

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

[REDACTED]  
Little Miss Sophie's

Case No. 23-WG-00415

DECISION OF THE HEARING OFFICER

**APPEARANCES:**

[REDACTED] claimant

Employer failed to appear for hearing

**NATURE OF DISPUTE:**

RSA 275:43 V - Weekly, Unpaid (Vacation Pay/Sick Pay/Personal Day/ Holiday) PTO

RSA 275:44 IV – Liquidated Damages

RSA 275:21 VIII - Unpaid Overtime Pay

**DATE OF HEARING:**

March 29, 2023

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed a wage claim on February 6, 2023, alleging that she was owed \$2,701.40 in unpaid paid time off (PTO) and overtime. Notice of the claim was sent to the employer on February 7, 2023. The employer responded February 17, 2023. The claimant requested the hearing February 21, 2023. The hearing notice was issued February 27, 2023.

The employer did not appear for the hearing. A review of the file indicated that the notice of hearing was mailed to the employer at the address provided and was not returned to the Department as undeliverable. It was therefore determined that the employer received adequate notice of the hearing. After waiting 15 minutes for a delayed arrival or other communication from the employer, the hearing proceeded in their absence, consistent with administrative rule Lab 203.04.

The claimant seeks 40 hours of vacation pay at \$20.00 per hour, or \$800.00 and 63.38 hours of overtime pay. At the hearing, the claimant acknowledged that her overtime calculation was a mistake because she multiplied 63.38 by \$30.00, instead of the \$10.00 differential. The claimant agreed her overtime claim was for \$633.80 rather than \$1,901.40. The total claim is for \$1,433.80. The claimant also seeks liquidated damages on that amount.

## FINDINGS OF FACT

The following findings are based on testimony and matters of record in the Department file.

The claimant resides in Rochester, New Hampshire. The employer is a restaurant in Rochester, New Hampshire. The claimant testified that she was employed for 2 years by the employer as a cook and server from age 16 to age 18. The claimant testified her wage rate was \$20.00 per hour for cooking and \$3.26 per hour for serving.

Regarding the paid time off, the claimant offered pay stubs from December 27, 2021 to July 3, 2022 that showed the claimant had 40 hours vacation time accrued at the end of her employment. The claimant also provided a text message where the employer acknowledged that she refused to pay the claimant her vacation time.

Regarding the overtime claim, the claimant provided documentation of pay stubs and time sheets from December 27, 2021 to July 3, 2022. The pay stubs and time sheets indicated the claimant had worked 40.67 hours overtime as a cook in that period. The pay stubs indicated the claimant was paid \$4.89 per hour for the overtime, which is the overtime rate for the server's wage. The claimant asserts that she should have been paid a \$10.00 overtime differential rate for cook's wages.

## DISCUSSION AND CONCLUSIONS

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

Under RSA 275:43 V,

*"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).

In this case the claimant was able to demonstrate from the records provided that she had accrued and was owed 40 hours of vacation time at the conclusion of her employment. Her highest wage rate was \$20.00 per hour at the conclusion of her employment. The claimant is entitled to \$800.00 in gross pay for her accrued vacation time.

Under RSA 279:21 VIII, in relevant part,

*"Those employees covered by the introductory paragraphs of this section...shall, in addition to their regular compensation, be paid at the rate of time and one-half for all time worked in excess of 40 hours in any one week".*

The claimant was also able to demonstrate she is owed overtime pay. The records indicate the claimant worked 40.67 hours overtime as a cook. She should have been paid a differential of \$10.00 for those overtime hours. She was paid \$4.89 per hour. The claimant is owed \$5.11 per hour for the 40.67 hours, or \$207.82.

The claimant is entitled to \$1,007.82 in unpaid vacation and overtime pay.

Regarding liquidated damages, RSA 275:44 IV reads in relevant 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;*" (emphasis added).

In this case the employer failed to appear for the hearing after responding to the wage claim notice. There is evidence the employer has the ability to pay. There is evidence that the employer remains in business and was aware of the issues concerning the claimant's last paycheck. Further, the fact that the employer is still in business is evidence of the ability to pay the agreed wage.

The preponderance of the evidence indicates that the employer was aware that the wages were owed. The fact that the employer responded to the wage claim notice and failed to pay the claimant and failed to appear for the hearing indicates that the failure to pay was willful. The weight of the evidence in this case necessitates a finding that the failure to pay was not only willful but also without cause.

Therefore, it is found the employer willfully and without good cause failed to pay wages in the amount of \$1,007.82 in the time period required by RSA 275:43 I. Therefore, the claimant is entitled to the equivalent amount in liquidated damages.

### DECISION

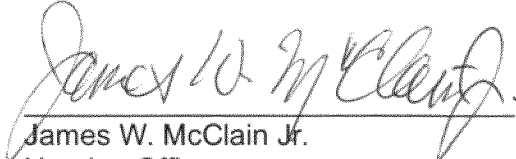
Based on the testimony and evidence presented, it is found the claimant has met her burden to prove by a preponderance of evidence that she is owed additional wages for accrued paid time off and overtime.

It is hereby ruled that this Wage Claim is **valid**.

The employer is directed to send a check payable to [REDACTED] to the Department of Labor in the amount of \$1,007.82 for the unpaid vacation and overtime pay, less all applicable taxes, within 30 days of the date of this decision.

The employer is directed to send a second check payable to [REDACTED] to the Department of Labor in the amount of \$1,007.82 for the liquidated damages within 30 days of the date of this decision.

April 25, 2023  
Date of Decision

  
James W. McClain Jr.  
Hearing Officer

JWM/nd