

Board of Review
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Issue ID: 0002 4253 84

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by D. Lusakhpuryan, 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 September 25, 2012. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 11, 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 January 31, 2013. 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 afford the claimant an opportunity to present evidence. Both parties attended the remand hearing. 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 engaged in deliberate misconduct under G.L. c. 151A, Section 25(e)(2), by not putting away items, is supported by substantial and credible evidence and is free of 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 started working as a fulltime bakery team member for the employer, a food market, on October 6, 2003. The claimant's last day of work was on September 25, 2012. The claimant was paid \$13.60 per hour. The claimant's schedule would vary from week to week.
2. The employer discharged the claimant for not putting away items.

3. The employer expected the bakery team members to put away items.
4. The employer had this expectation in order to ensure the safety of its establishment.
5. Whether a bakery team member is discharged for violating this expectation is left to the discretion of the employer.
6. The claimant had attended team meetings on: March 22, 2012, May 24, 2012, June 2, 2012, June 8, 2012, July 16, 2012 and September 6, 2012. During the meetings, the employer explained that bakery team members were required to put assigned items away.
7. On June 3, 2012, the employer issued the claimant a written warning for not putting away items (Exhibit 6).
8. On August 28, 2012, the employer issued the claimant a verbal warning for not putting away items.
9. On September 13, 2012, the claimant was assigned to put away supply items. The claimant did not put away the supply items.
10. The employer had to seek approval from upper management before it could terminate the claimant.
11. On September 24, 2012, the claimant was placed on an unpaid 1 day suspension.
12. On September 25, 2012, the claimant was discharged by the bakery team leader.

Credibility Assessment: Though the claimant contended during the hearing that on September 13, 2012 he did not fail to put away his assigned supplies, the employer's contention to the contrary is assigned more weight where the employer witnessed this behavior and also provided photographic images during the hearing to substantiate this behavior. Therefore, the employer's testimony is assigned more weight than the claimant's testimony.

Ruling of the Board

In accordance with our statutory obligation, we review the consolidated findings of fact made by the review examiner to determine: (1) whether these findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion that the claimant is not entitled to receive benefits is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and, in doing so, determines that they are supported by substantial and credible evidence to the extent set forth 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 . . .

Pursuant to the above provision, the employer has the burden of establishing that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. The review examiner, solely on the basis of the employer's unchallenged testimony, initially concluded that the employer had met its burden. We remanded the case to afford the claimant the opportunity to present testimony. Following remand, we conclude that, as a matter of law, the employer did not meet its burden.

It is significant that the claimant had worked for this employer as a bakery team member for nine years without incident. The record indicates that, after nine years without disciplinary action, claimant's supervisor retired and was replaced by a new supervisor.¹ The review examiner's consolidated findings establish that the employer expected the bakery team members to put away items. The claimant was discharged for not putting away items, after receiving a written warning and a verbal warning for not putting away items. Whether an employee is discharged for violating the employer's expectation is within the employer's discretion.

The deliberate misconduct standard, within the meaning of G.L. c. 151A, § 25(e)(2), requires an inquiry into the claimant's state of 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). Thus, a critical issue in determining whether disqualification is warranted is the claimant's state of mind at the time of the conduct that caused his discharge. The fact that the claimant failed to comply with the employer's expectation, in and of itself, is insufficient to disqualify him under G.L. c. 151A, § 25(e)(2).

In order to deny benefits, it must be shown that the claimant acted "with intentional disregard of [the] standards of behavior which the employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). Thus, at a minimum, what must be proved is the employee's willfulness in the form of awareness of what he is doing, and that what he is doing violates the employer's policy or expectation. See Still v. Comm'r of Department of Employment and Training, 39 Mass. App. Ct. 502, 1996. Absent an intentional disregard of the employer's interest, there is no basis, under G.L. c. 151A, § 25(e)(2), for denying benefits.

The review examiner found that the claimant failed to put away items after having been warned for that conduct in the past. However, the review examiner made no inquiry into the claimant's state of mind as to whether he had the requisite intent for deliberate misconduct, and made no

¹ We have supplemented the findings of fact by referring to unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

state of mind finding that the claimant's failure to comply with the employer's expectation was intentional or that he intentionally acted contrary to the employer's interest. Consequently, while the findings of fact may establish that the claimant failed to comply with the employer's expectation, the record fails to support the conclusion that the conduct for which the claimant was discharged was the result of wrongful intent.

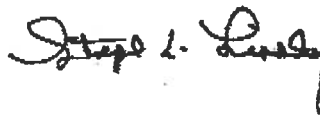
It is worth noting that, in its statement to the agency during the initial investigation, the employer indicated that the claimant was separated for continued "Poor Work Performance" (Exhibit #5), and that he was issued a written warning for "Poor Work Performance and carelessness." The employer also testified at the hearing that the claimant was discharged for his performance: the claimant was responsible for breaking down the product and "didn't do it accurately." There is nothing in the record to suggest that such failure was due to any deliberate lack of effort by the claimant. Deficiencies in work performance, even when repeated and cumulative, do not disqualify a claimant from receiving benefits. Nantucket Hospital v. Dir. of Division of Employment Security, 388 Mass. 1006 (1993) (rescript opinion).

Finally, although it is not dispositive, we find the review examiner's credibility assessment unpersuasive and legally insufficient. It is contrary to the evidence in the record. The review examiner assigned more weight to the employer's testimony because "the employer witnessed this behavior." There was no testimony that the employer directly witnessed any of the alleged misconduct for which the claimant was discharged, or for that matter, that it was witnessed by anyone else. The review examiner also stated, in support of her credibility assessment, that "the employer provided photographic images during the hearing to substantiate this behavior." However, the employer's photographs are admittedly indecipherable. Moreover, the employer failed to present evidence to document when and where the photos were taken, or, more importantly, that the claimant was responsible for whatever was shown in the photos. The employer testimony that she believed "the photos were taken that day" is not a sufficient authentication of the photos.

These deficiencies are not dispositive, however, because the examiner's credibility assessment addressed only whether the claimant engaged in the conduct in question. Our decision does not depend upon whether the claimant committed the alleged conduct, but whether he did so with the requisite state of mind. As the record does not indicate that he acted deliberately or wilfully in disregard of the employer's interests, the alleged conduct is not disqualifying.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 29, 2012, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION – January 9, 2014

Stephen M. Linsky, Esq.
Member



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/th

