



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

---

Mailed and Filed: DECEMBER 02, 2020

IN THE MATTER OF:

Appeal Board No. 612682

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 612682, 612683, and 612684, the claimant appeals from the decisions of the Administrative Law Judge filed October 7, 2020, which sustained the initial determinations disqualifying the claimant from receiving benefits, effective March 16, 2020, on the basis that the claimant voluntarily separated from employment without good cause; charging the claimant with an overpayment of \$1,860 in benefits recoverable pursuant to Labor Law § 597 (4);

charging the claimant with an overpayment of \$8,400 in Federal Pandemic Unemployment Compensation (FPUC) repayable pursuant to § 2104 (f) (2) of the

Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$279 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

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

**FINDINGS OF FACT:** The claimant was employed part time as a crew member by the employer smoothie/acai

bowl restaurant for about one and a half years. The claimant had a varied work

schedule, since she was also attending school. The claimant last worked on March 15, 2020. Sometime between March 16 and March 19, the claimant and two coworkers (who were sisters) learned that they had potentially been exposed to COVID-19 on March 16, as her coworkers' mother was sick. On Thursday March 19, the claimant and her two coworkers (BP and EP) were told via a group text from one of the restaurant managers, not to report to work their shifts for the rest of that week. The claimant was next scheduled to work on Sunday March 22, 2020. On that day, the claimant texted JT, who was her supervisor and a manager, and said that she did not feel comfortable coming in for her shift that day.

The claimant did not thereafter contact JT or anyone else at the employer restaurant to advise that she was prepared to return to work, or ask when she was next scheduled to work. The claimant did not reach out to JT because she had heard, through BP, that JT told BP and EP that they were not to return yet. The claimant assumed that because she had been exposed to the same individual (who had the flu, and not COVID-19), that JT's directive referred to her as well. The claimant did not call or otherwise contact JT to confirm whether her assumption was accurate.

The claimant did not receive a schedule to work after March 22, 2020, and did not call or otherwise contact the employer about the fact that she had not received a schedule. Rather, the claimant continued to assume that she was not allowed to return to work. The claimant was never told not to come back to work, and was never told there was no work for her at the restaurant. The employer remained open for business during the entire period at issue, through the date of the hearing, and the employer hired new workers to help cover the schedule when the claimant failed to return to work.

The claimant filed a claim for unemployment benefits on April 3, 2020. Upon filing, the claimant was asked the reason she was no longer working for her most recent employer. Among the answers available for the claimant to choose were "quit," "fired," "discharged/let go," and "lack of work." The claimant responded that she was unemployed due to a lack of work. Thereafter, the claimant received \$1,860 in regular unemployment benefits, and \$8,400 in Federal Pandemic Unemployment Compensation (FPUC) benefits.

**OPINION:** The credible evidence establishes that the claimant was separated from her employment when she did not return to work after calling out for her scheduled shift on March 22, 2020, and did not contact the employer to advise

that she was prepared to return after her concern that she had been exposed to COVID-19. This conduct by the claimant constitutes a voluntary separation from employment for unemployment insurance purposes.

We are not persuaded by the claimant's contention that since she did not receive a schedule to work after March 22, her separation from employment was involuntary. Having called out for her scheduled shift on March 22, it was the claimant's responsibility to contact the employer to advise that she was ready to return, and find out when she was next scheduled to work. Nor are we convinced that the claimant reasonably assumed that JT's communications with her coworkers also applied to her. The claimant's own testimony establishes that she was not specifically mentioned in the texts or conversations JT had with her coworkers. Further, nothing in those communications indicated that the employer was terminating anyone's employment. In addition, any misunderstanding or miscommunication could have been cleared up by the claimant contacting her supervisor, advising that she was ready to come back to work, and asking when she could return. Instead, the claimant had no direct communication with her supervisor after March 22, and unreasonably relied on communications not involving her to reach a faulty conclusion about her employment. The claimant's admitted failure to contact the employer was a failure to take reasonable steps to preserve her employment, and constitutes a voluntary separation from employment without good cause under the Labor Law. Accordingly, we find that the claimant was separated from employment under disqualifying circumstances.

The evidence further establishes that when the claimant filed her claim for unemployment benefits on April 3, 2020, she indicated that she had been separated from employment due to a lack of work. Since the credible evidence establishes that the claimant's separation was voluntary, and there was work available for

the claimant had she returned, her response upon filing was factually false. Therefore, the benefits at issue

were both overpaid and recoverable, under Labor Law § 597 (4) and § 2104 (f)

(2) of the Coronavirus Aid,

Relief, and Economic Security (CARES) Act. Since the claimant knew or should have known her separation was not due to a lack of work, her false statement

upon filing was also a wilful misrepresentation, and the forfeit penalties were properly imposed.

Finally, the hearing Judge properly found that a former employee who had been laid off or fired by the employer, was not relevant or necessary to decide the issues.

DECISION: In Appeal Board Nos. 612682, 612683, and 612684, the initial determinations, disqualifying the claimant from receiving benefits, effective March 16, 2020, on the basis that the claimant voluntarily separated from employment without good cause; charging the claimant with an overpayment of \$1,860 in benefits recoverable pursuant to Labor Law § 597 (4); charging the

claimant with an overpayment of \$8,400 in Federal Pandemic Unemployment Compensation (FPUC) repayable pursuant to § 2104 (f) (2) of the Coronavirus

Aid, Relief, and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$279 on the basis that the claimant made a willful misrepresentation to obtain benefits, are 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>.

JUNE F. O'NEILL, MEMBER