



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 27, 2020

IN THE MATTER OF:

Appeal Board No. 612284

PRESENT: GERALDINE A. REILLY, MEMBERS

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits effective January 30, 2020, 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 January 30, 2020 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a 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 August 21, 2020 (020-134448), the Administrative Law Judge granted the employer's application to reopen 020-10695 and sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board, insofar as the initial determination was sustained. The Board considered the arguments contained in the written statements submitted on behalf of the claimant.

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

FINDINGS OF FACT: The claimant worked for a beverage distribution company as a warehouse associate from January 21, 2019 until January 30, 2020. Sixty per cent of the employer's business involves delivery to schools. The claimant is a registered sex offender and is on parole through 2027; and one of his restrictions is that he may not enter a school. At hire he told the hiring manager (later his supervisor), NS, that he had a criminal background and that

he was on parole.

From January to June 2019, the claimant worked in the warehouse, packing and moving product. In June 2019, when he asked for a raise, NS made him a driver's helper after getting permission from the claimant's parole officer for the claimant to be at work at 5:00 AM. In July 2019, the claimant and his driver covered the route of an absent driver and delivered product to the outside loading dock of a school in Queens. As it was summer, there were no children present. This was the only school the claimant delivered to in his six months as a driver's helper. After the claimant obtained a CDL license at the encouragement of his supervisor, he applied for a job as a driver, at which time a background check was run, and the employer's Human Resources Director discovered his sex offender status and the underlying charge on December 30, 2019. She asked for a statement of his parole restrictions which he provided, which indicated that he could not deliver to schools. On January 31, 2020, the employer discharged the claimant because he could not deliver to schools given his sex offender status and because they could lose business from schools if he did deliver to a school and anything adverse happened. The claimant asked to return to work in the warehouse and was denied the opportunity.

OPINION: The credible evidence establishes that the employer discharged the claimant after running a background check and discovering that he was a registered sex offender because he was restricted from entering a school which meant that he could not deliver to schools and over half their customer base was schools. The credible evidence further establishes that the claimant informed the hiring manager/his supervisor of his criminal background at hire. While an employer may discharge an employee for any lawful reason, not all such reasons rise to the level of disqualifying misconduct under the UI Law. Although the claimant assisted with one delivery to a school in July 2019, according to the claimant's credible first-hand testimony he did not enter the school but instead only placed the delivery on the outside loading dock and, as it was summer, there were no children at the school. Additionally, he wasn't discharged until January 31, 2020, which is six months after the event. Since the record fails to establish a direct nexus in time between that incident and his discharge, misconduct for unemployment insurance purposes has not been established. Even if we were to consider the nexus to have been closed because the Human Resources Director found out about his offender status on December 30, 2019, the fact that there were no children at the school in the summer and the delivery was to an outside loading dock shows the

claimant's action to be an isolated instance of poor judgment and not disqualifying misconduct. Further, while the claimant could not deliver to schools as a driver, he had not been made a driver at the time of his discharge and had made no other deliveries to schools. A determination of disqualifying misconduct may not be imposed for a possible future event. Accordingly, we conclude that the evidence fails to establish that the claimant's actions here constituted misconduct under the Unemployment Insurance Law, and consequently, he lost his employment under non-disqualifying conditions.

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

The initial determination, disqualifying the claimant from receiving benefits effective January 30, 2020, 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 January 30, 2020 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.

GERALDINE A. REILLY, MEMBER