

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

██████████  
v.

Lobster Connection  
CASE #63663

DECISION OF THE HEARING OFFICER

**APPEARANCES:** Claimant, self-represented  
Employer, self-represented (failed to appear)

**NATURE OF DISPUTE:** RSA 275:43, I — Weekly (unpaid wages)  
RSA 275:43-b — Payment of Salaried Employees  
(unpaid salary)  
RSA 275:44 — Employees Separated from Payroll  
Before Pay Dates (Liquidated Damages)<sup>1</sup>

**DATE OF HEARING:** January 19, 2022

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed a wage claim on October 25, 2021, alleging that he was a line cook for the employer's restaurant in Tilton. He claimed that the employer refused to pay him his weekly salary unless and until he made up three sick days he took during that week, and also refused to pay his salary for the last week in which he worked.

Notice of claim was sent to the employer on October 26, 2021. The employer did not file an objection. On November 9, 2021, the claimant notified the Department that he had just that day received payment for the last week's salary but not the preceding week. The claimant requested a hearing and a notice of hearing was sent on November 19, 2021.

At the appointed hour for the hearing, the employer failed to appear. Fifteen minutes later, no one had appeared for the employer or contacted the Department. The notice of claim and notice of hearing were

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<sup>1</sup> Issue added at claimant's request pursuant Lab 204.06.

mailed to the employer's mailing address at Lobster Connection, Mark Conley, Owner, 1007 Laconia Road, Tilton NH 03276. The notices sent to that address were not returned undelivered. The claimant testified that he spoke with the employer's bookkeeper by telephone on November 9, 2021 and she told him the employer was intending to attend the hearing when it was scheduled.

It was determined that the employer received proper notice of the hearing. The case went forward in the employer's absence, pursuant to Department Administrative Rule Lab 203.04.

### **FINDINGS OF FACT**

The following findings are based on the claimant's testimony, his exhibits, and matters of record in the Department file. The claimant acknowledged under oath that his written submissions to the Department were true, and those statements are treated herein as part of the testimony in the case.

Claimant is 23 years old and lives in Bristol. He graduated from high school in 2016 and started working at the employer's Tilton restaurant in June of 2017. The restaurant was open from April through the end of October or early November. Claimant started as a prep cook and later was promoted to line cook. He was paid a weekly salary of \$900.00. He generally worked six days a week. Pay periods ran from Monday to Sunday with payday the following Thursday. He was paid by check in hand.

Claimant worked the first day of the pay period commencing Monday, October 11, 2021. He had the next two days off because the restaurant was closed. He worked half a day Thursday, October 14 and went home sick. He stayed out sick for the next three days. On Sunday he told the employer he was well and would return Wednesday when the restaurant re-opened (it was closed Monday and Tuesday October 18–19). When he returned on Wednesday, another employee told him he would not be paid for the preceding week because of the sick days he took. Claimant worked Wednesday and Thursday. Claimant did not receive his regular paycheck on Thursday.

Claimant reported to work on Friday, October 22. Owner Mark Conley was in that day and claimant asked for his paycheck. The owner told him that he would not be paid until he made up for the sick days from the preceding week. Claimant refused to do that and the employer stated, "Then I guess you're done." Claimant filed the instant wage claim on October 25, 2021.

On November 9, 2021, the claimant received a paycheck for the pay period October 18–24, 2021. The check was accompanied by a note from the bookkeeper:

██████████  
Mark paid you for a full week, even though you only worked 21 hours & walked off the job. He does not pay for sick time.

Best of luck,  
Linda

(Claimant's exhibit.) As of the date of hearing, claimant still had not received his salary for the October 11–17, 2021 pay period.

## 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).

Claimant's testimony was clear and specific. To some extent it was corroborated by the paystub he submitted and the accompanying note from the employer. Claimant's evidence was unrebutted and is credited.

