

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Foss Performance Materials
CASE #63424

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Laurie Chevalier, representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (unpaid vacation pay)

DATE OF HEARING: December 7, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on September 7, 2021, alleging that he gave his two weeks' notice on Friday, August 13, 2021. When he returned to his next scheduled shift on Tuesday, August 17, the plant coordinator told him he did not need to finish out working the two-week notice period and still would receive pay for that period, plus his unused vacation time. He was not paid for the two weeks. His unpaid wage claim was for \$1,200.00. He further alleged that he was owed \$630.00 in unpaid vacation pay.

Notice of claim was sent to the employer on September 14, 2021. The employer filed an objection on October 6, 2021. The claimant requested a hearing on October 14, 2021 and a hearing notice was sent on October 15, 2021.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's representative, and plant coordinator Steve Duffy, exhibits offered by both parties, 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.

The claimant is 31 years old and lives in Plaistow. He has a high school diploma from Whittier Regional Vocational Technical High School in Haverhill, Massachusetts. He started working for the employer in November 2014. He was a machine operator. He generally worked 48 hours a week (four 12-hour shifts) and was paid \$21.45 an hour. Claimant's regular workdays were Tuesday through Friday. Pay periods ran from Sunday to Saturday and payday was the following Thursday. He was paid by direct deposit.

In 2021, as an employee with more than six years' seniority, claimant was entitled to three weeks' paid vacation per year. As of the date his employment was terminated, he had already taken two weeks' paid vacation and had scheduled the third week, but not taken it yet.

On Friday, August 13, 2021, claimant submitted his written resignation, indicating that his last day at work would be August 20. Claimant submitted a text message conversation between himself and his crew chief Donald Trejo that took place on Saturday, August 14:

Trejo: ...resignation form. What's up buddy?? Really don't want to lose you man!

Claimant: Steve was hunting me down all day I was working on line H doing 75 yarders sharing 1 gun & it was 102 degrees. I didn't feel good at all & to have him up my ass like that I just had enough.

Trejo: Sorry man! Should have told you he would be in charge. My bad! Do you plan on finishing off your 2 weeks? Don't want to see you throw away 7 years Bro! Leaving on Friday Sick didn't get you in trouble.

Claimant: Ya im gonna finish out my two weeks.

Trejo: [Liked "Ya I'm gonna finish out my two weeks"]

Claimant's exhibit.

Claimant reported for work on Tuesday August 17 and was called up to Steve Duffy's office. He testified that Mr. Duffy informed him he was not required to work through his last day and was essentially relieved of duty as of that day. He also testified that Mr. Duffy told him he would be paid for the two weeks anyway, and would also receive his vacation pay. He did not report to work after August 17.

Claimant testified that around August 23, he texted to another supervisor, Patrick Ward, to confirm that he was going to be paid for his last two weeks and his vacation pay. He said that Ward texted-back to the effect that Ward had asked Mr. Duffy and Mr. Duffy said he could tell the claimant that he would be paid for the two weeks and the vacation pay. (The alleged text messages were not admitted into evidence because they had not previously been disclosed to the employer as required by Department administrative rule Lab 204.07.)

When claimant received his final paycheck on August 26, he was surprised to see that he was paid only for four hours, corresponding to a show-up wage for Tuesday, when he was sent home. He was also surprised to see that he only received vacation pay for 12 hours, not the 48 hours he had remaining for the year. Claimant testified that he knew of instances where the employer had excused employees from working through the notice period but still paid them for those two weeks. Claimant admitted that he was aware of the Associate's Handbook and CBA Agreement that the employer submitted into evidence, but said he was relying primarily on what Mr. Duffy had told him.

Claimant said that, had Mr. Duffy told him on August 17 that he was not being allowed to work out his two weeks' notice and would not be paid, he would have complained to his union rep right away. He testified that he believed the CBA required the employer to pay out the two weeks in this situation, i.e., when it declined to allow the employer to work through the notice period. However, no documentary evidence of such a provision was offered in evidence.

Claimant said that, when he went to the union rep after-the-fact, he was advised to file a complaint in this Department rather than a union grievance.

Steve Duffy, 52, has worked for the employer for 29 years. He is the manager of the fabric department where the claimant worked. He testified that, after receiving claimant's notice of resignation, he believed that the claimant would be disruptive if he were allowed to work out his two weeks. Therefore, when the claimant reported for work on Tuesday, August 17, he told the claimant that he did not need to work through the two weeks. He denied ever telling the claimant that he would be paid for the two weeks anyway. He testified that, in effect, although he might have phrased it as, claimant "did not have to work," the bottom line was, the claimant was not allowed to work any further.

Mr. Duffy testified that, if the claimant had complained about this, he would have referred him to the HR department. He did not specifically remember having such a conversation. Mr. Duffy also denied telling Patrick Ward to tell the claimant that he was going to be paid the two weeks' wages.

Laurie Chevalier, 62, has worked for the employer for 45 years. She is the HR manager. She testified that the employee handbook refers to a two-week notice "request," but has no provision for paying employees who are let go upon

giving such notice, beyond the last day actually worked. She further testified that that, although vacation pay is awarded at the start of the year, when an employee separates from the company mid-year, he is only entitled to a prorated amount of his unused vacation pay. In claimant's case, he was eligible to take up to three weeks in a year. As of his last day worked, claimant's prorated award was 108 hours. He had already used 96 hours. Thus, he had 12 hours of unused, accrued, prorated vacation time remaining.

The employee handbook, under "End of Employment," provides,

If you wish to resign, [employer] requests that you notify your manager in writing of your intent to resign and your anticipated departure date at least two weeks in advance. Of course, as much time as possible is appreciated by both the Company and your coworkers.

Accrued unused vacation time and/or sick time, if applicable, will be paid out in accordance with the CBA for bargaining unit employees.

Employer's exhibit.

The CBA provides,

Employees discharged or quitting prior to the vacation period shall be paid their vacation moneys on a pro-rate basis at the time such employment is terminated.

If you leave [employer] in good standing, you may be considered for re-employment.

Employer's exhibit.

The employer also submitted a paystub corresponding to claimant's final paycheck, covering the pay period August 15–21, 2021. The paystub showed regular earnings of \$85.80 for four hours and a vacation payout of \$257.40 for 12 hours. Ms. Chevalier testified that the four hours was payment for claimant's partial workday on Tuesday, August 17. The claimant did not challenge the authenticity of the paystub but maintained that he was entitled to a full week of vacation, which he had already scheduled before leaving the company, as well as payment for 48 hours' wages and not just 4 hours.

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).

With regard to the wage claim, Mr. Duffy's testimony is credited that he told the claimant he did not have to work during the notice period, but he never told him he would be paid for not working during that period. Claimant's testimony to the contrary is not credited. Instead, it is understood that the claimant misunderstood the significance of being told he did not have to work out the two weeks.

To the extent that the claimant inferred he would be paid for hours not actually worked, such an inference was not reasonable. There was no documentary evidence of such a written policy. Claimant was an at-will employee. He was essentially let go on Tuesday, August 17. Absent a specific agreement, policy, or practice of paying employees after they are let go—for example, a severance pay benefit—the claimant had no reasonable basis to expect that he would be paid more than four-hour show-up wage for his appearance at work on the day he was let go. Claimant's testimony that he believed the CBA supported his claim for hours not worked during the notice period is not credited. It was not supported by documentary evidence in the CBA or by testimony from the union rep.

It is therefore found that the claimant failed to meet his burden of proof with respect to the claim for unpaid wages.

With respect to the claim for unpaid vacation pay, the claimant's contention that he was entitled to an award of the rest of his annual award—a full week—is contradicted by the plain language in the CBA agreement, to the effect that employees leaving the company receive a payout of the pro-rated annual award, accrued up to the date of separation, less time already used. This is what the claimant received. That the claimant had already scheduled a week's vacation before turning in his resignation did not give him additional rights to a vacation payout in the event he separated from the company before taking the vacation. Thus, the claimant did not prove that he was entitled to an additional vacation payout.

DECISION

Based on the foregoing discussion, the claimant's claims for unpaid wages and unpaid vacation pay are, respectfully, ruled **invalid**.

December 13, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/nd