

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

T. Antaya, L.L.C.
CASE #62304, 62339

DECISION OF THE HEARING OFFICER

APPEARANCES: Leif Becker, Esq., representing the claimants
Timothy Antaya, representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43-b — Payment of Salaried Employees
(unpaid salary)
RSA 275:43, V – Weekly (unpaid
vacation/PTO/holiday pay)
Statutory interest

DATE OF HEARING: May 11, 2021 (record held open until May 25, 2021)

BACKGROUND AND STATEMENT OF THE ISSUES

Claimant filed on March 11, 2021. She alleged that she is owed her regular semi-monthly salary due February 15 and February 28, 2021, nine days of holiday pay, four weeks of PTO, and statutory interest. Notice of the claim was sent to the employer on March 12, 2021. No objection was received from the employer. Notice of hearing was sent on April 8, 2021. After filing, claimant acknowledged receipt of a net payment for the two missing pay periods in February, but questioned accuracy or correctness of the deductions.

Claimant filed on March 23, 2021, amended April 7, 2021. In her amended claim, she alleged that she is owed her regular salary for five semi-monthly pay periods February 15 through April 15, 2021; 4 weeks of vacation pay, 10 days of PTO, one day's pay for working on a holiday, and statutory interest. Notice of the claim was sent to the employer on March 24, 2021. No objection was received from the employer. Notice of hearing was sent on April 8, 2021. After filing, claimant acknowledged receipt of a net payment for

the two pay periods in February 2021, but questioned the accuracy or correctness of the deductions.

The hearings were consolidated. All parties participated remotely by video conference under a standing order of the Department, necessitated by COVID-19. The claimants were together in one location, their attorney in another, and Dr. Antaya in another. At the conclusion of the hearing, the record was held open to permit the parties to submit closing arguments.

Preliminary issues regarding untimely disclosure of witness and evidence. At the start of the hearing, Dr. Antaya indicated that he intended to call employee Holly Caldas as a witness. Counsel for the claimants objected on grounds that Ms. Caldas had not been previously disclosed as a witness, contrary to the two-business-day requirement of Lab Rule 204.07. Counsel further argued that his clients would be prejudiced in the event the witness were allowed to testify, because he had not prepared a cross-examination. The argument of prejudice was credited and the witness was excluded.

Dr. Antaya objected to the admission of claimant's exhibits as untimely because they were only provided to him one day prior to the hearing, contrary to the requirements of Lab 204.07. This objection was taken under advisement and ruled upon at the end of the hearing. It was denied in part and granted in part. Given the nature of the exhibits, it was determined that the employer was not surprised or prejudiced by the material contained therein. Nevertheless, the employer was granted the right to challenge the authenticity of the exhibits in his post-hearing submission. For further details, parties are referred to the procedural letter from the Department dated May 12, 2021.

FINDINGS OF FACT

The following findings are based on the testimony of the two claimants, Timothy Antaya, claimants' exhibits, and matters of record in the Department file. During the course of the hearing, the claimants 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. For the sake of clarity, the claimants are referred to herein by their first names.

Claimant [] is [] years old and lives in Hampton. She has a bachelor of arts degree and an associate degree in radiology for ultrasound. She has worked for Dr. Antaya since May 2013. Her responsibilities for the employer included business development, HR, and marketing. She also was involved in recording payroll information for employees. In June 2020, the finance person left the company. After that, [] took on those responsibilities, including reporting payroll data to the payroll company.

testified that, prior to 2021, the employer sometimes fell several weeks behind in making payroll. In 2021, the company again fell behind. Ruth testified that in February, she was being confronted by employees concerned about not receiving their paychecks. At Dr. Antaya's request, she was also occupied with filling out paperwork for the COVID-19 PPP program. She had questions about how the PPP receipts were being handled and had some ideas on how to structure the company's finances so that it could make its payroll.

For some of the time in mid-February 2021, Dr. Antaya was out of the office. relayed her concerns and suggestions to him about these matters in a telephone conversation and he became very angry. On the evening of February 26, 2021, Dr. Antaya notified her that she was terminated effective that day. She testified that she was not allowed back into the building after that.

