

Board of Review
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Issue ID: 0010 9952 16
Claimant ID:

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rachel Zwetchkenbaum, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from her position with the employer on July 22, 2013. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 23, 2013. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on February 20, 2014. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, was disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to make subsidiary findings from the record. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant's discharge was attributable to deliberate misconduct when she used food past its sell-by-date to make sandwiches for sale to store customers, believing that the food was still good, and that she was helping the employer is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked as a La Carte Clerk, for the employer, a Supermarket, from March 7, 2007 until July 22, 2013, when she was discharged.
2. The claimant worked a part-time schedule. The claimant did not work for any other employers.

3. The employer has a written policy that requires the employee who sees that a sell-by date is reached on food to dispose of the food in order to keep food fresh. Violations of the policy are dealt with on a case-by-case basis.
4. The claimant received a copy of the policy.
5. The employer expects all employees to ensure that all products available for purchase for customers have not reached their expiration dates and refrain from putting out any food that has passed its expiration date and dispose of any food or products that are passed their expiration dates in order to ensure all food is fresh and safe to eat.
6. The claimant was informed of this expectation at a training which she attended after hire.
7. The claimant worked on July 5, 2013.
8. On July 5, 2013, the claimant needed to make sandwiches to put out in the la carte food section of the store. The store was low on meats that day. The claimant saw a pulled pork product to use for sandwiches, but noticed that the sell-by date had already passed.
 - a. The claimant attempted to ensure that the meat was still good and fresh by smelling and tasting it, and asking two co-workers to taste it. Everyone agreed that the meat seemed fine.
 - b. The claimant believed that the pork was good to serve because it was fully cooked and vacuum packed, and was not a perishable item like cold cuts in the deli counter.
 - c. The claimant believed that food could be fresh beyond its expiration date.
 - d. The claimant knew that the employer expected all employees only to serve and sell food that was fresh and that had not gone bad.
 - e. The claimant used the pork in question in sandwiches and put them out in the a la carte area for customers to purchase.
 - f. The claimant believed that serving the meat in question was a good thing because it helped the employer because the employer was low on meat that day and she thought that even though the expiration date had passed that the food was still good to eat. The claimant did not think she was doing anything wrong by using the pork in sandwiches.
9. When the claimant saw that the pork product sell by date had gone by she did not dispose of it nor did she report it to any supervisors.
10. An employee reported what the claimant had done to the employer.
11. On July 10, 2013, the employer began an investigation into the events that occurred on July 5, 2013.

12. On July 10, 2013, the claimant was interviewed by the employer and admitted to using out of code food in making sandwiches on July 5, 2013 and that she had been trained that she was not supposed to do so.
13. On July 10, 2013, the claimant was suspended.
14. On July 22, 2013, the claimant was terminated.
15. The claimant filed for unemployment benefits, effective the week beginning July 21, 2013.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's initial conclusion that the claimant engaged in deliberate misconduct when she made sandwiches using food that had passed the sell-by date. Instead, the review examiner's consolidated findings of fact support the conclusion that the claimant may have had a good-faith lapse of judgment when she decided to use out-of-date food, but she lacked an intention to harm the employer, and intended in a misguided way to further the employer's best interests.

The review examiner denied benefits after analyzing the claimant's separation under G.L. c. 151A, § 25(e)(2), which provides in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest

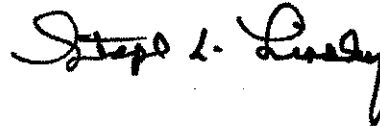
The deliberate misconduct standard, within the meaning of G.L. c. 151A, § 25(e)(2), requires an inquiry into the claimant's mind with respect to both an intent to commit the act resulting in misconduct and an intent to act in a manner contrary to the employer's interest. Goodridge v. Dir. of Division of Unemployment Security, 375 Mass. 434 (1978). In this case, the review examiner concluded that the claimant was subject to disqualification for deliberate misconduct. The Supreme Judicial Court has held that a finding of deliberate misconduct alone is insufficient to deny benefits under the law, and the review examiner must make also findings showing that the claimant acted in wilful disregard of the employer's interest at the time of the misconduct. "When a worker has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). We remanded the case to the review examiner

to make subsidiary findings from the record regarding the claimant's state of mind, and whether she intended to harm the employer or act against its interests.

Following remand, the consolidated findings establish that the claimant lacked the requisite state of mind for disqualification, under G. L. c. 151A, § 25(e)(2). There are no findings or evidence in the record indicating that the claimant intended to harm the employer or act against its interests. The consolidated findings establish that the claimant thought that she was doing nothing wrong by using the pork in sandwiches. She and her two coworkers examined the meat by smelling and tasting it, and they all agreed that the meat was fine. She thought the pork was good to serve because it was fully cooked and vacuum packed. The claimant believed that she was doing a good thing by helping the employer because the employer was low on meat; and, as part of her job, she needed to make sandwiches to put out for sale to customers. The claimant was aware of the employer's expectation that sell-by dates should be observed and food be disposed of when the date was reached. However, she interpreted that expectation in a misguided way, thinking that the purpose of the rule was to serve fresh food and, if that food could be fresh beyond the expiration date, and if it was still fresh, it could be served.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct on wilful disregard of the employer's interest when she attempted to serve the employer's interest by using out of date food that she believed was good to eat.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending July 21, 2013, and for subsequent weeks if otherwise eligible.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – October 10, 2014



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SPE/rh