Claim for unpaid salary. New Hampshire law generally requires that salaried employees "receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked," RSA 275:43-b, I. However, if an employee is terminated for cause or terminates on his own accord, an employer is permitted to prorate salary on a daily basis for the days worked in the last pay period. RSA 275:43-b, II.

Neither of these exceptions applies. The claimant did not terminate of his own accord; he was fired because he refused to make up for three sick days taken in the preceding pay period. This raises the question whether the termination was "for cause."

The Department standard for deciding whether a termination is "for cause" was established in Lakeshore Estates Associates LLC v. Michael F. Walsh (Belknap Super., 06–E–259, April 4, 2007). The superior court held that, to constitute termination "for cause" as intended by RSA 275:43-b, II, the employer had to have had reasonable grounds for determining that the employee engaged in misconduct meriting termination and "the employee must have received notice, express or fairly implied, that such misconduct would be grounds for termination."

The general rule is that a salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked. See, RSA 275:43-b. Absent evidence of

excessive use of sick days in violation of company policy, an employer cannot require a salaried employee who is out sick for only part of the workweek to make up for the time or forfeit part of his salary. Based on the testimony presented, the claimant was within his rights in refusing to make up the sick days. Thus, the employer's decision to terminate him on that basis was not "for cause."

The claimant worked Monday and half of Thursday in the October 11–17, pay period and three days in the October 18–24 pay period. He was entitled to be paid his full salary for both weeks, totaling \$1,800.00.

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

I. Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours.

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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.

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Pursuant to paragraph IV, 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). In the same opinion, 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."

That standard is satisfied in this case. The evidence does not permit a finding that this was "an accident or an act committed on the basis of a mistake of fact." Based on the note the employer sent to the claimant with his overdue payment the last week worked, it is apparent that the employer made a conscious decision to pay the claimant for just one week rather than the two weeks he was due. Assuming the employer believed he could withhold sick days from claimant's final paycheck, he was mistaken as a matter of law. Every person is presumed to know the law, Town of Nottingham v. Newman (N.H. 2001), and ignorance of the law does not constitute good cause for failure to pay final wages in time. The claimant proved he was entitled to liquidated damages.

Claimant was due his full salary for two weeks, a total of \$1,800.00. Pursuant paragraph I of RSA 275:44, the claimant was entitled to his full wages within 72 hours of termination. The employer discharged him on October 22, 2021; thus, payment was due on or before October 25. For each countable day

after that during which the amount remained unpaid, damages accrued at ten percent of the total due, up to a maximum amount equal to the unpaid amount of \$1,800.00

By November 9, 2021, when the claimant received the employer's check, more than ten countable days had elapsed. Therefore, in addition to unpaid wages, the claimant is entitled to liquidated damages of \$1,800.00.

### DECISION

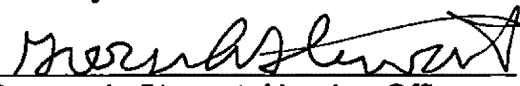
Based on the evidence submitted, for reasons set forth above, it is ruled that the claim for unpaid wages is **valid** to the extent of two weeks' salary (\$1,800.00), and the claim for liquidated damages is **valid** to the extent of \$1,800.00 because more than ten countable days passed after the wages were due. The employer is entitled to a credit for the late payment of \$900.00 that the claimant received November 9, 2021.

The net amount awarded to the claimant is as follows:

Two weeks' salary	\$1,800.00
Liquidated damages	\$1,800.00
Credit for Nov. 9 payment	( \$ 900.00 )
Total due to claimant	\$2,700.00

The employer is hereby ordered to send a check to the Labor Department, payable to ██████████ in the amount of \$2,500.00, less applicable deductions for the unpaid salary component of \$900.00 but not for the liquidated damage award of \$1,800.00, within 30 days of the date of this Order.

February 2, 2022  
Date of Decision

  
George A. Stewart, Hearing Officer

GAS/nd