Although she worked in the office throughout both pay periods in February 2021, did not receive her paycheck for that month. She testified that her semi-monthly salary was \$7,947.92.

Dr. Antaya's job offer letter to provided in pertinent part,

You will be eligible to participate in paid time off benefits and will accrue 15 days of PTO per year, plus you will receive. [sic]

You will have 10 vacation days in addition to the PTO days. After 5 years of employment, you will have earned an additional 10 vacation days—20 total vacation days and 15 PTO days. All PTO and Vacation Days will begin on January 1st following the first year of your employment at Antaya.

Cl. Exh. 10–12.

testified that she had not used any PTO in 2021 and had only taken one of the ten paid holidays. She said that annual PTO and holiday benefits were awarded at the start of the year and vested on that date; they did not have to be earned by time served during the year. She further testified that the company practice with respect to employees leaving the company was to pay out their unused PTO and vacation time, without proration for the remainder of the year following their separation. She said that the employee handbook stated these same policies. No handbook was offered into evidence.

After she filed the instant claim, received a check for \$11,800.22, which purported to cover her net pay after taxes for February. Cl. Exh. 16. She submitted in evidence a paystub for February 1–15, 2021 and dated February 12, 2021. It showed current gross earnings of \$8,197.92, and a net after taxes and deductions of \$5,900.11. Cl. Exh. 8.

also testified that her daughter worked from home for the employer from March through April 15, 2021.

Claimant _____ is _____ and lives at home with her mother _____. She started working for the employer in March 2014, working part-time after high school, and subsequently full-time as office manager, HR assistant, and marketing person. She testified that she was responsible for the company's social media platforms. Her semi-monthly salary was \$2,750.00.

Dr. Antaya's job offer letter to _____ provided in pertinent part,

PTO—You will have 15 days of PTO per year (10 are scheduled company wide observed holidays). As your job requires you to be in the office for mail and shipping, if you must be in the office on a PTO company holiday, you will be paid an additional days pay.

Vacation—You will have 10 vacation days in addition to the PTO days. After 5 years of employment, you will have earned an additional 10 vacation days—20 total vacation days and 15 PTO days.

All PTO and Vacation Days will begin on January 1st following the first year of your employment at Antaya.

Cl. _____ Exh. 11–12.

_____ testified that she worked every pay period through April 15, 2021 and had not taken any PTO. She also worked on President's Day, February 15, 2021, a paid holiday, explaining that she came into the office that day to accept deliveries.

After February, she worked from home. This was the result of an email she received at the end of February from Dr. Antaya, stating that "we would all be working from home." She testified that while working from home, she mostly worked on the company's social media, answered emails, tried to "put out fires from what had been going on with the money issues with my mom," and HR matters.

_____ testified that she was terminated by email on April 15, 2021, "from the yoga instructor," Holly Caldas. She also referred to an (apparently earlier), "confusing email saying that she [Ms. Caldas] was now my supervisor." She said that she tried to contact Dr. Antaya for clarification but was unable to reach him.

_____ said that she did not receive her regular semi-monthly paychecks for February, March, and the first half of April. After she filed the instant claim, she received a check for \$4,734.78, which purported to cover her net pay after taxes and deductions for the two February pay periods. Cl. _____ Exh. 16. She submitted in evidence a paystub for February 1–15, 2021 and dated February 12, 2021. This paystub showed current gross earnings of \$2,750.00, and a net after taxes and deductions of \$2,187.39. Cl. _____ Exh. 8.

On cross-examination, _____ initially denied receiving an email from Dr. Antaya on February 26, 2021. Questioned further, she agreed that she received an email on that date from Dr. Antaya's email address, but said she believed it was authored by Holly Caldas. The email asked her to provide a doctor's note to

explain her absences and it notified her that Ms. Caldas was her new supervisor. She was to contact her new supervisor for further instructions.

Her answer as to whether she tried to contact Ms. Caldas was unclear; however, she testified that she made repeated attempts to contact Dr. Antaya at the work phone. She added that she heard he was using "a burner phone and chasing a loan shark in New York" so she couldn't get ahold of him.

