

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

Pain Specialty Group
CASE #62598

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Margaret O'Brien, Esq., representing the employer

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

DATE OF HEARING: June 11, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed on April 30, 2021, alleging that she is owed a separation payment for unused earned time totaling \$8,677.30. She also requested an award of liquidated damages. Notice of the claim was sent to the employer on May 4, 2021. The employer's objection was received on May 14, 2021. Claimant requested a hearing and the hearing notice was sent on May 24, 2021. The 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 the employer's owner Anh Ngo, M.D., exhibits offered by the parties, and matters of record in the Department file. During the course of the hearing, the 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 34 years old and lives in Maine. She has a master of science degree in nursing, awarded in 2016. Prior to working for the employer,

she worked as a registered nurse and then as a nurse practitioner at a pain intervention clinic.

In May 2018, claimant was hired as a nurse practitioner at the employer's pain intervention clinic in Exeter. At that time, the clinic was owned by Manuel Sanchez, M.D. In 2019, the clinic moved to Newington. In January 2020, Anh Ngo, M.D. purchased the practice.

Claimant's duties included managing patients with chronic pain, prescribing for them, follow-ups, interventional procedures, and some administrative work such as monitoring opioid agreement compliance. Company benefits included "earned time" (ET):

Earned Time is an innovative benefits program that combines traditional time off benefits into one convenient bank of benefit hours. Employees may draw from their Earned Time Bank for absences due to vacations, personal or family illness, holidays and personal time off needs. Employees begin accruing Earned Time the first day of employment.

Er. Exh. B 4 (Employee Manual 2020). As a salaried employee, after one year, claimant accrued 200 hours (five weeks) of ET per year. Employees could carry over a maximum of 80 unused accrued ET hours into the next calendar year. Excess unused hours were forfeited. The company also offered a once-a-year cash-out option whereby an employee could request a lump sum payment in lieu of time off for up to 40 hours of accrued ET.

Claimant testified that, when she started in 2018, there were about eight or nine employees, including a case manager and an office manager. The office manager took care of payroll, which included tracking individual employees' ET usage and providing the necessary information to the employer's payroll-service provider. To track ET usage, the office manager referred to the clinic's daily calendars plus emailed requests and notices from employees.

The biweekly paystubs, Cl. Exh. H, showed holiday, PTO, and sick time, both current and year-to-date; these figures were listed under the heading "Earnings." Under the heading, "Additional information," they showed current "time off balances." However, the only time-off balance shown under this heading was for "PTO"; there was no separate balance shown for sick time and holiday time. It is understood that the figure reported as PTO under "Time off balances" included all the absences charged against ET.

Claimant testified that, not long after Dr. Ngo took over the practice, the office manager and the case manager left, and some other staff members eventually left as well. With the shortage of staff, she was unable to find time to use all her vacation days.

After the office manager's departure, Dr. Ngo took over the payroll duties. Claimant testified that, from that point forward, the ET accounting on her paystubs was inaccurate. The paystubs no longer updated her usage of PTO,

sick hours, or holiday hours. Her PTO balance (understood as ET balance) kept climbing as if she was not using any ET.

Claimant testified that she sent Dr. Ngo multiple emails to let him know that she had taken time off and it was not being reflected on her paystubs. As evidence of this, she provided a copy of an email she sent him on November 1, 2020. Cl. Exh. A. Claimant testified that, notwithstanding her email, the paystub information was never corrected. Her paystub dated December 24, 2020 showed 210.3 hours of unused accrued ET. Cl. Exh. H.

On March 11, 2021, claimant gave three weeks' notice in a cordial letter to Dr. Ngo. Er. Exh. C.

Claimant testified that she met with Dr. Ngo in late March and they discussed her unused ET balance. She said Dr. Ngo questioned the amount of time she was claiming. On March 29, 2021, she sent him an email stating that she had an unused ET balance of 114.30 hours from 2020 and 51.66 from 2021, for a total of 165 hours. Dr. Ngo replied shortly afterward, asking for clarification. Claimant replied, in pertinent part,

165 hrs is what is left for ET hours payout see below:

ET accrued 2020: 191.88 hours +50.42 (2019)

ET used 2020: 104 hours

ET balance 2020: 138.30

ET accrued 2021: 51.66 (based on 7 pay periods)

ET used 2021: 24

ET balance 2021: 27.66

$138.30+27.66=165.96$

Total ET balance left for payout: 165

Cl. Exh. B.

Claimant's last day at work was April 2, 2021. She received her final paycheck on April 15, 2021, covering the pay period March 29–April 11, 2021. There was no payout for unused accrued ET, but there was a bonus payment of \$5,000.00. The paystub showed a PTO balance of 229.34 hours. Cl. Exh. I.

On April 18, 2021, claimant wrote to Dr. Ngo acknowledging the bonus payment but stating that she had \$8,680.95 for unused ET coming to her and thus he still owed her \$3,680.95. Cl. Exh. D. In the letter, she also referred to a 12 x 31 spreadsheet Dr. Ngo had provided showing the number of patients claimant had seen each day in 2020; there were a number of days showing that she saw either none or less than a full days' worth of patients. Er. Exh. D. In her reply email, claimant stated that she was sending back an annotated version of the chart. In the annotated version, claimant indicated that 25 days were true days off, "whether it was illness, COVID related illness or planned vacation time," as opposed to "low census days" and not days off. Er. Exh. E (emphasis added).

On April 23, 2021 Dr. Ngo the emailed the claimant for further information about those days off that were not PTO: specifically, whether claimant was experiencing symptoms and sought medical attention, was subject to a physician-ordered / government ordered quarantine, child care due to sickness, or caring for child whose school or daycare was closed. Cl. Exh. E. Claimant responded on April 25, 2021, indicating that four days in 2020 and ten in 2021 were COVID-19 related absences (children's school closings, claimant had symptoms and consequent tests, children quarantined for exposure). Cl. Exh. E.

Not receiving a reply to her demand for the additional payment that she believed was due, claimant filed her wage claim on Friday, April 30, 2021. On Monday May 3, she received an email from Dr. Ngo containing a proposed Separation Agreement. The agreement included a promise to pay the claimant the amount she claimed she was still owed, \$3,680.95. The offer was conditioned on her signing the Separation Agreement, in which she would relinquish certain rights to seek further legal relief arising out of her employment. Cl. Exh. F. Claimant replied that she would agree to the proposed terms but requested a non-substantive change (change maiden name to married name) before she signed it. Dr. Ngo made the requested change and sent a revised agreement form. He also advised the claimant that she would have to withdraw her wage claim before the separation agreement could be executed. Claimant declined to do so. The Separation Agreement was never signed. Cl. Exh. G.

On cross-examination, counsel for the employer questioned claimant's contention that absences related to COVID-19 were not chargeable to ET. Claimant responded that she believed these did not fall within the scope of ET because the employer could seek reimbursement for such payroll expense under the Families First Act. She said understood this to be the case because the employer had posted notices regarding the terms of the FFA in the employee bathrooms. When she was shown a copy of the notice (not in evidence), showing that the FFA's effective dates were April 1, 2020 through December 31, 2020, claimant agreed that the two COVID-19 related dates (March 16-17, 2021) before April 1, 2020 should be stricken from her claim. With regard to her COVID-19 related absences for 2021, claimant testified that she believed the FFA had been extended, therefore she did not withdraw those 2021 dates from her claim.

Claimant was also cross-examined with respect to the employer's scheduling calendar, which showed that claimant was not available for various periods of time, ranging from a full day to intervals within the day. As a result of this questioning, claimant conceded that her claim for 2020 ET should be reduced by four additional days (September 2 & 4, November 5 & 23).

The total concession by claimant for 2020 was six days (48 hours). There were no concessions as to the ET claimed for 2021.

Anh Ngo, 47, lives in [redacted] Massachusetts. In addition to a medical degree, he has an M.B.A. He has ten employees currently. He is the owner of Pain Specialty Group, P.L.L.C. He corroborated claimant's testimony that he took over payroll duties after his office manager left, but testified that this occurred in April 2020. He assumed that all his employees were reporting their ET usage to payroll. He did not discover until after the claimant gave her notice that the payroll company had not been tracking her ET usage. He did a preliminary audit and prepared a grid showing claimant's time off usage and sent it to the claimant; claimant sent back an annotated copy of the grid, disputing the number of days that the employer was attributing to earned time. Er. Exh. D, E.

Dr. Ngo testified that he met with the claimant before her last day at work and told her that, to resolve the dispute, he would pay her an extra \$5,000.00 in the form of a bonus. He said that the claimant indicated that she would accept that as a compromise of a disputed claim. He was surprised when, after she received her final paycheck including the \$5,000.00 bonus, claimant demanded an additional payment of \$3,680.95.

Again in an effort to resolve the matter, he agreed to pay the requested amount; this time, however, he insisted that the claimant sign a Separation Agreement intended to prevent her from coming back again with an additional demand for payment. At about this time, claimant filed her wage claim. Dr. Ngo testified that he was advised by his attorney that the Settlement Agreement would be ineffective unless the claimant first withdrew her wage claim. Claimant refused to do so and therefore no additional payment was made.

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.

