

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.
Tumbledown Care, L.L.C.
CASE #62809

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Nicole Feudo, 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)
Statutory interest

DATE OF HEARING: November 16, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on August 31, 2021, alleging that she worked for the employer as a waitress for eleven shifts and did not receive the credit card tips she earned. Her claim is for \$1,300.00. She also requested an award of liquidated damages in the amount of \$150.00.

Notice of claim was sent to the employer on June 7, 2021. The employer filed an objection on June 23, 2021. Claimant requested a hearing on September 28, 2021 and one was scheduled by hearing notice sent October 8, 2021. The claimant appeared telephonically from Florida and the employer's representative was physically present at the Department in Concord.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant and the employer's representative, employer's exhibits, and matters of record in the Department file. During the course of the hearing, both parties acknowledged under oath that their written submissions to the Department were true and accurate to the best of their knowledge and belief, and those statements are treated herein as part of the testimony in the case

Claimant is 52 years old and is currently living in Florida. She has a G.E.D. and a certificate in hairdressing. She has worked as a waitress for eight or nine years.

She started working at the employer's Sanbornville restaurant in April 2021. She was paid \$5.00 an hour plus tips. Pay periods ran from Sunday to Saturday with payday the following Friday.

She testified that she worked a total of 11 shifts, but she did not have a specific recollection of the dates on which she worked. The employer submitted set of daily shift reports showing that claimant worked on 10 separate days, the first being April 24 and the last, May 30, 2021. The employer also submitted a payroll journal covering the six weekly paydays from April 30 to June 4, 2021. These showed claimant's hourly wages and tips she was paid through payroll during each of the corresponding six pay periods.

The claimant did not contest the accuracy of the employer's records with regard to the days she worked and the hours she worked on those days. She also agreed that she had been fully paid for her hourly wages. However, she testified that the employer did not pay her the tips that were put through on credit cards. She estimated that she was owed \$1,300.00 in credit card tips.

She testified that she complained to restaurant owner Dave Guttadauro and he just laughed at her. She was terminated after that.

Ms. Feudo, 56, lives in Wakefield, Massachusetts. She is the employer's bookkeeper. She testified that, when the claimant first started working for the employer, the procedure was to allow servers to take the credit card tips they earned out of cash receipts if there was sufficient cash in the register to allow that. If tips were still owed, the balance was included in their next paycheck.

Starting May 23, 2021, there was a change in procedure: servers were no longer allowed to take some or all of their credit card tips out of cash; instead, all credit card tips were included in their paycheck.

The shift reports submitted in evidence showed the claimant's sales and tip activity on each day she worked. Ms. Feudo went through each shift report describing how the credit card tips were paid out. Prior to May 23, either all or most of the claimant's credit card tips were paid out in cash. Commencing May 23, all credit card tips were not paid out in cash but were included in the claimant's paycheck.

Ms. Feudo testified that when the claimant questioned whether she was receiving all her credit card tips, Ms. Feudo went back through and checked everything against the backup paperwork. She found one instance where claimant's tips did not appear to have been properly recorded. The May 13 shift

report showed only \$22.30 in credit card tips; however, claimant's paperwork showed \$167.42 in credit card tips for that day. Thus, Ms. Feudo concluded the claimant was still owed \$145.12 in tips for that day. This error was corrected with a payment of \$145.12 which was included in claimant's final paycheck, dated June 4, 2021. That check also included the tips claimant earned on May 23, 27, and 30 (technically the latter day belonged to the next pay period but it was paid out early because claimant was terminated that day).

Ms. Feudo prepared a chart summarizing claimant's sales and tips and hourly wages over the 10 shifts that she worked. Claimant had a total of \$781.56 in cash sales. The restaurant records did not record how much claimant received in cash tips for these sales. Ms. Feudo noted that a good waitress commonly received an average of 18 percent in tips. Assuming claimant's tips were consistent with the norm, Ms. Feudo testified that she would have received about \$140.76 in cash tips. Claimant had a total of \$4,960.04 in credit card sales. On this amount, she received \$904.88 in tips, which is equivalent to just over 18 percent. Claimant worked a total of 46.44 hours, earning \$232.20 in hourly wages. Combined with tips (including the inferred cash tip amount), she earned a total of \$1,278.08, which comes to \$27.52 per hour.

Ms. Feudo testified that, at some point, the claimant inadvertently received another employee's paycheck and deposited it into her own account. The claimant admitted that she did so but said it was an error and she simply had not looked at the face of the check to see to whom it was made out. Ms. Feudo testified that the claimant did not return the proceeds from the check to the employer or to the employee to whom they belonged. With the claimant's permission, the employer subtracted that amount, \$84.98, from the claimant's last pay check. She testified that this incident was the reason the claimant was let go.

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).

Claimant's testimony was vague and hard to follow. The employer's testimony was detailed and clear, and was supported by what appeared to be business records. No reason was found to question the authenticity of those records, and the claimant did not attempt to do so. Ms. Feudo's summary also demonstrated that the amount of tips claimant received based on the sales she made was consistent with the average tipping rate of 18 percent.

The employer suggested that the claimant may have been confused by the change in procedure as to how credit card tips were paid out. Whatever the reason, the employer's testimony and supporting exhibits are credited. The claimant's contention that she was not paid her credit card tips is found to be unproved.

DECISION

Having considered the testimony and documents in evidence, it is found that the claimant failed to meet her burden of proving that she was not paid all her earned credit card tips. Her wage claim is therefore ruled **invalid** and her claim for liquidated damages, **moot**.

December 8, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb