



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: APRIL 07, 2010

IN THE MATTER OF: Appeal Board No. 548663

PRESENT: LEONARD D. POLLETTA, GERALDINE A. REILLY MEMBERS

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits, effective August 25, 2008. 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 hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed October 5, 2009 (A.L.J. Case No.), 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 was employed as a part time school bus driver for 11 years until March 31, 2009. The claimant suffers from diabetes. Pursuant to law the claimant is required to be medically certified every six months as capable of driving. The claimant usually carries cookies, peanut butter crackers or hard candy on the bus with him in case of low blood sugar. On March 30, 2009 the claimant was fasting in preparation for a blood test for his recertification. The claimant suffered an attack of low blood sugar while transporting children and "got lost". He was on the radio with the dispatcher and the employer set out looking for claimant. They contacted 911. The claimant was found, another driver took his bus and the paramedics worked on the claimant. On March 31, 2009, the claimant did a morning run. Later that day the claimant

was asked if he had any "snacks" on his bus. He replied that he did. He had a Pop Tart, which he ate. The other driver working with claimant had prepared sandwiches for both of them. Claimant had purchased soda. The owner's personal assistant then informed the claimant that he could not work until he was medically certified as able to drive.

The claimant was not released by any doctor to return to work until June, 2009. The claimant was rehired by the employer at the start of the new school year in September 2009.

OPINION: The credible evidence establishes that the claimant was separated from his employment on March 31, 2009 when he was released from his driving duties and told that he could not work for the employer until he was reclassified as medically capable of employment. While the owner contends that he fired the claimant later that day, then again in April and again in May, 2009, we note that the claimant was separated without pay from his employment due to his medical condition prior to any of these alleged discharges by the employer. When a claimant is laid off from employment, without pay, and without a definite date of return, this is considered to be the point of separation. Claimant cannot thereafter be separated from employment which he does not have.

We therefore must conclude that the claimant was separated from employment for non disqualifying reasons and that he is otherwise entitled to receive benefits.

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

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 overruled.

The initial determination, holding the claimant eligible to receive benefits, effective August 25, 2008, is sustained.

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

LEONARD D. POLLETTA, MEMBER

GERALDINE A. REILLY, MEMBER