

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]

v.

Empire Electric, L.L.C.
CASE #22-WG-00015

DECISION OF THE HEARING OFFICER

APPEARANCES: [REDACTED] self-represented
Leroy Bixby, representing the employer

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

DATE OF HEARING: September 20, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claim was filed on August 5, 2022. The claimant alleged that when his employment ended, he was not paid for the two weeks of vacation time that he had earned. On August 14, 2022, the employer objected to the claim. The claimant requested a hearing on August 15, 2022. The hearing notice was sent on August 22, 2022.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant and the employer's owners, Leroy Bixby and Jonathan Eastman, exhibits offered by the claimant, and matters of record in the Department file. The witnesses 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 37 years old and lives in Wentworth. He attended vocational tech school for four years and has a master-electrician license. He has worked as an electrician for 16 years. He started working for the employer on May 1, 2021. He performed electrical work in homes and businesses. His salary as of the date of separation was \$40.00 per hour.

He testified that, when he was hired, the employer told him he would have two weeks of vacation per year, awarded at the date of hire and on his

anniversary date. The two weeks did not have to be accrued over time; they were available to him at any time, provided that he made the request in advance and the employer approved it.

The claimant testified that in 2021, he used nine vacation days. He was not claiming that the unused days carried over on his anniversary date. It was his understanding that his anniversary date on May 1, 2022, he was awarded two weeks' vacation time for the coming year.

On June 26, 2022, the claimant submitted a request for time off for a six-day vacation in August. The employer did not immediately approve the request. On July 18, the claimant gave two week's notice. He testified that he did not like how the employer was running the business. He testified that his request for time off in August was approved the same day that he gave his notice. The approval was subsequently canceled.

Claimant testified that at some point after he gave his notice, he asked Jon Eastman if he was going to be paid for his unused vacation time. Mr. Eastman said he did not know and would have to talk to co-owner Leroy Bixby and get back to him. Claimant never heard back.

After giving his notice, the claimant worked the rest of the week ending Friday, July 22. The next week he worked Monday the 25th, took Tuesday off, and worked Wednesday the 27th. He did not return to work after that. He testified that he decided not to work through the full two-week notice period because the employer had not gotten back to him about whether he would be paid for his unused vacation pay and he figured the answer was going to be no.

Claimant received his final paycheck on the next regular payday, August 5. It did not include a payout for vacation time.

Claimant was asked what led him to believe that he was entitled to a payout of his unused vacation time. He stated that the employer had no employee handbook and he had never seen a written policy regarding vacation time. He had never been told that the company had a policy or practice of paying out unused vacation time upon an employee's separation and was never told that it would do so in his case. He was unaware of whether the employer had ever paid any other separating employees for unused vacation time. As a master electrician, it had been difficult for him to take the vacation days because the employer had a lot of jobs going and he needed to be there. He had been a good and loyal employee and he thought it was fair for him to be paid his unused vacation time.

Leroy Bixby, 57, of Rumney, and Jon Eastman, 34, of Wentworth, testified on behalf of the employer. They formed the LLC about two years ago.

Mr. Bixby had previously run an electrical contracting business for 18 years. As of the date of hearing, the company had three employees.

Mr. Bixby testified that the employer has no handbook and no written policies regarding vacation. He agreed that the company granted the claimant two weeks' vacation time per year, with no annual carryover. Vacation time was to be used by current employees and could not be cashed in on separation. The vacation time did not have to be accrued during the year but rather, could be used starting when it was awarded, provided that the employee requested the time off in advance and the request was approved. Mr. Bixby testified that the company did not have a policy or practice of paying out unused vacation time and had never done so with any separating employee.

Asked why the employer approved claimant's request for time off in August on the same day that claimant submitted his two weeks' notice, Jon Eastman stated that he was hoping the claimant would change his mind about quitting.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wages in the form of unused vacation time. 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 argued that he was entitled to be paid for the two weeks of vacation time that was awarded to him on his anniversary date. The employer did not contest that the claimant had two weeks vacation time coming as of his last day of employment, but stated that it had no policy or practice of paying separating employees for unused vacation time.

With regard to benefits, RSA 275:43, V provides that

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.

(Emphasis added.) "[W]hen due" is a reference to contingencies specified in the employer's policy that the employee must meet in order to be eligible for the benefit in question.

The claimant testified that the employer had no written policy regarding vacation pay and the employer conceded as much. However, the claimant presented no evidence to show that the employer had a policy or practice of

paying a separating employee for unused vacation time. There was no evidence that he was ever promised such a benefit. The employer testified that it had no such practice or policy and had never promised such a benefit to the claimant. Under the circumstances, Mr. Eastman's statement to the claimant that he would get back to him regarding whether he would receive such a payout did not provide a reasonable basis for the claimant to believe that he was entitled to such a benefit.

Employers are required to provide written notice of their policies regarding benefits such as vacation pay:

Every employer shall provide his or her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employee's expenses, pension, and all other fringe benefits per RSA 275: 49.

Administrative rule Lab 803.03 (b) (Notification and Records).

In the context of a wage claim, an employer's failure to provide a written policy does not give a claimant carte blanche to define what those policies are. Rather, an employer's alleged non-compliance with these requirements is addressed by the Department through its Inspection Division. Employers are not required by law to offer a payout of unused vacation time, unless they have a policy or practice of doing so. Therefore, despite the employer's failure to prove compliance with Lab Rule 803.03(b), the claimant's demand for a separation payout for two weeks' unused vacation time is rejected as he failed to prove the employer had such a policy or practice, or that he had a reasonable basis for believing it did.

DECISION

Having carefully reviewed the exhibits and testimony, it is found that the claimant did not meet his burden of proving that the employer owed him a payout for unused sick days upon his separation from employment. The claim is ruled **invalid**.

September 27, 2022
Date of Decision


George A. Stewart, Hearing Officer

GAS/nd