Claim for Unpaid ET. Vacation pay, sick time, and similar time-off benefits, when they are a matter of employment practice or policy, are considered wages when due. RSA 275:43, V.

The employer did not contest that claimant had 50.42 hours unused ET carried over from 2019 into 2020.

In 2020, claimed earned 191.88. At the start of the hearing, claimant conceded to using 104 hours (13 days) ET in 2020, During cross-examination, she agreed to an additional 48 hours (6 days) used in 2020, for a total of 152 ET hours used in 2020. That leaves a balance of 39.88 hours of unused ET for 2020. Adding the 2019 carryover gives a total carryover into 2021 of 90.3 hours

unused ET. However, according to the employer handbook, employees could carry over a maximum of 80 unused accrued ET hours into the next calendar year. Excess unused hours were forfeited.

During cross-examination, claimant testified that she had tried to avoid this result (80 hour carryover limit) by cashing out 40 hours in 2020, an option described in the employee handbook, Er. Exh. B 6, but, despite multiple requests, she was never given that option. In her narrative submission dated June 7, 2021 claimant made no reference specifically to making 40-hour cash-out requests in 2020 and she submitted no documentary evidence showing that she did so. Her testimony on this point is not credited.

Applying the annual carryover limit reduces the claimant's unused ET carried over into 2021 to 80 hours.

In 2021, up through her termination date of April 2, the claimant earned 51.66 of ET. In its written submission dated June 8, 2021, the employer stated that the claimant conceded in an email March 27, 2021 that she used 12 PTO days in 2021. Er. Exh. O 1-2. However, in that email, the claimant conceded only three days for ET used in 2021; the other nine were COVID-19 days. Claimant testified that she understood that she could take COVID-19 days without charging them to ET, because the employer was participating in the FFA refund program. The employer offered no evidence that the claimant was advised in writing regarding as to how COVID-19 days were to be handled with respect to ET, other than posting a government issued notice, which was not introduced in evidence. The claimant's testimony is credited and her understanding that the COVID-19 days would not be credited is found to be reasonable. Accordingly, only the 24 hours (three days) conceded by the claimant are subtracted from 2021 ET, leaving 27.66 unused ET hours for 2021.

To the extent that the employer argued that its calendar evidence supported charging additional ET days, this evidence is found to be speculative and unreliable for the present purpose; the office calendars did not purport to be vacation records.

Salaried employees cannot be charged for vacation time whenever they are away from work; they are entitled to their full salary without respect to actual hours worked. RSA 275:43-b, I. Employers are not required to keep records of hours worked by salaried employees, Lab 803.03 (g). In light of this statutory and regulatory framework, implementation of a paid vacation policy for salaried employees requires that the employer keep clear and accurate records as to vacation time requested, approved, and used. Apropos is Lab 803.03 (Notification and Records), in pertinent part,

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

- (4) Make such good records as shall show the exact basis of remuneration of an employee's compensation....

According to the Employee Handbook, the employer had in place a system for tracking vacation requests, for both salaried and hourly employees. See Er. Exh. B 5. Had the employer applied this policy to the claimant, the instant dispute over used ET would likely have been avoided. That said, it remained the claimant's burden to prove that she was entitled to the vacation payout. Subject to her own concessions during the hearing, it is found that she met her burden of proof.

Combining 80 unused hours ET carried over from 2020 with the 27.66 from 2021 gives 107.66 hours unused ET. At claimant's imputed hourly salary of \$45.67, she was entitled to a separation payout for unused ET of \$4,916.83.

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

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. * * *

Thus, 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). 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 Court went on to explain that RSA 275:44 "was not intended to impose liability where the employer's refusal to pay wages is based upon bona fide belief that he is not obligated to pay them."

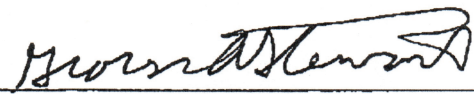
In this case, the claimant proved that she was owed ET, but the amount was substantially reduced by concessions and the application of the employer's written ET policies regarding carryover limits. More importantly, In recognition of the dispute regarding how much ET the claimant was due on separation, the employer paid her a bonus amount of \$5,000.00 with her final wages. The bonus exceeded the amount that has been found to be due based on the evidence at the hearing.

The claimant did not prove that the employer's refusal to pay the ET she claimed was willful and without good cause. Thus, an award of liquidated damages is not warranted.

DECISION

It is found that the claimant was entitled to a payout of \$4,916.83 for unused ET. With her final paycheck, claimant received a bonus of \$5,000.00, which she agreed could be applied to her claim. It is therefore found that her claim for additional unpaid wages is **invalid**, as is her claim for liquidated damages.

July 8, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb