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**Issue ID: 0002 1180 82**

# BOARD OF REVIEW DECISION

0002 1180 82 (Feb. 18, 2014) – By waiting until the claimant's fifth attendance violation following a final warning, which had provided that any further disciplinary problems will result in termination, the employer led the claimant to believe that his behavior was condoned. The claimant lacked the requisite state of mind to be disqualified under G.L. c. 151A, § 25(e)(2).

## Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 4, 2012. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 3, 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 July 22, 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 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.

The issue before the Board is whether the review examiner's conclusion, that the claimant's discharge for unexcused absences constituted deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

## Findings of Fact

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

1. The claimant was a foreman for the employer, a landscape service, from March 21, 2012 to September 4, 2012, when the claimant was discharged.

2. The claimant worked full time, Monday to Friday, 7:00A.M. to 4:00P.M., and his rate of pay was $14.00 an hour.

3. The employer expected the claimant to attend work because he is a crew leader that was expected to give instructions to a crew of employees each day. The claimant was made aware of this expectation as a matter of common sense and as one of his regular job duties.

4. The employer has a policy that requires an employee to notify the employer of an absence. The consequence for violating this policy is 1) verbal warning, 2) written warning, and 3) termination.

5. The claimant received a written warning for absenteeism and tardiness on September 4, 2012 and June 7, 2012.

6. The claimant was notified in the June 7, 2012 written warning that further similar conduct could cause his termination.

7. The claimant was absent four (4) additional times between June 7, 2012 and August 30, 2012. These absences were considered unexcused and it is unknown why the claimant was absent on these four (4) occasions.

8. The claimant was not discharged after any of the four (4) absences because the employer thought the claimant would "turn things around."

9. The claimant sent his supervisor a text message on August 31, 2012 stating that he would be absent that day. His supervisor responded with a text stating it was not a good idea. The claimant did not respond to the supervisor's text message.

10. The claimant was absent for an unknown reason on August 31, 2012.

11. The claimant was discharged for not attending work on August 31, 2012.

Ruling of the Board

In accordance with our statutory obligation, we review the 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 is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant's discharge constituted deliberate misconduct which disqualified him from unemployment benefits.

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 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, … provided that such violation is not shown to be as a result of the employee's incompetence.…

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. The review examiner initially concluded that the employer had met its burden. After review, we conclude that the employer has not met its burden and reverse the review examiner's decision.

The review examiner found that the employer discharged the claimant for attendance infractions, following an unexcused absence. The employer had an attendance policy requiring employees to notify the employer when absent. While the policy contains progressive steps of discipline for recurring infractions, the review examiner correctly concluded that the employer does not uniformly enforce the policy.

Arising from the employer's attendance policy is an expectation that employees will attend work as scheduled. The claimant was aware of this expectation through common sense (he was a crew leader who was expected to instruct a crew of workers each day), and because he had received a written warning for absenteeism and tardiness on June 7, 2012. *See* Hearings Exhibit #5. The warning cited the claimant for "several occasions" when he reported to work late, "two separate occasions" when he called out sick within a few days, and cautioned that "any further disciplinary problems will result in termination."

Notwithstanding this final warning, the claimant accrued four additional unexcused absences between June 7 and August 30, 2012. The employer did not follow through on its admonition and discharge the claimant for these four unexcused absences, because it believed the claimant would "turn things around." When the claimant sent his supervisor a text message on August 31 indicating he would be absent that day, the supervisor simply responded it was not a good idea. Thus, the employer discharged the claimant for his fifth infraction after a so-called "final warning."

Here, although the employer issued a final warning and eventually discharged the claimant for an attendance infraction, it had effectively condoned his misconduct by failing to enforce the edict in its final warning to him. When an employer remains silent in the face of an employee's act that may or may not be deliberate misconduct, those aware of the situation may draw the conclusion that they may engage in the behavior without adverse consequence. "Silence, however, can, paradoxically, speak." <u>Richardson Elec. Co., Inc. v. Peter Francese & Son, Inc.</u>, 21 Mass. App. Ct. 47, 51 (1985); <u>O'Brien v. Director of Div. of Employment Security</u>, 393 Mass. 482, 483, n.7 (1984). The employer's forbearance, while laudable as a humanitarian gesture, signaled to the claimant that further infractions would not detrimentally affect his employment status. Despite such intervening forbearance, the employer could have corrected the situation by issuing a clear "no further tolerance" type warning and then following through on it. Here, however, having evaded punishment for several attendance violations after a final warning,

the claimant had reasonably developed the misimpression that he would not suffer any consequence and, therefore, lacked the requisite state of mind to support disqualification.

We, therefore, conclude as a matter of law that the claimant was discharged without having engaged in 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 September 12, 2012, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - February 18, 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.

JPC/rh