STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 01, 2021

IN THE MATTER OF:
Appeal Board No. 616051

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

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 was an appearance on behalf of the employer. By decision filed May 21, 2021 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination.

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

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

FINDINGS OF FACT: The claimant worked for the employer, a residential apartment building, as a live-in superintendent from around 2002 until February 6, 2020. The claimant's duties included provide maintenance of the apartment building, including making general repairs on the building. The employer's practice is to not terminate a superintendent during the winter months as the employer wanted to be certain there was someone on site for the

residents and because the boiler required constant attention during those months. The employer needed to have a superintendent present at the building in case of an emergency.

On December 27, 2019, the employer observed the claimant tampering with the employer's equipment in the secure boiler room, including the security camera recorder and the computer that controls the boiler. The employer saw the claimant on the employer's video system, ripping some equipment from the wall and pressing buttons on the heating control unit for the boiler, after which the claimant redirected the security camera, removing himself from view. As a result of the claimant's actions, the video system and the heating control unit for the boiler became inoperative, and the employer had to have the equipment repaired. On the same day, the employer decided to discharge the claimant, but needed to find a superintendent to replace the claimant. As the employer needed to have a superintendent living on site and had no vacancies, the employer needed to have the claimant vacate the apartment in which he was living so the new superintendent had an apartment in the building to live in.

On February 6, 2020, the employer discharged the claimant because the employer found a superintendent to replace the claimant.

OPINION: The credible evidence establishes that the employer discharged the claimant on February 6, 2020 because the employer observed the claimant in the secure boiler room on December 27, 2019 tampering with the employer's equipment, including the security camera recorder and the heating control unit for the boiler, after which the claimant redirected the security camera, removing himself from view. As a result of the claimant's actions, the video system and the heating control unit for the boiler became inoperative, and the employer had to have the equipment repaired. It is well settled that there must be a direct nexus in time between the alleged act and the discharge to establish misconduct, and if there is a delay, there must be a reasonable explanation for such delay (Appeal Board No. 552340). The Board has held that the nexus between a claimant's wrongdoing and the claimant's discharge is destroyed only when the employer has not shown justification for the delay in discharging the claimant for a specific act of misconduct (Appeal Board No. 543468). In the case before us, the claimant was not discharged by the employer until approximately five weeks after the incident. However, the employer has indicated that it needed to find a replacement for the claimant due to the need to have a superintendent present at the building in case of an emergency. In addition, as the building utilized a live-in superintendent and

the claimant was occupying the only available apartment in the building, time was needed for the employer to arrange for the apartment to be vacated before a new superintendent could move in. Under these circumstances, we find that the delay in discharging the claimant was not unreasonable and should not have been a factor in determining whether the claimant's actions constituted disqualifying misconduct (Matter of Weinstein, 161 AD3d 1410 [3d Dept 2018]). We conclude that the claimant's actions in tampering with the employer's equipment, causing the equipment to become inoperative and in need of repair, constitute misconduct and his employment ended under disqualifying conditions.

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

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in

the future, is sustained effective February 7, 2020.

The initial determination, holding the claimant eligible to receive benefits, is overruled.

The claimant is disqualified from receiving benefits, effective February 7, 2020 until the claimant has

subsequently worked in employment and earned remuneration at least equal to 5 times the claimant's weekly benefit rate for all claims filed on or before January 1, 2014, or until the claimant has subsequently worked in employment and earned remuneration at least equal to 10 times the claimant's weekly benefit rate for all claims filed after January 1, 2014. Employment and earnings from non-covered, excluded or self-employment will not count.

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

MICHAEL T. GREASON, MEMBER