

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Jennifer Baltoumas d/b/a Diamond in the Ruff
CASE #22-WG-00209

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Employer, self-represented

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid tips)
RSA 275:43-b — Payment of Salaried Employees
(unpaid salary)
RSA 275:48 — Withholding of Wages (removed at
hearing)

DATE OF HEARING: December 15, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

Claimant filed a wage claim on October 28, 2022, alleging that she is owed salary and tips for two time periods: the week ending September 25, 2021 and the week ending December 31, 2021. Notice of the claim was sent to Employer on October 31, 2022. Employer did not file an objection. Claimant requested a hearing. Notice of hearing was sent on November 21, 2022.

At the start of the hearing, Claimant was asked if she was making a claim for improper wage garnishment, as that issue was included on the notice of hearing. She said she was not making such a claim. That issue was therefore removed from consideration.

FINDINGS OF FACT

The following findings are based on the testimony of Claimant and Employer's witness Kathryn Holmes, exhibits offered by both parties, and matters of record in the Department file.

Claimant is 26 years old and lives in Derry. She has a bachelor's degree in business administration. Before working for Employer she was an administrative assistant at a pet-daycare business. Prior to that, she worked in retail and fast food establishments. In August 2021, she started working for Employer's pet grooming business in Nashua. She worked as a pet groomer and receptionist. She was also tasked with reporting employee hours to the payroll company.

Claimant was paid a salary of \$705.00 per week plus tips. Her tips were usually paid out as cash. Pay periods ran from Sunday to Saturday. Payday was the following Friday. Claimant was generally paid by direct deposit but sometimes by check if the payroll was turned in late. She kept track of the amount of her tips on notes that she kept. However, she testified that she no longer had her notes documenting the tips that she earned.

Claimant worked the week of September 20–25, 2021 but never received a paycheck for this week. She also testified that she had made tips totaling \$114 that week which she never received. Claimant testified that she also worked the week of December 27–31, 2021 and was never paid her salary or tips totaling \$15.00.

Claimant resigned from her position in July 2022.

Kathryn Holmes, 37, has been the Employer's store manager for about a year and a half. The company currently has 10 employees and has been in business for five years.

Ms. Holmes agreed that Claimant worked September 20–25 and had not been paid. She contended that it was Claimant's fault that she was not paid, because Claimant had failed to put in her hours for that week. With regard to December 27–31, Ms. Holmes denied that Claimant did any work at all during that week. She presented time sheets and a payroll report that corroborated this testimony.

Employer did not produce any records regarding tips earned by Claimant or paid out to her.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she 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).

The Claimant's testimony that she was not paid her salary of \$705.00 for September 20–25 was not contested by the Employer and is credited. Although the employer contested the claim for tips totaling \$114.00, no documentary evidence was provided to show the amount of Claimant's tips for that week or proof that she was paid her tips.

In this regard, Department administrative rule Lab 803.03 (Notification and Records) provides that:

- (f) Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:

- (4) Make such good records as shall show the exact basis of remuneration of an employee's compensation;

Compliance with this rule gives an employer a ready means of resolving good-faith disputes such as the present one. But an employer's failure to follow this rule does not relieve the claimant of her burden of proving entitlement to unpaid tips or any other benefit, or carte blanche with respect to such claims.

In this case, Claimant's testimony that she earned the tips in the amount claimed was not contested and is found to be credible. Absent any documentation showing that Claimant already received the tips, her testimony that she never received them is credited.

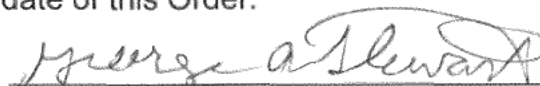
With regard to December 27–31, Employer produced credible evidence to show that Claimant did no work that week. Although salaried employees are generally entitled to receive their full salary without regard to the number of hours worked, they are not entitled to receive any salary for a pay period in which they do no work, pursuant to RSA 275:43–b, I(a). As it is found that Claimant did no work that week, she was not entitled to her regular salary. Her claim for tips earned that week is also found to be without merit.

DECISION

Based on the evidence and testimony, it is found that Claimant was not paid her salary and tips earned during the week of September 20–25, 2021, totaling \$819.00.

The employer is hereby ordered to send a check to the Labor Department, payable to ██████████ in the amount of \$819.00, less applicable deductions, within 30 days of the date of this Order.

January 9, 2023
Date of Decision


George A. Stewart, Hearing Officer

GAS/nd