Asked who gave her her assignments for March and April 2021, she said, "My mom did." She testified that she was not aware that [redacted] was no longer employed by the company.

On April 21, 2021, [redacted] sent an email to Dr. Antaya, acknowledging receipt of a net check for two pay periods but claiming back wages still due for March 3–April 15, 2021. The email also contained additional allegations largely consistent with claimant's testimony at the hearing. Dr. Antaya replied shortly afterwards, notifying the claimant that, by not contacting Ms. Caldas as he had requested her to on February 26, 2021, and by not making herself available for work after that, [redacted] made February 26, 2021 her last day of work. His email also contained allegations consistent with his testimony at the hearing. Claimant replied later, reiterating her demand for wages due and accusing Dr. Antaya of lying. (cc'd this email thread to the Department.)

Timothy Antaya, Ph.D. is 65 years old and, as of the date of hearing, lived in Hampton Falls. He is the owner and sole member of the employer, a limited liability corporation, founded in 2012 to develop new medical devices for next-generation cancer treatment. Cl. [redacted] Exh. 9. He had about seven employees as of the date of the hearing. Prior to COVID-19, he had as many as 22.

Dr. Antaya testified that the company had never made a separation payout of PTO, vacation, or holiday pay to any employee leaving the company. He further stated that [redacted] was in charge of developing benefit policies and had specifically recommended against providing such separation benefits.

He also denied that financial irregularities were driving [redacted] separation from the company. All grants, contracts, and awards to the company were reviewed by a CPA. As the sole member of the L.L.C., Dr. Antaya was personally liable for any misappropriation of company funds. The CPA would "decide what's what." No CPA audits were introduced into evidence.

Regarding the past problems with making payroll, which he attributed to COVID-19, Dr. Antaya said he had suggested to [redacted] and other employees that he might temporarily shut the company down until the economy returned to normal, but [redacted] and the other employees indicated that they would prefer that he continue operating the company notwithstanding its difficulties in making payroll on time. He said the only person who did not ultimately receive his pay

for 2020 was himself, and that he invested over \$100,000.00 of his personal funds to keep the company going in 2020. No supporting documentation was provided for this testimony.

Regarding the delay in paying _____ and _____ for February, Dr. Antaya testified that _____ had made errors in PPP reports that were due in January and thus the company's PPP award were delayed. He also stated that when he returned to the office on February 22, 2021 from a trip to New York, payroll records and many other confidential documents were missing, and these had to be reconstructed before payroll could be prepared.

Regarding the events of February 2021, Dr. Antaya testified that he left the office on February 19, 2021 for a trip to New York City to meet with investors. While there, he received several phone calls from employees who said they were being harassed by both claimants. _____ was calling him with questions about documentation that she said was needed for the pending PPP application. After he returned to the office on February 22, 2021, he found that the financial information he needed was missing. At that point he called the police and locked the building. He said the police came and completed a report. No documentary evidence of a police investigation was offered in evidence.

Dr. Antaya said one particular harassed employee was a young mechanical engineer, a key employee, whose condition was deteriorating as a result of "gaslighting" by _____ and _____. Dr. Antaya testified that he terminated Ruth because of this harassment.

Regarding _____ Dr. Antaya testified that he did not fire her at that point, because he had not "lost hope for her." Instead, he assigned her to a new supervisor, Holly Caldas. He had heard that _____ had been out of the office due to a serious illness; that was why, in his February 26, 2021 email, he requested that she provide a doctor's note, in addition to asking her to contact her new supervisor, Ms. Caldas.

Dr. Antaya testified that Ms. Caldas was the health and wellness director for the company. It was a part-time job, 10 hours a week. _____ was the one who hired Ms. Caldas. It was Ms. Caldas' responsibility to make sure that employees had a safe and healthy environment to work in. Prior to 2020, the company had as many as 22 employees and also frequently had international visitors. The young engineers in his employ expected more than a bare-bones workplace. The office was a 10,000-sq. ft. building. It included an exercise platform where employees could practice with TRX (strength training) equipment. They could also participate in yoga exercises conducted by Ms. Caldas.

