

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

3LBC, L.L.C. d/b/a Servpro of Derry-Londonderry
CASE #62258

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Jimmy Lyndes, representing the employer

NATURE OF DISPUTE: RSA 275:43, I, V — Weekly (unpaid wages)
RSA 275:43, I, V — Weekly (unpaid vacation
pay/expenses)
RSA 275:44, IV — Employees Separated from
Employment before Pay Days (liquidated damages)

DATE OF HEARING: May 4, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed on March 1, 2021, alleging that he was owed wages for pay periods ending February 20 and February 27, 2021, also for 40 hours unpaid vacation time. Claimant amended the claim to add unpaid hours for company-required OSHA training and to state that he had received his wages for the period ending February 20, 2021 and also his final paycheck for period ending February 27, 2021; however, the latter check bounced and he incurred a \$35.00 overdraft fee as a result; the check was finally made good on March 26, 2021. Claimant also requested an award of liquidated damages. No objection was received from the employer.

The claimant requested a hearing and a notice of hearing was sent on March 31, 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 Jimmy Lyndes, exhibits offered by the claimant, and matters of record in the Department file. During the course of the hearing, the

claimant acknowledged under oath that his written submissions to the Department were true, and those statements and documents are treated herein as part of the testimony in the case.

Claimant is 30 years old and lives in Derry. He has an associate's degree in criminal justice, awarded in 2015. He is also has an IICRC water restoration license. Prior to working for the employer he worked as a restaurant cook and a package handler for FedEx. He started working for the employer in October 2019 as a water restoration technician. Claimant worked with a crew doing cleaning and restoration projects the Derry-Londonderry area. The company office is in Derry.

Claimant was paid \$18.00 per hour. Weekly pay periods ran from Saturday to Friday, with paydays the next Friday. (Claimant's exhibits.) He was usually paid by direct deposit.

Claimant testified that the employer gave its workers 40 hours' vacation pay after one year of employment. He said he had never seen an employee handbook or a posted notice of employee benefits.

On October 19, 2020 the claimant completed a 10-hour OSHA training program in construction safety and health and obtained a OSHA-10 certification card. The course was required by his employer. Claimant did the course at home on a computer. He was not paid for the time spent on it.

Claimant testified that he was fired on Wednesday February 24, 2021. He said he was in the company office talking with the office manager, Samantha Anderson. He was asking her for copies of his past paystubs. Company owner Jimmy Lyndes came in and told him he would have to leave or the owner would call police. Claimant said he left and did not work for the employer after that.

On February 26, 2021, the employer canceled claimant's regular direct-deposit payroll check for the week ending February 19, 2021 because claimant had not returned company owned equipment. On March 2, 2021 claimant came to the office to return the equipment.¹ Claimant received a paper check for the week ending February 19, 2021 (claimant's exhibit). He testified that the office manager refused to give him his final check until the next regular payday, Friday March 5, 2021.

On May 5, 2021, claimant returned to the office and picked up his final paycheck for the week ending February 26, 2021. That check was for 28.18 hours at \$18.00/hour, gross amount \$507.24, net \$420.51 (claimant's exhibit). He deposited the check into his account but it was returned unpaid, resulting in an overdraft to claimant's account and a \$35.00 overdraft fee. (Claimant's exhibit.) Claimant received and cashed the replacement check on March 26, 2021.

¹ In an email dated March 3, 2021, claimant said he returned the equipment and received the check on March 1, 2021; at the hearing, he said it was March 2, and the employer did not contest that it was one of those two days.

Claimant's final wages did not include payment for the required ten hours of OSHA training and did not include a vacation payout for the 40 hours he claimed he was entitled to.

Jimmy Lyndes, 50, lives in Dover. He has a bachelor of arts degree in business finance. He is one of the owners of the business, a Servpro franchise purchased in November 2016. The employer's legal name is 3LBC, L.L.C. It has ten employees.

Mr. Lyndes testified that the company gives its employees paid holidays after one year of employment. Beyond that, it has no generally applicable vacation policy. Instead, the company may award individual employees vacation time on a case-by-case basis. If the company decides to give an employee paid vacation time, the individual employee is notified and a record is placed in his or her personnel file. Mr. Lyndes testified that there is no written vacation policy statement in a handbook or notice regarding vacation days posted in the workplace. He further testified that the claimant was never offered paid vacation time.

Mr. Lyndes testified that the company did not pay the claimant his final check within 72 hours because he did not return the company's equipment within that time frame. He did not contest that the claimant returned the equipment on March 1 or 2, 2021. He also did not contest the claimant's testimony regarding the ten-hour OSHA training in October 2020.

On February 24, 2021, the claimant was part of a crew of three employees cleaning floors in a warehouse. Mr. Lyndes drove by the site at around 9:30 a.m. to check on their progress. He observed that the claimant was not working and was talking on his cell phone. He told the claimant to get to work. Mr. Lyndes stopped by again about half an hour later and claimant was still not working.

Mr. Lyndes returned to the office and, around noon, he looked at the building surveillance monitor and saw the claimant enter the office and commence talking with the office manager, Ms. Anderson. Mr. Lyndes came into the room and asked the claimant what he was doing when he was supposed to be working. The claimant responded that it was none of his business as he was saying goodbye to Ms. Anderson. Asked what he meant by that remark, claimant said he was not working for the employer any more. Mr. Lyndes told him, in that case, he was not permitted to remain in the building and to get out before he called police. Claimant left at that point. Mr. Lyndes testified that he interpreted the claimant's statements and behavior as a resignation.

Mr. Lyndes testified that, sometime in November 2020, the company had given its employees a written notice stating that, if they left the company, they must return all company equipment before they would be paid their final wages. He stated that claimant signed an acknowledgment that he received and agreed to the terms. (The claimant denied ever receiving or signing such a document.)

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he 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 claimant conceded that, with the exception of his vacation claim and his OSHA-10 claim, he had received his final wages, albeit late. Claimant also sought reimbursement of the \$35.00 bank overdraft fee that resulted from the bounced check. Employer's testimony that this was due to a bank error is not credited, and the amount is deemed to be an expense properly charged to the employer.

Claim for Unpaid Vacation Pay. Vacation pay, when such a benefit is a matter of employment practice or policy, is considered wages when due. RSA 275:43, V.

Claimant was vague in his explanation of why he believed there was a 40-hour vacation benefit after a year of employment, and unclear as to the details of such a policy. He had never seen anything in writing offering a vacation benefit and did not testify as to the vacation policy being applied to anyone while he was employed at the company. The paystubs he submitted made no reference to vacation pay or other benefits. The employer's testimony that the company offered no generally applicable benefits except for holiday pay after one year is credited.

At the same time, it is noted that by law and regulation, employers are required to provide written notice of policies and procedures as to benefits such as paid vacation time. Based on Mr. Lyndes' testimony, it appears that the employer is not in strict compliance with these requirements. However, non-compliance with posting and notice requirements does not relieve the employee of his burden of proving entitlement to the benefit in question.

In this case, the claimant failed to meet his burden of proof as to the vacation pay claim.

Claim for unreimbursed time spent on required training. Pursuant to RSA 275:42, "wages' means compensation...for labor or services rendered by an employee." If the time spent in the OSHA training constituted hours worked for the employer, then claimant as an hourly employee was entitled to be paid for it. As to what constitutes hours worked, Department Administrative Rule Lab 803.04 incorporates Title 29 Part 785 of the Code of Federal Regulations, promulgated by the United States Department of Labor. In pertinent part, the referenced federal regulations provide as follows:

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

- (a) Attendance is outside of the employee's regular working hours;
- (b) Attendance is in fact voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee's job; and
- (d) The employee does not perform any productive work during such attendance.

29 C.F.R. 785.27.

The claimant's testimony regarding the ten hours of required training for OSHA-10 was supported by documentary evidence that was not contradicted by the employer. At a minimum, the above criteria (b) and (c) were not met: attendance was required and the training related to claimant's work. Accordingly, it is found that the time spent completing the training constituted hours worked, for which the claimant was entitled to be paid at his regular hourly rate.

Claim for liquidated damage award. RSA 275:44 provides, in pertinent part,

II. Whenever an employee quits or resigns, the employer shall pay the employee's wages no later than the next regular payday...either through the regular pay channels or by mail if requested by the employee....

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.

The employer's testimony that the claimant quit the job voluntarily is credited. The employer told claimant to leave the premises only after the claimant informed him that he was "saying good-bye" to the office manager—a statement that, under the circumstances, the employer reasonably took to be a notice that he was quitting the job. Therefore, claimant's final wages were due on the next regular payday following his resignation. The next regular payday was March 5, 2021. Claimant did receive a check on that date; however, it bounced. The Claimant did not actually receive his final wages until March 26. He still has not been paid his for his time spent completing the OSHA-10 certification and the overdraft fee.

Pursuant to RSA 275:44, 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 single 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). 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."

The standard for a finding of "willful and without good cause" is satisfied in this case. The employer's statement that the initial non-payment of its check was due to a bank error, absent any documentary supporting evidence, is not credited. Moreover, such an error would not justify a delay from March 5 to March 26, 2021 in claimant receiving his final wages.

RSA 275:44, IV provides for liquidated damages equal to ten percent of the unpaid wages for every day after the date on which payment was due, excluding Sundays and legal holidays, up to a maximum damage assessment equal to the amount of wages that were due. This maximum is reached when the delay continues for 10 days excluding Sundays and legal holidays.

The total amount due to the claimant as of March 5, 2021 was as follows:

Gross earnings for week ending February 26, 2021	\$507.24
Amount owed for OSHA-10 training (10 x \$18.00)	<u>\$180.00</u>
Total wages due on March 5, 2021	\$687.24

This amount remained unpaid from March 6 until March 25, 2021 when a portion of it (the gross earnings) was paid. Within that period there were 17 days (Sundays and legal holidays excluded). In this case, the tenth countable day was March 17, 2021.

Accordingly, the claimant is entitled to a liquidated damage award of \$687.24.

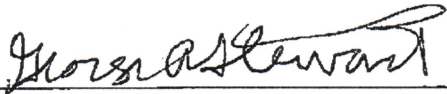
DECISION

Based on the testimony and evidence presented, the claim for unpaid time spent completing the OSHA-10 is found to be **valid** to the extent of \$180.00. The claim for reimbursement of the \$35.00 overdraft fee is found to be **valid**. The claim for liquidated damages is found to be **valid** to the extent of \$687.24. The total award, liquidated damages plus the unpaid wages, is as follows:

OSHA-10 hours worked	\$180.00
Overdraft fee	\$ 35.00
Liquidated damage award	<u>\$687.24</u>
Total	\$902.24

The employer is hereby ordered to send a check to the Department, payable to _____ in the amount of \$902.24, less applicable payroll deductions/withholding from the \$180.00 for hours worked, within 30 days of the date of this Order.

May 26, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb