Board of Review
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Issue ID: 0002 3362 66

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Carolyn Hunt, 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 his position with the employer on June 7, 2012. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 9, 2012. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 18, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether the review examiner's findings of fact are supported by substantial and credible evidence and the record, and his conclusion — that no mitigating circumstances existed to excuse the claimant's failure to timely report to work or notify the employer right away on June 6, 2012 — is free from any error of law affecting substantial rights.

Findings of Fact

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

1. The claimant worked for the employer, a grocery store, as a full-time team member from January 4, 2012 until June 6, 2012, when he was separated from employment.

2. The employer's handbook contains an attendance policy whereby if an employee "calls in more than two hours past their scheduled starting time or after half their shift has passed, whichever is less time, the Team Member is considered a "no call/no show" rather than an absence." The first instance of a no call/no show results in either a final written warning or discharge.

3. The employer's practice is to issue a final written warning if a team member misses a mandatory store meeting.

4. The employer discharges all team members who have been issued a final warning and subsequently violated the same policy.

5. The purpose of the employer's policy is to ensure that its stores are properly staffed.

6. The claimant acknowledged that he received the handbook by signing for it during his orientation period on January 4, 2012.

7. The claimant was given a final written warning on April 24, 2012, because he failed to attend a mandatory store meeting on April 21, 2012, scheduled for 6:00-8:00 AM. The employer considered this to be a "no call & no show."

8. The claimant was scheduled to work from 9:00 AM to 3:00 PM on June 6, 2012. When by 9:20 AM the claimant had not arrived, his supervisor called the claimant and left him a message. The claimant called the supervisor back, explaining that he had slept through his alarm after having picked a friend up at the airport late the night before. The claimant said that he would be in to work as soon as possible.

9. The claimant arrived at work at 10:23 AM. The claimant was suspended on June 6, 2012.

10. As the claimant had already been given a final written warning, he was discharged the next day.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence . . . .

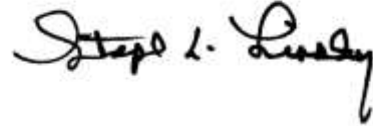
The review examiner concluded that the employer carried its burden to show that the claimant was discharged for engaging in a knowing violation of a reasonable and uniformly enforced policy of the employer. We disagree.

The review examiner found that the claimant received a copy of the employer's policy, which provides that, if an employee calls out more than two hours past his scheduled start time or after half his shift has passed, whichever is less time, the employee is considered a no-call, no-show. The claimant had received a final written warning on April 24, 2012, for being a no call, no show on April 21, 2012. The review examiner found that on June 6, 2012, the claimant was scheduled to work from 9:00 AM to 3:00 PM, but he did not arrive for the start of his shift. At 9:20 am, the employer called the claimant and left a message. The claimant returned the employer's call and explained that he had slept through his alarm. The claimant arrived at work at 10:23 AM. Since the claimant contacted the employer and arrived at work within two hours of his start time for his six-hour shift, he did not violate the employer's no call, no show policy. The question then becomes whether the claimant engaged in deliberate misconduct in willful disregard of the employer's interest when he was late for work and failed to notify the employer right away.

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Director of Div. of Employment Security, 377 Mass. 94 at 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Id. There is no evidence in the record that the claimant intended to be late for work and not notify the employer right away on June 6, 2012. Rather, the claimant was late and did not timely notify the employer because he slept through his alarm. The fact that the claimant set his alarm shows that he did not intend to be late for work. In our view, the claimant has set forth mitigating circumstances sufficient to excuse his failure to comply with the employer's expectation that he report to work on time or timely notify the employer. *See* Garfield, 377 Mass. at 97. Accordingly, the claimant is not disqualified under G.L. c. 151A, § 25(e)(2). Id.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to a knowing violation of a reasonable and uniformly enforced policy of the employer or deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 16, 2012, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION – October 11, 2013

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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.

SVL/rh