

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Modestman LLC

Case No. 63378

DECISION OF THE HEARING OFFICER

Appearances: ██████████ appeared Pro Se
Ashley Sheehan- owner- appeared on behalf of 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: October 26, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on September 1, 2021. The claim asserts that he is owed \$10,000.00 in unpaid wages and liquidated damages associated with the unpaid wages. The wage claim was mailed to the employer on September 3, 2021. The employer failed to file an objection. The matter was scheduled for a formal hearing. Notices of Hearing were forwarded to all parties on September 22, 2021.

FINDINGS OF FACT

Modestman LLC is a microbrewery in Keene, NH. The business opened in October of 2019. The claimant was an original employee. There was discussion of the claimant's exact title at hearing. Claimant testified he was a bartender. He thought he was going to earn \$20.00 an hour in this position plus tips; however, he was paid \$15.00 an hour plus tips. In addition to his bartending duties, the claimant was also "in charge" while at work. He made the schedule for the other employees.

With regards to tips, the claimant testified that all tips were pooled. Cash tips were paid out at the end of the night. Credit card tips were paid out in the weekly paychecks. The claimant did not sign an agreement to have his tips pooled. The claimant is unsure of how the tips were distributed amongst the employees in the weekly paychecks. Claimant asserts, that the tips he received in his weekly paycheck

were not his full wages. The claimant requested an accounting of the tips he was paid out and did not receive an accounting. The claimant stated that he did not receive his full wages from the time the brewery opened until the time it closed for the Covid 19 pandemic (October 25, 2019 to March 17, 2020)

The claimant's 2020 W2 was \$48,000.00. The claimant alleges that he is owed at least another \$100.00 for each week he worked from October 25, 2019 to March 17, 2020 for tips not properly dispersed.

Ashely Sheehan is the owner of Modestman Brewery. Mr. Sheehan testified that he hired the claimant to run the business. Mr. Sheehan agrees that the credit card tips were deposited into the corporate accounts and distributed not to the person who earned them, but by a system of hours worked. Specifically, the business accountant who did payroll would take the total tips earned and then distribute them to employees based on the hours worked per week. The business did not have its employees sign off on this tip pooling process.

Mr. Sheehan now understands that tipped employees have certain rights under NH laws. Mr. Sheehan asserts his payroll is now done differently and his employees do sign tip-pooling agreements. The claimant no longer works for the employer.

Mr. Sheehan agreed that he had prior discussions with the claimant with regards to the pooled tips. Mr. Sheehan does not know how his business could go back in time to determine if the claimant was properly paid.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is owed and due \$10,000.00 in unpaid wages and liquidated damages. Proof by a preponderance of the evidence as defined in Lab 202:05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

New Hampshire Statute is clear that tips are considered wages and are the property of the employee who earns them. RSA 279:26-b Tip Pooling and Sharing states:

I. Tips are wages and shall be the property of the employee receiving the tip and shall be retained by the employee, unless the employee voluntarily and without coercion from his or her employer agrees to participate in a tip pooling or tip sharing arrangement.

II. No employer is precluded from administering a valid tip pooling or tip sharing arrangement at the request of the employee, including suggesting reasonable and customary practices, and mediating disputes between employees regarding a valid tip pooling or tip sharing arrangement.

III. Nothing shall preclude employee participants in a tip pool from agreeing,

voluntarily and without coercion, to provide a portion of the common pool to other employees, regardless of job category, who participated in providing service to customers.

In this case, the claimant did not voluntarily agree to pool his tips and have them distributed in accordance to the number hours worked per employee per week. It appears that the employer now understands that how tips were collected and shared in 2019/2020 was not in accordance with New Hampshire law.

Because the claimant was not provided with either an explanation of the tip distribution each week, and did not receive his earned tip correctly, he is at a disadvantage in proving the wages he earned but was not paid. The employer did not dispute that their might be wages due the claimant. The employer had no paperwork to suggest what the accurate number might be.

The claimant's testimony that he believes he was "shorted" \$100.00 per week in earned tips from October 25, 2019 to March 17, 2020 is found persuasive. This is the only evidence presented and it was not contradicted by the employer. From October 25, 2019 to March 17, 2020 is 22 weeks. Therefore, the claimant is owed \$2, 200.00 in unpaid wages for the tips he earned during this time that were not properly distributed.

Liquidated Damages are governed by Ives v Manchester Subaru, 126 N.H. 796, 498 A.2d 297 (1985), which explains that the phrase "willfully and without good cause" means voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed. An employer acts willfully if, having the financial means to pay wages which he knows he owes [and] fails to pay them.

In this case, it was clear that from at least June 2021 the claimant had informed the employer that he disputed the unpaid wages. There was testimony that the claimant had discussions with the employer's new manager, Dan, about the tip pooling practice and how it had been handled in the past. The employer did not dispute these discussions. The employer did not dispute that the claimant had asked for his unpaid wages. Despite these discussions, there was no effort from the employer to review the accounting to determine if the claimant had been paid properly. Given the testimony heard at hearing, it is found that the employer had knowledge of the unpaid wages and took no steps to remedy the situation. The employer's action was willful and without good cause. The claimant is entitled to liquidated damages of \$2,200.00 for the employer's failure to pay the wages that were due.

DECISION

After a thorough consideration of the evidence and testimony presented, and as RSA 275:43 I requires that an employer pay an employee all wages that are owed and due, it is found that the claimants have successfully met their burden to prove by a


preponderance of the evidence that they are owed and due unpaid wages; it is hereby ruled that **this Wage Claim is valid.**

The employer is hereby ordered to send a check to the Department of Labor, payable to ██████████ in the total of **\$4,400.00**, less applicable taxes with a statement of said deductions **within thirty (30) days of the date of this Order.** Taxes may only be deducted from \$2,200.00. No taxes shall be deducted from the \$2,200.00 awarded for liquidated damages.

Such is the Order of the Department.

November 10, 2021
Date of Decision

SFF/cb



Sarah F. Fuller, Hearing Examiner