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

Mailed and Filed: DECEMBER 06, 2022

IN THE MATTER OF:
Appeal Board No. 625318

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 625315, 625316, 625317, the employer appeals from the decisions of the Administrative Law Judge filed July 19, 2022, which overruled the initial determinations, holding the claimant ineligible to receive benefits, effective April 15, 2020, through July 5, 2020, on the basis that the claimant was not capable of work; charging the claimant with an overpayment of $3180.00 in regular benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an overpayment of Federal Pandemic

Unemployment Compensation of $7200.00 recoverable 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 48 effective days and charging a civil penalty of $1557.00 on the basis that the claimant made willful misrepresentations to obtain benefits.

In Appeal Board Nos. 625318, 625319, 625320, the employer appeals from the decisions of the Administrative Law Judge filed July 19, 2022, which overruled the initial determinations, holding the claimant ineligible to receive benefits, effective July 6, 2020, through December 9, 2020, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of $2252.00 in regular benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an overpayment of Federal Pandemic

Unemployment Compensation of $1800.00 recoverable 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 160 effective days and charging a civil penalty of $670.87 on the basis that the claimant made willful misrepresentations to obtain benefits.

In Appeal Board Nos. 625321, 625322, 625323, the employer appeals from the decisions of the Administrative Law Judge filed July 19, 2022, which overruled the initial determinations, disqualifying the claimant from receiving benefits, effective December 13, 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 the employer prior to December 13, 2020, cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of $7150.00 in regular benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an

overpayment of Federal Pandemic Unemployment Compensation of $10,500.00 recoverable pursuant to § 2104 (f)(2) of the Coronavirus Aid, Relief and

Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Pandemic Emergency Unemployment Compensation of $2915.00 recoverable pursuant to § 2107 (e)(2) of the Coronavirus Aid, Relief and

Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 8 effective days and charging a civil penalty of $3213.93 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearings 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 and the Commissioner of Labor.

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

FINDINGS OF FACT: The claimant has worked as a cashier, part-time, for the employer, a supermarket, since 2019. The claimant reads and speaks limited English. The employer provided the claimant a copy of the employee handbook and the employer's policies in English, including the employer's rewards' program. The employer's policy associated with the program stated "improperly scanning the employee rewards' application to earn points is considered stealing." The employer did not previously issue any disciplinary warnings to

the claimant.

The claimant's husband is abusive. As of March 2020, the claimant suffered injuries to her hand due to her husband's abuse, causing arthritis. The claimant's doctor placed the claimant on medical leave from her employment as of April 14, 2020. The claimant remained on an unpaid leave of absence from her employment from April 14, 2020, scheduled through June 5, 2020, which was extended through July 5, 2020, due to her medical condition, her injuries from domestic violence, and her lack of childcare. The claimant conceded that she was unable to work from April 15 through July 5, 2020.

As a result, the claimant contacted the Department of Labor in April 2020, and explained her situation, in broken English, to a representative. The representative advised the claimant to apply for unemployment insurance benefits. On April 24, 2020, the claimant filed a claim for unemployment insurance benefits online with her husband's assistance. She completed most of the questions herself; at times, her husband prompted her with what to say and how to answer due to her limited English proficiency. The claimant did not recall seeing the claimant handbook or reading the handbook online because of her language barriers. The claimant understood that she needed to be ready, willing, and able to work in order to collect unemployment insurance benefits.

When the claimant was asked to certify after April 24, 2020, the claimant would respond that she was ready to work. Her husband had counseled her to answer "zero" when asked whether there were any days, she was unable to work. She told her husband to certify for her if he thought it was okay. Thereafter, the claimant's husband regularly certified for benefits on the claimant's behalf.

The claimant returned to work, from her medical leave, as of July 5, 2020. She worked on July 6, 7, 8, and 9, 2020. She continued to work at least four days per week through the week ending December 6, and on December 7, 8, and 9, 2020. The claimant last worked on December 9, 2020, when she was discharged.

After the claimant had resumed working as of July 5, 2020, and was working through December 9, 2020, the claimant's husband continued to certify on her behalf. She did not know what her husband did as to her certifications, but she had advised him that she was again working. The claimant is unaware of how much money she received in unemployment insurance benefits. The claimant did not dispute the accuracy of the Department of Labor's benefit ledgers. The

claimant's husband did apprise the claimant that he had put over $10,000.00 in unemployment insurance benefits in her own account.

During her two years of employment, the employer became aware that the claimant had accrued a significant amount of reward points and redeemed such points for cash. The employer concluded that the claimant, in accumulating so many points during her tenure, had scanned customers' purchases as if they were her own. The employer's loss prevention team investigated by reviewing the claimant's history purchases and surveillance videos for confirmation.

On December 9, 2020, the employer met with the claimant to discuss her potential discharge. The employer's store manager, department manager, and union representative confronted the claimant with a completed "Employee Warning Report" that stated the claimant acquired and redeemed excessive customer points and that the claimant had been given a prior verbal and written warning of August 5, 2019, and February 6, 2020, respectively. The "Warning Report" was offered to the claimant in English, without translation, and the claimant signed the warning without understanding the contents or the consequences. The employer did not show the surveillance video to the claimant. The employer discharged the claimant that same day.

OPINION: Pursuant to Labor Law § 597 (3), any determination regarding a

benefit claim may, in the absence of fraud or willful misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information. The initial determinations at issue were mailed February 22, 2022, and April 18, 2022, which were more than a year after the claimant had claimed and collected unemployment insurance benefits in 2020. Thus, a willful misrepresentation on the claimant's part is necessary to provide the Department of Labor with the authority to redetermine the claimant's benefit rights.

