STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 02, 2019
IN THE MATTER OF: Appeal Board No. 606149

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective February 2, 2019, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to February 2, 2019 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed April 15, 2019 (), the Administrative Law Judge overruled the initial determination.

The employer and the Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the employer and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as an assistant sales manager and trainer by the employer home improvement/flooring distribution company for just under one year. The employer has an "Equal Opportunity & Anti-Harassment Policy" which was received by the claimant at hire. The policy, in pertinent part, prohibits verbal sexual harassment, including, "sexual innuendos and suggestive comments; insults, humor and jokes about sex, anatomy or gender-specific traits; sexual propositions; threats; repeated requests for dates; or statements of a sexual nature about other associates, even in their absence."

During his employment, the claimant had a number of interactions with another employee, DW, a sales coordinator, who was not directly supervised by the claimant. On

one such occasion, the claimant approached DW to ask her a question, and DW began to complain to the claimant about the employer, indicating that she believed the employer owed her money for referrals she had made. DW was agitated, and asked the claimant if she could sit in her car on her 15-minute break rather than stay in the office. The claimant did not ask DW to sit in his car or tell DW to save him a seat in her car. On another occasion, DW was complaining to the claimant about her job and comparing it to her previous job at a sports bar known for its scantily-clad waitresses. The claimant commented to DW that it would be funny if she wore her uniform from that job to work the following Halloween, when employees were encouraged to dress in costume.

At holiday time, the claimant, DW and two other sales managers were discussing what kind of wine they like to drink. After DW left the conversation, the claimant suggested to the other managers that they all chip in and purchase a bottle of wine for the claimant as a holiday gift. Shortly thereafter when the claimant and his wife were out shopping, the claimant and his wife purchased a bottle of inexpensive wine and gave it to DW as a holiday gift. The claimant told DW not to tell the other two managers about the gift.

Occasionally, the claimant and other managers travelled out of town for business. It was routine for the managers who were out of the office to touch base with employees in the office and jokingly ask if the employees left behind missed the managers who were out of town. In January 2019, the claimant was at a work-related convention in Houston, Texas with a number of other managers, including DW's mother who was an upper-level manager in the employer's company. The managers were joking that DW liked them better than the claimant. DW's mother stated that DW liked all of the managers equally. Prompted by this conversation, the claimant said he was going to text DW to ask if she missed him, and did so.

On or about January 31, 2019, DW complained to one of the sales managers about comments made by the claimant. The employee relations manager, the sales manager and the market manager met with the claimant on February 1, 2019, confronting him with DW's accusations, and discharged him on February 4, 2019, after concluding that his conduct violated the employer's "Equal Opportunity & Anti-Harassment Policy." The employer did not question any other employees about DW's complaints before firing the claimant.

OPINION: The evidence establishes that the claimant was discharged because the employer concluded that he engaged in conduct that was a violation of the employer's Equal Opportunity & Anti-Harassment Policy.

We do not concur with the analysis in the hearing decision that all claimants who have

engaged in sexually harassing conduct towards another employee must be warned prior to discharge in order for their conduct to be considered misconduct for unemployment insurance purposes. Under certain circumstances, a claimant's behavior may indeed be considered misconduct even without a warning, such as where the claimant was a manager charged with enforcing the employer's policy prohibiting harassment, including sexual harassment. Thus, we agree with the Commissioner's contention on appeal that a warning is not necessary under circumstances of established sexual harassment, although the cases cited by the Commissioner of Labor are distinguishable since in each case the claimant had received a warning about his conduct prior to discharge.

However, this record fails to establish that the claimant engaged in the conduct, and under the circumstances, contended by the employer. Significantly, the only firsthand testimony provided at the hearing was that of the claimant, who credibly and consistently denied that he suggested that DW save him a seat in

her car, as alleged by the employer. In addition, the claimant provided consistent and credible testimony, which was not disputed by the employer, regarding the circumstances surrounding other conversations and verbal exchanges he had with DW, including the lighthearted context in which comments were made between and

among coworkers. Based upon the claimant's firsthand credible testimony, his exchanges with DW do not amount to misconduct.

We are not persuaded by the documentation and testimony provided by the employer indicating that the claimant admitted that he asked DW to save him a seat in her car when she went on her break. The witnesses provided inconsistent testimony regarding the claimant's admission, and the market manager's testimony was inconsistent with his prior written statement on the topic. The employer's witnesses are also inconsistent with respect to the content of the text message sent by the claimant. As to the employer's contentions that the claimant admitted seeing DW in a "crop top" she wore into work the day after her birthday when she reported to work in the same clothes she wore out the night before, I note that the claimant was not questioned about this incident. However, even if he did admit seeing DW in a "crop top" there is no firsthand evidence that the claimant engaged in any inappropriate conduct or conversation in connection with his observation. Further, we find it significant that the employer acknowledged it did not conduct a more complete investigation of the allegations, accepting the facts alleged by the complaining coworker without questioning others who might have witnessed one or more of the events.

We find that the conduct established by this record does not obviously fit into the conduct

prohibited by the employer's policy, and was not so egregious that the claimant should have known he was jeopardizing his employment. Accordingly, we find that the claimant's behavior did not constitute misconduct under the Labor Law, and conclude that he was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective February 2, 2019, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to February 2, 2019 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER