

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

CROSTOWN COURIER SERVICE
Case No. 63431

DECISION OF THE HEARING OFFICER

Appearances: ██████████ claimant, on his own behalf, Pro Se

Nature of Dispute: RSA 275:43 I - Weekly, Unpaid Wages (removed at hearing)
RSA 275:43 I - Weekly, Unpaid Wages, Overtime
RSA 275:43 V - Weekly, Unpaid Sick Pay
RSA 275:44 IV - Employees Separated from Payroll Before
Paydays (removed at hearing)
Liquidated Damages

Claimant: ██████████

Employer: Jennifer Lavallee, Vice President of Finance and Administration,
Crosstown Courier Service

Date of Hearing: November 8, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

On the basis of the claimant's assertions that he is owed \$4388.67 in unpaid wages for overtime, \$882.00 in unpaid paid time off and \$298.65 for unpaid 401(k) and \$1741.50 for unpaid sick leave he filed a Wage Claim with the New Hampshire Department of Labor on September 8, 2021. A Notice of Wage Claim was mailed to the employer on September 13, 2021. The wage claim was amended as the paid time off and 401(k) wages were paid. The employer objected to the wage claim in writing. The claimant requested a hearing. Hearing notices were mailed to all parties on October 8, 2021 and a hearing was scheduled accordingly.

At the start of the hearing, the claimant clarified that only two issues remain and they are unpaid sick pay and unpaid overtime wages. All other issues were removed from the hearing agenda.

FINDINGS OF FACT

The claimant provided a mailing address of 1223 Bennett Way, Newmarket, NH 03857 at the time of the hearing. He was hired by Crosstown Courier Service in 2017 as a driver and then became a dispatcher in December 2019. He continued to be employed by this company through September 8, 2021 when he voluntarily resigned his position. His hourly rate when he last worked for the employer was \$18.00 per hour and he indicated he works 43+ hours per week.

In addition to his hourly rate the claimant indicated that he received other benefits including accrual of sick pay. He was candid that he was not aware of what the exact policy was with respect to what happens with sick leave upon separation from employment. He indicated that in past experiences he has experienced that vacation and sick leave are paid out upon separation from employment.

The claimant testified that working as a dispatcher required him to work on call shifts. He was paid for three hours for each shift that he was on call and was paid time and ½ for overtime hours. The claimant explained that the on call hours are inclusive of the hours that he was available and on call, but do not include the numbers of calls he answered per shift. He agreed that during the overnight shift from 11:30 PM to 6 AM the call volume is very low. The work is done remotely from his home, but indicated that he was unable to travel because he needed to be home by the computer with a modem. He agreed that the policy does permit him to eat or sleep or watch movies during the on call.

The claimant testified that he would submit timecards weekly for all hours worked but was not paid for all hours worked. He later testified that he would only put three hours on his timecard for the on call shifts because that's what he was told to do. He presented exhibits detailing hours scheduled on dates worked but did not include actual schedules or time records that he submitted to his employer.

Duly sworn, Jennifer Lavalley, cross-examined the claimant regarding the sick pay policy. He agreed that he had received and signed two handbooks. Then on behalf of the employer Ms. Lavalley testified that the employer's policy is that unused sick pay is not paid out upon separation from employment.

With respect to the claimant's assertions regarding hours on call, the claimant agreed that he was issued a laptop and was aware of the telemarketing equipment policy. He agreed that he submitted hours on his timecard and would put on his timecard that he worked three hours. Ms. Lavalley testified that in attempts to resolve this issue she asked the claimant to provide her, prior to the hearing, proof that he worked more than three hours' time during the on call shifts. The claimant advised her that he didn't submit every call so he was just looking for pay for the entirety of the overnight/on call shifts. She testified that with regard to on call shifts, employees are

able to use their time as they see fit they just need to be in a location where they can access the network in the event that calls come in.

APPLICABLE LAW:

Applicable law regarding unpaid wages is New Hampshire RSA 275:43 (I) Weekly or Biweekly, Unpaid Wages, which states:

Every employer shall pay all wages due to employees within 8 days after the expiration of the work week if the employee is paid on a weekly basis, or within 15 days after the expiration of the work week if the employee is paid on a biweekly basis, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph IV or IV-a(a), on regular paydays designated in advance by the employer and at no cost to the employee.

Applicable law governing liquidated damages is New Hampshire RSA 275:44 (IV), which states, in part:

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; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition.

Applicable law governing unpaid employee expenses is New Hampshire RSA 275:43 (V), which states:

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.

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 unpaid overtime wages and is entitled to payment of accrued but unused sick pay at the time of separation of his employment. 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.

With respect to the issue of unpaid sick leave, Ms. Lavellee testified persuasively that the company's policy is that they do not pay out sick leave upon separation from employment. She explained that this is articulated in the employee handbook. The

claimant testified that he received and signed for copies of the handbook. The claimant further testified that he was not aware of what the company's policy was but based his claim on an understanding that vacation and sick pay are generally paid upon separation. State of New Hampshire does not require that employers provide sick pay; however, when this benefit is provided, employers are required to have a policy that articulates what happens to accrued but unused time upon separation from employment. Ms. Lavallee testified persuasively that the employer has a policy that articulates that no payment of unused time is made upon separation from employment. The claimant did not dispute that the policy exists, rather, he indicated he just wasn't aware of what the policy was. In light of the policy, the wage claim with respect to sick pay is not valid.

Regarding the claimant's assertion that he is due overtime pay for hours he was in an on-call status but not paid, it is not clear where Mr. Stevenson derived the hours from that he submitted in his hearing exhibits. Moreover, he agreed that he submitted three hours of time on his timecard and did not submit additional hours for payment. He agreed that while in an on-call status, he was able to eat, sleep, and watch movies adjust had to be available in the event that a call came in. There was no credible evidence presented that he was not paid for all hours worked.

DECISION

Based on a thorough review of the evidence and testimony presented, and as RSA 275:43 I requires that an employer pay all wages due to an employee, it is found that the claimant did not meet his burden to prove by a preponderance of the evidence that he is owed unpaid wages; it is hereby ruled that **this Wage Claim is invalid.**



Tahra White
Hearing Officer

Date of Decision: November 23, 2021

Original: Claimant
cc: Employer

TW/cb