Dr. Antaya testified that, after he terminated _____ he took Ms. Caldas on full time, starting March 1, 2021. She was placed in charge of the back-office activities. One of her job responsibilities was to supervise _____

Dr. Antaya testified that [redacted] made no effort to contact him from the last week of February until March 28, 2021. It was not clear from his testimony what if any communication occurred on the latter date. Asked by the hearing officer why he waited to terminate [redacted] until April 15, 2021, if she was not in touch with the company in March, he said he was preoccupied during the month of March with getting the PPP application in and dealing with the fallout from the gaslighting perpetrated by [redacted]. He testified that, because the company never received a response from [redacted] after his February 26, 2021 email, his understanding was that she had abandoned her job after that date.

Dr. Antaya agreed that the company did send [redacted] an email around April 15, 2021 notifying her that she was no longer an employee. However, other than the emails dated April 21, 2021 referenced previously, there were no emails in evidence and the exact wording of the purported April 15, 2021 letter was not established.

On cross-examination, Dr. Antaya testified that employees were permitted to work at home in 2020 and 2021 due to COVID-19. He denied that the company was being evicted from its offices, but said that an eviction process was pending. He said that, notwithstanding the eviction proceeding, it was not going to occur and the company would remain in its current location. He testified that the basis of the eviction was not nonpayment of rent but "some strange interaction in February" between the landlord and [redacted]. The landlord was fully aware of the company's lean financial circumstances and was willing to wait for payment of the arrears. No further details were provided regarding the strange interactions between [redacted] and the landlord or the status of the eviction proceeding.

Dr. Antaya testified that he had been in arrears on payroll on three occasions in the past, lasting for four, five, and three or four pay periods, respectively. Despite these financial difficulties, he still kept Ms. Caldas on the payroll. As for the date when he actually terminated [redacted]'s employment, Dr. Antaya said he did not know the exact date, but Ms. Caldas would have known that. Asked why, if [redacted] was terminated effective February 26, 2021, the company felt the need to tell her on April 15, 2021 that she was terminated, Dr. Antaya responded that, under the circumstances, where [redacted] had simply been completely out of touch, some clarification was needed.

DISCUSSION AND CONCLUSIONS

The claimants had the burden of proving by a preponderance of the evidence that they were 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).

Claims of

The employer did not contest that, as of the date the claim was filed, had not been paid her wages due for February. After the claim was filed, she received a payment of \$11,800.22, purporting to represent her net pay after deductions for the two pay periods in February. The claimant's exhibits included a paystub for the February 1–15, 2021 showing current gross earnings of \$8,197.92, and a net after taxes and deductions of \$5,900.11. Cl. Exh. 8. Multiplying the latter figure by two gives \$11,800.22. It is therefore found that the claimant received her net wages due for February 2021, albeit late. Although there was an allegation that the deductions were calculated incorrectly, the claimant did not raise an issue under RSA 275:48 (Withholding of Wages). Moreover, employers are expressly authorized to withhold and deduct amounts for taxes and benefits requested by the employee. RSA 275:48, I(a), (b). To the extent the claimant is challenging whether the employer actually applied the withheld amounts properly to federal taxes or employee benefit programs, any such claim would be outside the scope of the instant proceeding and would properly be addressed to the Department's Inspection Division.

With regard to the claim for PTO and vacation time, argued that, on January 1, 2021, she was awarded four weeks' vacation pay plus 15 PTO days. (The PTO days included the 10 paid holidays set forth on Cl. Exh. 14.)

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. The terms and conditions of such benefits are at the sole discretion of the employer. However, RSA 275:49, V and Lab 803.03 (f) (6) require such policies to be in writing and acknowledged by the employee.

The only writing in evidence was the offer letter, which stated as follows:

You will be eligible to participate in paid time off benefits and will accrue 15 days of PTO per year, plus you will receive. [sic]

You will have 10 vacation days in addition to the PTO days. After 5 years of employment, you will have earned an additional 10 vacation days—20 total vacation days and 15 PTO days. All PTO and Vacation Days will begin on January 1st following the first year of your employment at Antaya.

Cl. Exh. 10–12.

The above-quoted language, standing alone, cannot reasonably be construed as an award of the entire annual vacation and PTO days, as a vested benefit, effective at the start of each calendar year. A policy of awarding full vacation time at the start of the year without pro-ratio is unusual and will not be inferred.

The benefit that [redacted] is claiming would be, in the hearing officer's experience, quite exceptional. Missing is any language referring to an award of PTO and vacation days fully vested as of the first of the year. The statement, "All PTO and Vacation days will begin on January 1st following the first year of your employment," (emphasis added) simply does not do it. The policy states, "You will accrue 15 days of PTO per year" (emphasis added). This language is consistent with a benefit that must be earned through employment during the year. Just as importantly, the policy makes no provision for a separation payout of unused vacation or PTO time. It was not contested that unused vacation days at the end of the calendar year could not be carried over to the next year. Such use-it-or-lose-it policies rarely if ever coexist with a vacation payout on separation, and will not be inferred without credible evidence.

[redacted] argument that she had a right to payment for holidays that had not even occurred yet is likewise without support in the written policy. She acknowledged that she received her holiday pay for President's Day, the only holiday that occurred prior to her separation from the company.

[redacted]'s testimony that the company's employee handbook "was consistent with" her view of the policy is not credited. No handbook was offered into evidence. Had the handbook clearly provided the benefit as she described it, it seems likely she would have offered it in evidence. Her testimony that the company practice was consistent with her claim that she was due a separation payout of her vacation and PTO time is also not credited. As the person responsible for managing the office since 2014, it would be expected that she could produce independent corroborating evidence of such practice.

It is found that the [redacted] failed to meet her burden of proof as to the claim for a separation payout of PTO, vacation, or holiday time.

Claim for interest. Pursuant to RSA 524:1-b, simple interest begins to accrue from the date of writ, which in this case corresponds to the date the claim was filed, March 11, 2021, and continues through the date of judgment, June 22, 2021. Galloway v. Chicago-Soft, Ltd. (N.H. 1998). Given that [redacted]'s wage claim was satisfied on April 15, 2021, that date is used instead of the date of judgment. Using the applicable annual interest rates, set via RSA 336:1, the total award of interest is as follows:

Principal: \$11,800.22	
March 11 through April 15, 2021 (35 days)	
at 2.09 percent per annum	\$23.65

Claims of

The employer did not contest that, as of the date the claim was filed, [redacted] had not been paid her wages due for February. After the claim was filed, [redacted] received a payment of \$4,374.78, purporting to represent her net pay after deductions for the two pay periods in February. The claimant's exhibits included a paystub for the February 1–15, 2021 showing current gross earnings of \$2,750.00, and a net after taxes and deductions of \$2,187.39. Cl. [redacted] Exh. 8. Multiplying the latter figure by two gives \$4,374.78. It is therefore found that the claimant received her net wages due for February 2021, albeit late. Although there was an allegation that the deductions were calculated incorrectly, that issue is outside the scope of this proceeding for reasons stated in the discussion of [redacted] claim.

Claimant's testimony that she worked in the office on President's Day, a paid holiday, is credited. The offer letter expressly provided for an additional day's pay in such circumstances. Therefore, [redacted] should have received a day's pay for that work. Her calculation that her \$2,750.00 semi-monthly salary worked out to a daily rate of \$253.84 is also credited.

Claimant's testimony that she worked for the company from March through the first half of April 2021 is not credited. She wasn't in the office and she offered no documentary proof of any work she did from home on the social media platforms, responding to emails, or other company business. She said that her supervisor during this time was [redacted], however, the evidence established that [redacted] was terminated at the end of February and claimant's new supervisor was Ms. Caldas. Claimant's testimony that she was unaware that her mother no longer worked for the company is not credited; clearly [redacted] was aware of the fact, and Ruth did not testify that she continued to supervise [redacted]'s work after her own termination.

Claimant's argument that the employer's alleged April 15, 2021 termination letter showed that she was still an employee on that date is not persuasive. No such document was produced and the exact wording of the alleged termination letter was in dispute. On the other hand, Dr. Antaya's April 21, 2021 email was consistent with his testimony that the claimant abandoned her job after February 26, 2021.

[redacted] testimony was frequently evasive and marked by gratuitous personal attacks on Dr. Antaya and Ms. Caldas. She denied receiving the February 26, 2021 email from Dr. Antaya but then admitted that she did get the email, but said that it was really from Ms. Caldas. She was evasive as to the content of that email; eventually she acknowledged that Dr. Antaya had asked her for a medical note regarding her illness and also instructed her to contact her new supervisor, Ms. Caldas, for future assignments.

Asked whether she ever contacted Ms. Caldas, she referred to this person dismissively as "the yoga instructor." This did not serve as a justification for not complying with Dr. Antaya's direction. Similarly, in explaining why she did not reach Dr. Antaya by telephone, she stated that she had heard he was using "a burner phone and chasing a loan shark in New York" so she couldn't get ahold of him. This comment was unsubstantiated and amounted to little more than a personal attack.

During testimony, could frequently be heard in the background speaking to Despite admonishment from the hearing officer, she continued to do so. This circumstance did not speak well for either claimant's credibility. During Dr. Antaya's direct testimony, both claimants frequently attempted to interject their own comments. They were requested to stop but continued, and therefore the hearing officer found it necessary to mute them for the rest of Dr. Antaya's testimony. (Claimants' attorney was not muted.)

With regard to claim for four weeks of vacation time and 10 days of PTO, this claim fails for the same reasons that did: The description of the PTO, holiday, and vacation benefits in Dr. Antaya's offer letter, Cl. Exh. 12, cannot reasonably be construed as an award of the entire annual vacation and PTO days, as a vested benefit, effective at the start of each year. No other supporting documentation was provided, nor did claimant prove that the company practice was consistent with her claim. Neither did she prove entitlement to payment for holidays that occurred after her termination. Finally, she did not prove that the company had a practice of paying out vacation, holiday, and PTO to employees on separation.

Claim for interest. Pursuant to RSA 524:1-b, simple interest begins to accrue from the date of writ, which in this case corresponds to the date the claim was filed, March 23, 2021, and continues through the date of judgment, June 22, 2021. Galloway v. Chicago-Soft, Ltd. (N.H. 1998). s claim for unpaid salary was satisfied on April 15, 2021, that date is used instead of the date of judgment. Using the applicable annual interest rates, set via RSA 336:1, the award of interest for this claim is as follows:

Principal: \$4,374.78
March 23 through April 15, 2021 (23 days)
at 2.09 percent per annum \$5.76

With respect to the claim for working on a holiday (still unpaid), the date of judgment, June 22, 2021 is used as the end date for accruing interest. The award of interest for this claim is as follows:

Principal: \$253.84
March 23 through June 22, 2021 (91 days)
at 2.09 percent per annum \$1.32

Total interest due to is \$7.08.

In conclusion, it is noted that counsel for the claimants argued that the employer presented no documentary evidence to contradict the claimants' claims. However, it was the claimant's burden to prove their claims. With respect to their claims for a separation payout of PTO, holiday, and vacation time, they failed to do so.

DECISION

Based the evidence presented, it is found that _____'s claim for unpaid wages is **valid** but was satisfied by the employer after the claim was filed. She is awarded interest in the amount of \$23.65. The claim for unpaid vacation, holiday, and PTO time is found to be **invalid**.

It is found that _____'s claim for unpaid wages is **valid** but was satisfied by the employer after the claim was filed. Her claim for one day's pay is **valid** to the extent of \$253.84. She is also awarded interest of \$7.08, for a total of award of \$260.92. Her claim for unpaid vacation, holiday, and PTO time is found to be **invalid**.

The employer is hereby ordered to send a check to the Labor Department, payable to _____ in the amount of \$23.65, within 30 days of the date of this Order.

The employer is hereby ordered to send a check to the Labor Department, payable to _____ in the amount of \$260.92, less applicable deductions for the unpaid wage component of \$253.84 but not for the statutory interest, within 30 days of the date of this Order.

June 22, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb