



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: DECEMBER 03, 2020

IN THE MATTER OF:

Appeal Board No. 612459

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective December 21, 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 THE SOFA DOCTOR INC prior to December 21, 2019, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed September 23, 2020 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement 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 was employed as a technician by the employer furniture assembler for almost five years. The claimant had no set schedule, and no time that he had to report to the office, but was expected to be on-call Monday through Friday, from 8:30 A.M. to 6:00 P.M. to receive scheduled jobs for the employer's clients, as well as for any emergency jobs that came up. The claimant was expected to call in to report that he was working, and to accept or respond to the employer's calls. The claimant was

notified of his job assignments either through an electronic system for the pre-scheduled jobs, or by call from the employer.

On or before November 19, 2019, the claimant requested a week's vacation, from December 23 to December 28, 2019, to return to work on December 30. The managing director (MD) advised the bookkeeper that the claimant wanted to take "the week of 12/23 - 12/28 as vacation", ensured that the claimant had time available to take, and granted the claimant's vacation request.

The claimant did not return from vacation as expected on December 30, 2019, and did not contact the employer to say he would not be back or to explain his absence. On December 30, MD texted the claimant to find out where the employer's van was; the claimant was supposed to have dropped it off at the repair shop before going on vacation, and picked it up again when he resumed his work on December 30, 2019. The claimant did not respond to that text.

The claimant next contacted the employer by a text message to the managing director on January 6, 2020 at 2:08 P.M., stating, "Got back to Ny. Good Afternoon." MD responded by asking the claimant to come to the office the following day after 1:00 P.M. The claimant responded, "Yes," and that he was trying to make it to the meeting, but his flight got delayed. There had been no meeting scheduled for January 6; the claimant had not gone anywhere outside New York, had not taken a plane anywhere, and experienced no flight delay.

The claimant did not report to work or attend the 1:00 P.M. meeting on January 7, and did not call, text, or otherwise contact the employer to explain his absence. The claimant did not report to the office or call to explain his absence on January 8. At around 7:00 P.M. that evening, MD texted the claimant asking, "What is your excuse for not showing up today?" and received no response. On January 9 at 1:02 P.M., MD texted the claimant asking "when exactly" he planned to report. The claimant responded that he was on his way over.

When the claimant arrived at the offices on January 9, 2020, the owner and MD met with him and advised that he was fired. MD handed the claimant a discharge letter dated January 6, 2020, the date on which the employer had decided to fire the claimant because he did not return to work from his vacation on December 30, 2019 as scheduled, and did not contact the employer for over a week to explain his failure to return and his unauthorized extended absence.

OPINION: The credible evidence establishes that the employer discharged the claimant on January 9, 2020, because he failed to return from his vacation as scheduled on December 30, 2019, and failed to communicate with the employer at all after December 30, 2019 until January 6, 2020. The evidence establishes that when the claimant did contact the employer on January 6, 2020, he did not report to work, but provided a fabricated account including that he had just returned to New York and that his flight had been delayed.

We are not convinced by the claimant's testimony that he was given permission to take two full weeks off, and was not due to return to work until January 6, 2020. The claimant's testimony includes multiple contradictions and admitted untruths. His texts to the employer on January 6, 2020 indicate that he had just

gotten back to New York, and that his flight had been delayed, statements that he reiterated when speaking with a Department of Labor representative. He elaborated further during testimony that he had a job scheduled for 2:00 P.M. on January 6 when he returned from vacation, and that his flight was due in between 11 and 12, and he planned to go directly to the job. However, the claimant's deception was revealed at the second hearing, when he acknowledged that he did not go anywhere while he was away from work, and was not on a plane on January 6.

Nor are we persuaded by the claimant's testimony that after his 2:08 P.M. text to the employer on January 6, 2020, he called MD and got her permission to take off on January 7 and 8. The employer's phone records show no telephone call from the claimant on January 6. In addition, it is not plausible that the managing director would approve the days off, then text the claimant to find out why he had not shown up on those days. Further, the claimant initially testified that he asked for the additional days because he was sick when he came back from vacation, but later changed that account and stated that he needed those days to meet with lawyers to investigate discrepancies in the W-2 forms he had received from the employer. Adding to the inconsistencies within the claimant's testimony, credible testimony and other evidence produced by the employer establishes that the employer had not given the claimant his W-2 as of these dates in early January, since the employer had not yet received them from its payroll company. In addition, we note that the claimant testified at the first hearing that he was told when he was fired that he was being discharged for taking vacation without authorization; yet later testified that he first learned that was the reason for his firing from the

Department of Labor when he was denied unemployment benefits. The inconsistencies on key material facts throughout the claimant's testimony render his testimony as a whole untrustworthy and unreliable.

By contrast, the employer's managing director testified consistently over the course of the three hearings that the claimant was expected to return to work on December 30, 2019, after a week's approved vacation. She credibly and consistently denied that she gave the claimant permission to take two weeks off, from December 23, 2019 through January 3, 2020. Her testimony is supported by the e-mail she sent to payroll, setting the dates of the claimant's requested vacation week, and by the fact that she texted the claimant on December 30, 2019, the date of his expected return, to inquire about the employer's van he was supposed to have repaired and back in his possession and on the job on that date.

We are not persuaded that payment to the claimant for unused 2019 his sick days establishes that he was approved to take a second week off. The managing director credibly testified that according to the employer's policy, the claimant would not have been paid for the sick days, and given an additional week off. The fact that the sick pay was included in the claimant's pay for the week of December 23 through 27, and not the following week, supports that testimony.

Finally, even if the Board were to credit the claimant's questionable testimony that he had been approved for two weeks of vacation, we would still find that the claimant did not report back to work as scheduled on January 6, 2020. As noted herein, we are not convinced that the claimant spoke with the employer's managing director and was given permission to take additional days off after January 6.

The claimant's failure to return from an approved vacation when scheduled, taking additional, unauthorized time off, and his failure to communicate with the employer about the fact that he was not returning for more than a week, constitute misconduct under the Labor Law. Accordingly, we conclude that the claimant was separated from employment under disqualifying circumstances.

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

The initial determination, disqualifying the claimant from receiving benefits, effective December 21, 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 December 21, 2019, cannot be used toward the establishment of a claim for benefits, is sustained.

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

For information on Pandemic Unemployment Assistance eligibility, please visit the New York State Department of Labor's website at <https://dol.ny.gov/pandemic-unemployment-assistance>.

RANDALL T. DOUGLAS, MEMBER