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

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Mailed and Filed: MAY 22, 2023

IN THE MATTER OF:
Appeal Board No. 628487

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 628485, 628486 and 628487, the claimant appeals from the decisions of the Administrative Law Judge filed March 13, 2023, which sustained the initial determination holding the claimant ineligible to receive benefits, effective March 30, 2020 through August 16, 2020, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation as modified to be March 30, 2020 through April 5, 2020; and sustained the initial determinations charging the claimant with an overpayment of $1,576 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), and $600 in Federal Pandemic Unemployment

Compensation (FPUC) benefits recoverable pursuant to Section 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 32 effective days and charging a civil penalty of $326.40 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified in accordance with the

decision.

In Appeal Board Nos. 628488, 628489 and 628490, the claimant appeals from the decisions of the Administrative Law Judge filed March 13, 2023, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective July 20, 2020 through August 16, 2020, on the basis that the claimant was not capable of work; charging the claimant with an overpayment of $1,280.50 (inadvertently recited as $1,280.00) in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4);

and reducing the claimant's right to receive future benefits by 32 effective days and charging a civil penalty of $192.07 on the basis that the claimant made willful misrepresentations to obtain benefits.

In Appeal Board Nos. 628491 and 628492, the claimant appeals from the decisions of the Administrative Law Judge filed March 13, 2023, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective February 14, 2022 through March 13, 2022, on the basis that the claimant was on a paid vacation period; and charging the claimant with an overpayment of $770 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4).

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.

The Board considered the arguments contained in the written statement submitted by the claimant.

In Appeal Board Nos. 628488, 628489 and 628490, we have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made. The findings of fact and the opinion of the Administrative Law Judge are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board, except that the decision inadvertently recited that the claimant lacked capability from July 20, 2020 through August 20, 2020, instead of July 20, 2020 through August 16, 2020, and inadvertently included in this four week period the week ending August 23, 2020, with a discussion of the certification for this week. We further find and conclude that receipt of maternity leave pay, instead of working, is an admission that the claimant was not capable of working during this period. Based on the employer's records, bi-weekly maternity payments were made by direct deposit on July 31, 2020; August 14, 2020 and August 28, 2020. The claimant was unable to produce a copy of the contended checks or her 2020 bank records not supporting these direct deposits. Further, since when certifying, the claimant was advised to read the handbook, which is available on-line, she is bound by the information in the handbook, including that she must be capable of working. In light of all of this, and because the claimant gave birth and was hospitalized in the week

ending July 26, 2020, the certification for this week and the subsequent three certifications, that there were zero days in each week in which she was not ready willing and able to work, are intentionally made factually false statements and, so, are willful misrepresentations. Finally, even one willful misrepresentation provides the Commissioner of Labor with jurisdiction to issue all the initial determinations.

In Appeal Board Nos. 628485, 628486 and 628487, and Appeal Board Nos. 628491 and 628492, based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked in retail sales at the employer's stores from 2016 until March 16, 2022. Due to the pandemic, in mid-March 2020 the store was closed. The claimant was informed that the employer would pay her for the two-week pay period ending April 4, 2020. On April 10, 2020, the employer paid the claimant $1,193.11 gross for 80 hours for this two-week pay period. The claimant did no work in the statutory week of March 30, 2020 through April 5, 2020.

On April 6, 2020, the claimant filed an original claim for benefits, effective March 23, 2020. Using the Internet, she subsequently certified weekly for benefits. As part of the 2020 certifications, she always saw "9 Things You Must Do When Filing for Unemployment Insurance." Its directions included that she had to report

each day she worked. The 2020 claimant handbook provides, in part, the following:

Work means any service you perform for a business or persons on any day in the week, even if it was only for an hour or less. If you worked on any day, you will be asked, "Excluding earnings from self-employment, did you earn more than $504?". If you worked at all during the week, you must indicate if you earned more than $504 gross before taxes.

On May 15, 2020, when certifying for benefits for the statutory week ending April 5, 2020, the claimant was asked, "How many days did you work, including self-employment, during the week ending April 5, 2020?" and, "Excluding earnings from self-employment, did you earn more than $504?" She stated she worked zero days that week and did not earn more than $504 that week. For the week ending April 5, 2020, the claimant received $394 in regular unemployment

insurance benefits and $600 FPUC benefits.

