

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-232

JANUARY TERM, 2018

Christian Noll v. Department of Labor	}	APPEALED FROM:
(Junior's Pizza Inc., Employer)	}	
	}	Employment Security Board
	}	
	}	
	}	DOCKET NO. 03-17-045-06

In the above-entitled cause, the Clerk will enter:

Claimant appeals from a decision of the Vermont Employment Security Board upholding the administrative law judge’s determination that claimant was not entitled to unemployment benefits because he was discharged from his employment for gross misconduct. We affirm.

Claimant worked as a delivery driver for Junior’s Pizza, Inc. for approximately five months until he was fired on Monday, December 19, 2016. The employer indicated that claimant was fired for over-reporting hours he claimed he had worked the previous day. Claimant reported working from 9:40 a.m. until 4:00 p.m. on that Sunday, even though he performed some tasks at the restaurant that morning before going home, called the restaurant around 12:30 p.m. to ask if he was needed, came in around 1:00 p.m., did some food prep work, and then left shortly thereafter. Throughout these proceedings, including in his brief on appeal to this Court, claimant alleged that the restaurant’s general manager had proposed to him approximately ten weeks before he was fired that they try an “experiment” on Sundays where claimant could be “on call” for work at full pay after he had completed any necessary tasks.

The claims adjudicator found that claimant was discharged but not for misconduct connected to his work. Employer appealed and, following a telephonic evidentiary hearing, the administrative law judge reversed the claims adjudicator’s decision, concluding that claimant was fired for gross misconduct—specifically, falsifying his timesheet. At the hearing, the general manager denied offering claimant the on-call arrangement that claimant testified she offered. The administrative law judge did not find claimant’s version of what had occurred credible. Following a non-evidentiary hearing, the Board upheld the administrative law judge’s determination.

On appeal to this Court, claimant does not dispute that falsifying hours would constitute gross misconduct. Rather, he repeats his assertion that the general manager had proposed an on-call arrangement for Sundays that allowed him, presumably while being paid, to go home if there was nothing to do at the restaurant and be available for any needed deliveries. He also argues that the administrative law judge erred by excluding, as untimely filed, a document that he submitted by email on the Friday afternoon before the Monday morning hearing.

Regarding claimant’s principal argument, at the hearing before the administrative law judge, the general manager denied proposing or accepting the on-call arrangement alleged by

claimant. After hearing the testimony from claimant, the general manager, and another restaurant employee, the administrative law judge determined that claimant's allegation regarding the on-call arraignment was not credible. The Board found sufficient evidence to support the administrative law judge's findings and hence adopted those findings. In unemployment compensation cases, as in other cases, the finder of fact, not this Court on appeal, determines the weight of evidence and the credibility of witnesses. See In re Hatch, 130 Vt. 248, 257-58 (1972) (stating that "weight of the evidence, credibility of witnesses and the persuasive effect of their testimony is for the trier of fact"). Therefore, claimant cannot prevail on this argument.

Regarding claimant's contention that the administrative law judge erroneously precluded him from admitting evidence in this matter, claimant's submission of a document the Friday afternoon before the Monday morning hearing plainly violated the instructions on the notice-of-appeal form given to claimant, which required that all submissions be submitted no later than twenty-four business hours before the hearing. At the start of the hearing before the administrative law judge, after being informed that the document was not timely filed, claimant stated that he wanted to use it as a "base document" for his employment. The administrative law judge questioned the relevancy of the document, which apparently was critical of other employees working at the restaurant. Claimant did not challenge the exclusion of the document before the Board and has made no proffer on appeal to this Court as to the relevance of the document to the issue on appeal. We find no basis to overturn the Board's decision due to the exclusion of this document.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice