant testified that she mailed the key back on January 16, 2021 with a note asking the employer to please process her payroll. On February 14, she sent an email to the employer, again requesting payment for December, to which the employer responded, "[A]s soon as I get my key I will pay you." Claimant then filed her claim for wages due plus liquidated damages.

Brooke Bayko, is the owner of the yoga studio. It opened in October 2019. The business has 10 employees. Ms. Bayko testified that the claimant was scheduled to work December 2, 7, and 9, but only worked December 2. She said the claimant came to the studio at around 5:00 p.m. on Monday, December 7 and said she was having a really hard time teaching school from home due to the COVID-19 protocols. After a brief discussion, claimant decided she would rather not teach that day and so the employer substituted for her and the claimant went home.



The employer testified that the same thing happened on Wednesday, December 9: claimant came in, was stressed-out, and did not feel like teaching, so she went home and Ms. Bayko taught the class.

Regarding payment for December, Ms. Bayko admitted she should have paid the claimant for her work on December 2, but she denied that she owed her for the other two days. She said that, when the claimant texted her on January 7 and asked to be paid for the three days in December, she did not stop to verify whether the claimant actually worked three days in December, so she did not specifically deny that assertion. It was only later, after the wage claim was filed, that she realized the claimant was asking for three days, rather than the one day she worked.

The employer testified that she has a record-keeping system that shows when employees are scheduled to work and who actually taught the class. She said that this system shows that claimant was scheduled for December 2, 7, and 9 but did not teach the classes on December 7 and 9. She testified that it shows that she (Ms. Bayko) taught those classes.

She testified that, although employees had individual logins, any employee could log in and make changes to the schedule. Asked whether the system created an audit trail to show when changes were made, she said that feature was not implemented. She testified that she did not think it was possible to make a change after the class had been taught.

#### **DISCUSSION AND CONCLUSIONS**

The claimant had the burden of proving by a preponderance of the evidence that she was 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).

Claim for unpaid wages. The only factual issue in the case was whether claimant taught her scheduled classes on December 7 and 9. On this issue, the claimant's testimony is found to be more credible.

The employer's testimony that claimant made the 20-minute drive to work on December 7 and 9, only to turn around and go home again without teaching, was improbable. It was not contested that the claimant generally let the employer know by text messaging when she needed a substitute. As to the suggestion that the claimant was too stressed out to teach on those two days, the claimant's testimony that she generally found teaching yoga a way to relieve stress is consistent with common knowledge about the benefits of yoga, and sheds further



doubt on the testimony that claimant was too stressed out to teach her yoga class.

The payment history from August through November (claimant's exhibit) tends to show that the claimant taught most if not every Monday and Wednesday class during that time frame. This tends to contradict the employer's testimony that the claimant was frequently asking for a substitute to take her class.

Lastly, the text-message conversation from January 7, 2021 includes an apparent acknowledgment by the employer that the claimant worked three days in December 2020. The idea that a business owner would not at least question a terminated (or about-to-be-terminated) employee's statement of how much she was owed, without checking first, is contrary to common sense and experience.

Department administrative rule Lab 803.03 (Notification and Records) provides, in pertinent part,

- (f) Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:
  - (1) Record payroll information so that time records, showing the time work began and ended including any bonafide meal periods, shall support individual pay sheets and that payroll sheets, in turn, shall support canceled checks or cash receipts;
  - (2) Require that time records with entries that are altered shall be signed or initialed by the employee whose record was altered; \* \* \*

Compliance with this rule gives an employer a ready means of resolving good-faith disputes such as the present one. The employer's testimony regarding the timekeeping system in use at the yoga studio did not demonstrate full compliance with this rule, particularly with regard to documenting record-alterations. In any event, no such records were submitted in evidence.<sup>1</sup>

An employer's failure to follow this rule does not relieve the claimant of her burden of proving her wage claim. But the claimant's testimony that she worked December 7 and 9 is supported by the circumstantial evidence and is credited. She met her burden of proving that she worked three days in December, not just one, as the employer contended. Thus, she was entitled to receive \$105.00 as her final wages.

Claim for liquidated damages. RSA 275:44 provides, in pertinent 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

<sup>1</sup> During the hearing, the employer requested leave to submit screen shots showing the time records for December 2020. The claimant objected that they were not disclosed two days prior to the hearing. Consistent with rule Lab 204.07 (b), the employer's request was denied.



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. \*\*\*

Pursuant to paragraph IV, an award of liquidated damages for improper withholding of wages requires a finding that the employer acted "willfully and without good cause." Our Supreme Court has construed this expression as a unitary phrase, meaning "voluntarily, with knowledge that the wages are owed and despite financial ability to pay them." Ives v. Manchester Subaru, Inc. (N.H. 1985). In the same opinion, the Court stated, "A willful act is a voluntary act committed with an intent to cause its results. It is not, by contrast, an accident or an act committed on the basis of a mistake of fact."

That standard is satisfied in this case. The evidence does not permit a finding that this was "an accident or an act committed on the basis of a mistake of fact." The employer testified that she did not pay the claimant even for the one day she knew was owed because she wanted her key back first (she testified that she never received the key). Employers are not permitted to withhold wages when due except under limited circumstances enumerated in RSA 275:48, I (Withholding of Wages). None of the exceptions apply here. As for the dispute over the amount of wages due, it is found that the employer knew or should have known that she owed the claimant for three classes taught in December. Thus, claimant proved she was entitled to liquidated damages.

Claimant was terminated in early January. Pursuant to RSA 275:44, II, she should have received her full wages within 72 hours of termination. For each countable day after that during which the amount remained unpaid, damages accrued at ten percent of the total due, up to a maximum amount equal to the wages due. By February 17, 2021, when claimant filed the instant claim, more than 10 countable days had passed and the maximum award had already been reached. It is therefore found that the claimant is entitled to a liquidated damage award of \$105.00

#### DECISION


As RSA 275:43 requires employers to pay an employee all wages due on the regular pay day, and as the Department finds that the claimant proved by a preponderance of the evidence that she was due wages in the amount of \$105.00, it is hereby ruled that this portion of the wage claim is **valid**.

As RSA 275:44, IV holds an employer liable to a discharged employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as the Department finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to do so, it is hereby ruled that this portion of the wage claim is **valid** to the extent of \$105.00.



The employer is hereby ordered to send a check to the Labor Department, payable to \_\_\_\_\_ in the amount of \$210.00 (less applicable, standard payroll deductions for the unpaid wage component of \$105.00, but not for the liquidated damage award), within 30 days of the date of this Order.

April 14, 2021  
Date of Decision

  
\_\_\_\_\_  
George A. Stewart, Hearing Officer

GAS/sw