The claimant filed an original claim for benefits, effective October 11, 2021. In 2022, she was not working due to personal circumstances. Not to lose the accrued time, the employer distributed payments to the claimant. On March 11, 2022, representing the pay period February 20, 2022 through March 5, 2022, the employer paid 32 hours of paid-time-off (PTO) pay, and eight hours of holiday pay representing February 21, 2022 (Presidents Day). In addition, on March 25, 2022, representing the pay period of March 6, 2022 through March 19, 2022, the claimant was paid 32 hours PTO pay. The employer assigned these 32 hours to four days, namely, March 6, 2022; March 9, 2022; March 11, 2022, and March 12, 2022.

On February 25, 2022; March 7, 2022, and March 14, 2022, when the claimant certified for benefits for the statutory weeks ending February 20, 2022; March 6, 2022, and March 13, 2022, she was asked, "How many days were you owed vacation pay or did you receive vacation pay?" and "How many days were you owed holiday pay or did you receive holiday pay?" Each week, the claimant certified to zero vacation or holiday pay. As a result, the claimant received $308 per week in regular unemployment insurance benefits.

OPINION: In Appeal Board Nos. 628485, 628486 and 628487, the initial determination states the claimant lacked total unemployment because she worked four or more days and/or earned over $504 in each of four statutory weeks ending April 5, 2020; August 2, 2020; August 9, 2020, and August 16, 2020. Pursuant to Labor Law § 523 there are four effective days per week. One full

week of benefits consists of four effective days (see Appeal Board No. 577396). Labor Law § 522 states that, "'Total unemployment' means the total

lack of any employment on any day." An individual who works on four or more days per week does not lack total unemployment (see Labor Law § 523).

The credible evidence establishes that the claimant lacked total unemployment for the statutory week ending April 5, 2020. Although the claimant performed no work, she received $1,193.11 gross for 80 hours for the two-week pay period ending April 4, 2020, which weekly prorate share is more than the statutory limit of $504 for the relevant statutory week ending April 5, 2020. Accordingly, we conclude that the claimant was properly held ineligible for benefits for this week ending April 5, 2020.

The credible evidence further establishes that for the week ending April 5, 2020, the claimant certified that she worked zero days and that she did not earn more than $504 during this week. The handbook advises that work is an activity; this is in line with Labor Law § 522. The claimant was not

performing any activities for the employer during this week. As a result, this answer that she was not working is a mistake of law; it is not a factually false statement. Similarly, the handbook advises that a claimant must declare whether she earned more the $504 in a week in which she worked on any day. Given this stated emphasis that activities generate earnings, and that the claimant was not physically working during this week, her answer that she did not earn more than $504 that week is also a mistake of law; it is not a factually false statement. Since a willful misrepresentation is an intentionally, knowingly or deliberately made factually false statement (see, Matter of Valvo, 57 NY2d 116 [1982] and Matter of Vick, 12 AD2d 120 [3rd Dept 1960]), we conclude that these certifications do not constitute willful misrepresentations.

The credible evidence further establishes that the $394 in regular unemployment insurance benefits the claimant received for this week were overpaid. The initial determination's only stated basis for recoverability is

that the claimant made factually false statements to days worked, true earnings, or both. As these certifications are not factually false statements, we conclude that this overpayment of regular benefits is not recoverable.

The credible evidence further establishes that the $600 in FPUC benefits the claimant received for this week were overpaid. The claimant was not entitled to them since she lacked total unemployment for this week. Under § 2104 (f)

(2) of the CARES Act, individuals who have received amounts of FPUC benefits to which they were not entitled are required to repay those amounts. Accordingly, the FPUC benefits are recoverable.

Regarding the weeks ending August 2, 2020; August 9, 2020, and August 16, 2020, not only was no appeal taken from that portion of the decisions that excluded these three weeks, but there is no evidence to support a lack of total unemployment for such weeks. Accordingly, the initial determinations regarding these three weeks, and the associated overpayments and

certifications, remain overruled.

In Appeal Board Nos. 628491 and 628492, the initial determination states the claimant received vacation or holiday pay for three days in the statutory week ending February 20, 2022, for four days in the statutory week ending March 6, 2022, and three days in the statutory week ending March 13, 2022. Labor Law §

591 (3) provides that a claimant is not eligible to receive benefits during a paid vacation period. A paid vacation period is defined by the statute as "[T]he time designated for vacation purposes in accordance with the collective bargaining agreement or the employment contract or by the employer and the claimant, his union, or his representative. If either the collective bargaining agreement or the employment contract is silent as to such time ... then the time so designated in writing and announced to the employees in advance by the employer is to be considered such vacation period."

The credible evidence establishes that the PTO pay is vacation pay, and that the employer distributed a payment on March 11, 2022, representing the pay period February 20, 2022 through March 5, 2022, for 32 hours of vacation pay and eight hours of holiday pay (Presidents Day on February 21, 2022). However, there is no evidence that the employer assigned any specific days to this vacation pay, which is not inconsistent with the employer's distribution merely to preclude losing such the accrued time. As the statutory week ending February 27, 2022 is not at issue, the four vacation days and holiday pay are attributed to the statutory week ending March 6, 2022.

The credible evidence further establishes that the claimant received three days of vacation for statutory week ending March 13, 2022. Here, the evidence demonstrates that the employer designated the vacation pay to March 6, 2022; March 9, 2022; March 11, 2022, and March 12, 2022. However, since March 6, 2022, is in the prior statutory week, the claimant's vacation pay is only for three days for the statutory week from March 7, 2022 through March 13, 2022. This analysis is consistent with the initial determination holding the claimant in receipt of three days of vacation pay in the statutory week ending March 13, 2022. Accordingly, we conclude that the claimant is ineligible for benefits on four days in the week ending March 6, 2022, and on three days in the week ending March 13, 2022.

The credible evidence further establishes that the regular unemployment insurance benefits the claimant received for four days in the week ending

March 6, 2022 and for three days in the week ending March 13, 2022 were overpaid. They are recoverable because of the claimant's factually false certifications of zero days of vacation pay. Accordingly, we conclude that these benefits are a recoverable overpayment.

Finally, no appeal was taken from the decisions of the Administrative Law Judge holding the claimant's certifications did not constitute willful misrepresentations regarding the nonreceipt of vacation or holiday pay for the weeks ending February 20, 2022 (inadvertently stated as February 2, 2022), March 6, 2022 and March 13, 2022. Therefore, we are bound by those findings and conclusions.

DECISION: In Appeal Board No. 628485, the decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 628485, the initial determination, holding the claimant ineligible to receive benefits, effective March 30, 2020 through August 16, 2020, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation, is modified to be effective March 30, 2020 through April 5, 2020, only, on the basis that the claimant had earnings over the statutory limitation, only, and, as so modified, is sustained.

In Appeal Board No. 628486, the decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 628486, the initial determination charging the claimant with an overpayment of $1,576 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), is modified to an overpayment of

$394, which is nonrecoverable, and, as so modified, is sustained.

In Appeal Board No. 628486, the initial determination charging the claimant with an overpayment of $600 in Federal Pandemic Unemployment Compensation (FPUC) benefits 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. 628487, the decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 628487, the initial determination, reducing the claimant's right to receive future benefits by 32 effective days and charging a civil penalty of $326.40 on the basis that the claimant made willful misrepresentations to obtain benefits, as previously modified by the Administrative Law Judge, is overruled.

In Appeal Board Nos. 628488, 628489 and 628490, the decisions of the Administrative Law Judge are affirmed.

In Appeal Board Nos. 628488, 628489 and 628490, the initial determinations, holding the claimant ineligible to receive benefits, effective July 20, 2020 through August 16, 2020, on the basis that the claimant was not capable of work; charging the claimant with an overpayment of $1,280.50 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4);

and reducing the claimant's right to receive future benefits by 32 effective days and charging a civil penalty of $192.07 on the basis that the claimant made willful misrepresentations to obtain benefits, are sustained.

In Appeal Board Nos. 628491 and 628492, the decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 628491, the initial determination, holding the claimant ineligible to receive benefits, effective February 14, 2022 through March 13, 2022, on the basis that the claimant was on a paid vacation period, is modified to be effective February 28, 2022 through March 13, 2022 for four days in the week ending March 6, 2022 and three days in the week ending March 13, 2022, and, as so modified, is sustained.

In Appeal Board No. 628492, the initial determination, charging the claimant with an overpayment of $770 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), is modified in accordance with

this decision, and, as so modified, is sustained.

In Appeal Board Nos. 628491 and 628492, the amounts of the overpayment, and the amounts of the forfeit and civil penalties, are referred to the Department of Labor for recalculation in accordance with this

decision.

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

JUNE F. O'NEILL, MEMBER