The credible evidence establishes that the claimant, during the relevant period, certified she was ready, willing, and able to work and capable of employment, when the claimant was on a medical leave of absence from work. Although the claimant contends that she was willing to work, the claimant conceded that she was unable to work at any point during that time. As the claimant was unable to work at any point during the period at issue due to her medical condition, these certifications are false, and known to be false, and constitute wilful misrepresentations.

Although the claimant argued that she had no control over these certifications because her husband certified for her, we reject her contention as unpersuasive. In so doing, we note that the claimant admitted to opening her own claim and certifying for benefits. Even though the claimant granted her husband permission to certify on her behalf, the claimant bore responsibility for the accuracy of the certifications being made by him as her agent. (See Appeal Board No. 562419). Also, the claimant was bound by his certifications that she was able to work, when, in fact, she was admittedly incapable of work. These certifications are wilful misrepresentations such that the Department of Labor bore the authority to redetermine all of the claims associated with the underlying legal issues. (See Appeal Board No. 623888A). Hence, we find that the Department of Labor had jurisdiction to address the merits of all the initial determinations herein.

The claimant was admittedly on medical leave from her employment from April 15, 2020, through July 5, 2020. Hence, we conclude that the claimant was incapable of employment from April 15, 2020, through July 5, 2020. As the claimant was incapable of employment for the period, she was ineligible for unemployment insurance benefits. Therefore, the relevant federal benefits the claimant received are automatically repayable.

As to the claimant's certifications for regular unemployment insurance benefits for this period, we note that the claimant and her husband both certified that the claimant was ready, willing, and able to work when she was medically incapable. Therefore, these certifications were factually false and render the overpayment of regular benefits recoverable. They also constitute wilful misrepresentations for which a forfeit penalty was properly imposed. And, as there are wilful misrepresentations and a recoverable overpayment, the civil penalty was properly imposed.

The credible evidence then establishes that the claimant resumed work as of July 6, 2020, worked three days that week, worked four or more days per week through December 6, 2020, and three days (December 7, 8, and 9) in the week ending December 13, 2020. Hence, the claimant was not totally unemployed and ineligible for benefits for this period. Therefore, she was overpaid benefits. The federal benefits she received are automatically repayable.

The credible evidence further establishes that the claimant's certifications to not working or working less days than the days she certified are factually

false statements, which render the overpayments recoverable. These statements also constitute wilful misrepresentations for which the forfeit penalty was properly imposed. As there is both a recoverable overpayment and a wilful misrepresentation, the civil penalty was properly imposed.

Finally, the credible evidence fails to establish that the claimant accrued reward points to which she was not entitled. Although the employer alleges, at hearing, that the employer's loss prevention unit confirmed the claimant's theft of reward points by surveilling the video evidence, the record is devoid of any first-hand evidence or testimony to substantiate the employer's contentions. Significantly, when afforded the opportunity to produce first-hand witnesses at either the June or July hearings, the employer elected to proceed in their absence. Nor did the employer produce the surveillance video. Also, although the "Employee Warning Report" indicates prior verbal and written warnings, the employer's witness testified that the claimant had no prior disciplinary warnings, and the record is devoid of any explanation why the employer's discharge notice indicated to the contrary. Under these circumstances, we conclude that the claimant was separated from her employment under non-disqualifying circumstances. Accordingly, she was entitled to the unemployment insurance benefits she received and cannot be said to have been overpaid benefits. The regular and federal benefits at issue are therefore not recoverable.

However, the certification to having resigned in December 2020, when, in fact, the claimant knew that the employer had discharged her, constitutes a wilful misrepresentation for which a forfeit penalty was properly imposed. As there is no recoverable overpayment, the forfeit penalty shall be reduced to four effective days. And, in the absence of a recoverable overpayment, no civil penalty may be imposed.

DECISION: The combined decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

In Appeal Board Nos. 625315, 625316, 625317, the initial determinations, holding the claimant ineligible to receive benefits, effective April 15, 2020, through July 5, 2020, on the basis that the claimant was not capable of work; charging the claimant with an overpayment of $3180.00 in benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an overpayment of

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of 2020; and reducing the claimant's right to receive future benefits by 48 effective days and charging a civil penalty of $1557.00 on the basis that the claimant made willful misrepresentations to obtain benefits, are sustained.

In Appeal Board Nos. 625318, 625319, 625320, the initial determinations, holding the claimant ineligible to receive benefits, effective July 6, 2020, through December 9, 2020, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of $2252.00 in benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an

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Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 160 effective days and charging a civil penalty of $670.87 on the basis that the claimant made willful misrepresentations to obtain benefits, are sustained.

In Appeal Board Nos. 625321, 625322, the initial determinations, disqualifying the claimant from receiving benefits, effective December 13, 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 the employer prior to December 13, 2020, cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of $7150.00 in benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant

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Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Pandemic Emergency Unemployment Compensation of $2915.00 recoverable pursuant to § 2107 (e)(2) of the Coronavirus Aid, Relief and

Economic Security (CARES) Act of 2020; and charging a civil penalty of $3213.93 on the basis that the claimant made a willful misrepresentation to obtain benefits, are overruled.

In Appeal Board No. 625323, the initial determination, reducing the claimant's

right to receive future benefits by 8 effective days, is modified to reflect to reflect a forfeit penalty of 4 effective days, and as so modified, is sustained.

The claimant is denied, in part, and allowed IN part, benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER

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