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Issue ID: 0002 3844 00

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by M. K. Block, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on October 9, 2012. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 10, 2013. The claimant 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 awarded benefits in a decision rendered on June 7, 2013.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to make subsidiary findings from the record as to why the claimant was discharged and whether he had actually violated the employer's attendance policies. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the review examiner's decision to award benefits is supported by substantial and credible evidence and free from error of law, where he found that the final

absence prior to the claimant's discharge occurred because the claimant was not aware that the bus which would take him to work did not run on Columbus Day.

Findings of Fact

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

1. The claimant applied for benefits on October 17, 2012. The Department disqualified the claimant on January 10, 2013. The claimant appealed on January 17, 2013.

2. The claimant worked for the employer from April 29, 2011 to October 9, 2012. The claimant worked as a full time assembler as of September 6, 2012. Prior to September 6, 2012, the claimant worked a second shift running from 2:00 p.m. to 10:30 p.m.

3. The claimant lived in Athol, MA and worked at the employer's location in S. Deerfield, MA. The employer expected the claimant to get to and from work without assistance.

4. The claimant acknowledged receipt of an employee handbook on April 29, 2011. The appendix of the employee handbook explains the employer's attendance policy. The policy uses "instances." If the employee reaches 6 instances in a 9 month period termination will occur. The claimant had more than 6 instances in less than 9 months at the time of termination. (**Credibility Assessment**: The employer did not document but the claimant agreed to a full day of absence on September 26, 2012 and a .33 instance on October 1, 2013 [sic]. Therefore, from March 30, 2012 to October 8, 2013 [sic], the claimant had more than 6 instances.)

5. The employer has this policy in order to ensure personnel at its facility to meet production demands. The claimant understood this reason.

6. The claimant acknowledged a verbal warning on June 11, 2012. The claimant had accumulated 2.33 instances within a 90-day period.

7. On August 16, 2012, the employer placed the claimant on a final warning for attendance. This meant that the claimant entered a 90-day probationary period. The claimant had an additional 2.33 instances between June 12, 2012 and August 14, 2012.

8. In August 20, 2012, the claimant informed the employer that he would have a 60-day suspension of his ability to drive a vehicle. The claimant had not paid surcharges. The claimant had accumulated 7 surcharges in a 3 year period. The suspension began on September 6, 2012.

9. The employer changed the claimant's workday beginning on September 6, 2012. The employer had the claimant work as an assembler from 2:00 p.m. to 10:00 p.m. This allowed the claimant to receive a ride home from another worker.

10. The claimant would either receive a ride to work or take the bus. When the claimant needed to take the bus, he had to travel to Greenfield, MA first and leave for work at 10:00 a.m.

11. On September 26, 2012, the claimant missed work. On October 1, 2012, the claimant arrived late. Both of these instances occurred due to the claimant's ride. The claimant called the employer at 1:00 p.m. on October 8, 2012 to inform him than his ride had not arrived and that he'd be late and then that he would not make it at all. (**Credibility Assessment:** The claimant testified unchallenged that he called employer and spoke to a Mr. Chaisson to report his lateness and later to Mr. Middleton, because he would not arrive at all. The claimant had no supervisor on his second shift on October 8, 2012.)

12. On October 8, 2012, the claimant did not realize that the bus would not run on the Columbus Day holiday. The bus did not run on Columbus Day. The claimant did not make it to work.

13. The employer discharged the claimant for failing to comply with its attendance policy.

Ruling of the Board

The Board adopts the review examiner's consolidated 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, . . .

Under this section of the law, the employer has the burden to show that the claimant is not entitled to benefits. After the hearing, the review examiner concluded that the employer had not carried its burden. Following our review of the consolidated findings of fact, we agree that the claimant is entitled to receive benefits.

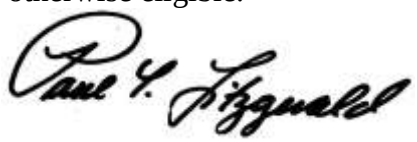
The review examiner found that the claimant was eventually discharged for failing to comply with the employer's attendance policy. The policy stated that an employee would be discharged if he reached six "instances" in a nine-month period of time. The claimant received warnings in June and August 2012 about his absences. The review examiner found that the claimant had 2.33 instances prior to June 11, 2012. He then had another 2.33 instances between June 12 and August 14, 2012. He then had another 1.33 instances prior to October 8, 2012. This equals 5.99 instances. On October 8, 2012, the claimant was absent from work again. This absence brought him above six instances, and he was terminated. Since the claimant had more than six instances within nine months at the time of his termination, he did violate the employer's attendance policy.

However, a violation of the employer's policy alone will not disqualify the claimant from receiving benefits. The employer must also show that the misconduct or violation was intentional or deliberate. *See* Still v. Comm'r of Dep't of Employment & Training, 423 Mass. 805, 810-813 (1996). In this case, the final incident which brought the claimant above six instances occurred on October 8, 2012, which was Columbus Day. Since early September 2012, the claimant had been relying on a co-worker to drive him to work. Since his ride did not pick him up on October 8, the claimant had to take a bus. At around 1:00 p.m., the claimant informed the employer about his delay in getting to work. However, the bus did not come, because it was the Columbus Day holiday. The claimant was not aware that the bus did not run on Columbus Day.

These findings indicate that the policy violation was not knowing or deliberate, as those terms are used in G.L. c. 151A, § 25(e)(2). The claimant did his best to get to work on October 8, 2012, but was not able to do so because of circumstances which were beyond his control; namely, the failure of his co-worker to pick him up and the bus to come that day. Under these circumstances, the claimant's conduct or violation on October 8 are not deliberate or knowing under the statute.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits is supported by substantial and credible evidence and is free from error of law, because the claimant did not have the state of mind necessary on October 8, 2012 to disqualify him from receiving benefits, under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending October 13, 2012, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - January 17, 2014

Paul T. Fitzgerald, Esq.
Chairman

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.
SF/rh