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

DECISION OF THE BOARD

Mailed and Filed: JULY 19, 2022

IN THE MATTER OF:
Appeal Board No. 622450

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board No. 622449, the claimant appeals from the decision of the Administrative Law Judge filed March 18, 2022, which sustained the initial determination disqualifying the claimant from receiving benefits, effective July 12, 2021, 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 July 12, 2021, cannot be used toward the establishment of a claim for benefits.

In Appeal Board No. 622450, the claimant appeals from the decision of the Administrative Law Judge filed March 18, 2022, which sustained the initial determination charging the claimant with an overpayment of $11,088.00 in benefits recoverable pursuant to Labor Law § 597 (4) and charging the claimant

with an overpayment of Federal Pandemic Unemployment Compensation of $2100.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

In Appeal Board No. 622451, the claimant appeals from the decision of the Administrative Law Judge filed March 18, 2022, insofar as the decision modified and sustained the initial determination charging a civil penalty of $315.00.

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 worked as a warehouse generalist/selector for a supermarket warehouse from July 31, 2020, until July 11, 2021. The claimant was a member of a union in contractual relations with the employer. The employer has an attendance policy, known as the "lost-time" policy, which holds that after 8 instances of attendance infractions in a 12-month period an employee is given a verbal warning. The next infraction results in a written warning. The next infraction results in a one-day suspension. A further infraction in a 12-month period results in a three-day suspension. The next infraction results in termination. At hire the claimant signed that he received the policy. The five-step policy is also included in the union bargaining agreement with the employer.

The claimant was suspended for three days on April 22, 2021, due to a fourth step violation of the lost-time policy. On July 10, 2021, the claimant was scheduled to work from 8:00 am until 4:30 pm. The claimant reported to work at 8:22 am and left at 3:55 pm. The claimant did not request permission to leave early from P.S., his immediate supervisor, or any other supervisor on the floor. This was the fourteenth infraction of the lost-time policy in 12 months. As the claimant was on the fifth step of the lost-time policy a decision was made to discharge the claimant. The claimant was contacted by P.S. and the union steward on July 15, 2021, and he was told that he was terminated for violation of the lost-time policy.

The claimant filed his claim for benefits on July 18, 2021. He informed the Department that he was separated from his employment due to a lack of work.

The claimant received all benefits at issue.

OPINION: The credible evidence establishes that the claimant was discharged on July 15, 2021, for violating the employer's lost-time policy for the fourteenth time in 12 months on July 10, 2021. The claimant was on the fifth and final step of the lost-time policy. The claimant does not dispute that he left before the end of his shift on July 10, 2021. The claimant was on notice after being suspended for three days on April 22, 2021, that the final step pursuant to the employer's lost-time policy for an attendance policy violation would be a discharge. Even crediting that the claimant did not receive the paper warning of April 22, 2021, the claimant admits that he knew that the

three-day suspension was for his violation of the lost-time policy. The claimant knew or should have known that termination would be the next step for another violation as he acknowledged receipt of the employer's policy at hire.

We credit the testimony of the claimant's supervisor, P.S., that he did not give the claimant permission to leave early on July 10, 2021, and his further testimony that the claimant was told he was being fired for violating the lost-time policy and not that he was being laid-off on July 15, 2021. The employer, as a supermarket supplier, is an essential business and it would not be a reasonable business practice for the employer to allow workers to leave before the end of their shifts or to lay off workers while at the same time authorizing the use of mandatory overtime. The claimant's action of leaving early on July 10, 2021, constitutes a disqualifying misconduct and the benefits he received constitute overpayments.

The overpayment of federal FPUC benefits, are recoverable as a matter of law. With respect to the overpayment of regular benefits, the credible testimony of P.S. is that the claimant was told on July 15, 2021, that he was being terminated from his employment because of his violation of the employer's lost-time policy. The claimant therefore knew that he was not let go due to a lack of work. His statement to the Department was factually false. The overpayment of regular benefits is recoverable.

However, as the Administrative Law Judge overruled the willful misrepresentation determination, there can be no civil penalty due to the overpayment of FPUC benefits and the finding of a $315.00 civil penalty, is overruled.

DECISION: In Appeal Board No. 622449, the decision of the Administrative Law Judge is affirmed.

In Appeal Board No. 622449, the initial determination disqualifying the claimant from receiving benefits, effective July 12, 2021, 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 ERIE LOGISTICS LLC prior to July 12, 2021, cannot be used toward the establishment of a claim for benefits, is sustained.

In Appeal Board No. 622450, the decision of the Administrative Law Judge is affirmed.

In Appeal Board No. 622450, the initial determination charging the claimant with an overpayment of $11,088.00 in benefits recoverable pursuant to Labor Law § 597 (4) and charging the claimant with an overpayment of Federal

Pandemic Unemployment Compensation of $2100.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, is sustained.

In Appeal Board No. 622451, the decision of the Administrative Law Judge, insofar as appealed from, is reversed.

In Appeal Board No. 622451, the initial determination as modified, and charging a civil penalty of $315.00, is overruled.

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

MICHAEL T. GREASON, MEMBER