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Issue ID: 0008 9856 93

BOARD OF REVIEW DECISION

0008 9856 93 (Jan. 9, 2014) – A claimant who refused to sign a last chance agreement in lieu of termination did not separate from her job voluntarily; she was fired. Since the underlying conduct was the claimant's poor work performance and there was no evidence that the claimant acted wilfully or deliberately, the Board held that she may not 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 separated from her position with the employer on May 11, 2013. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 12, 2013. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 3, 2013.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review. 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 is not entitled to benefits, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence, where the findings of fact indicated that she was dismissed from her job for not signing a Last Chance Agreement which was offered to her based on her history of poor work performance.

Findings of Fact

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

1. The claimant worked as a full-time Maintainer 1 with the employer's university from June 7, 2007 until May 11, 2013.

2. The claimant's separation from employment occurred because she refused to sign a Last Chance Agreement providing a six-month probationary period as an alternative to dismissal for poor work performance.

3. The employer offered the claimant the Last Chance Agreement in light of the claimant's past record of disciplinary action: Written Reprimand- 12-11-08; Letter of Reprimand- 10-27-9; notification of investigatory disciplinary hearing- 5-18-11; decision letter of investigatory disciplinary hearing- 6-14-11; training completion form- 9-27-11; notification of investigatory/disciplinary hearing- 2-28-12; decision letter of investigatory /disciplinary hearing- 3-13-12; training completion form- 6-28-12(restrooms); training completion form- 6-29-12(classrooms); Notification of Investigatory /Disciplinary Hearing; Decision Letter of Investigatory /Disciplinary Hearing 5-3-13; Last Chance Agreement 5-11-13.

4. On May 11, 2013 the employer advised the claimant and her union representative of the Last Chance Agreement. The claimant was suspended from employment and given ten days to decide whether she would sign the Agreement as an alternative to dismissal. The claimant refused to sign the Agreement, resulting in her dismissal from employment.

5. The claimant was aware of the six-month extension of employment offered by the employer.

6. The claimant considered herself to be a good employee, a "three" on a scale of "one to ten" with "one" being the highest.

7. The claimant felt that others were not disciplined for poor work performance. The claimant was not a supervisor and did not file a union grievance based on alleged unfair treatment.

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 the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact.[1] In adopting the findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is not entitled to benefits.

The review examiner applied G.L. c. 151A, § 25(e)(1), to the facts of this case. That section of law governs voluntary separations and resignations. He applied this statutory provision, because he concluded that the claimant had caused her own separation by failing to sign the Last Chance

[1] Finding of Fact #3 reflects a list of disciplinary actions listed by the employer in Exhibit #7. Although documentary evidence supporting this history of discipline is not in the record, the review examiner was within his authority to draw facts from the documents which were before him during the hearing.

Agreement, which he found to be a reasonable means by which the employer was trying to extend the claimant's employment.

The findings of fact, however, do not support a conclusion that the claimant resigned or quit her job voluntarily. Finding of Fact #4 indicates that the claimant was "dismissed" from her position. Moreover, we agree with a recent decision issued by the Appeals Court pursuant to Rule 1:28, Pulde v. Dir. of Div. of Unemployment Assistance (Dkt. No. 12-P-1236) (Slip. Op. November 26, 2013), that, in a similar situation, a "determination that [the claimant] voluntarily quit her job is wrong as a matter of law." Id. at 2. In Pulde, the claimant had been suspended from work pending completion of an employee assistance program. Upon her return to work, the employer demanded that Pulde sign a "Conditional Reinstatement Agreement," subjecting her future employment to certain terms and conditions, one of which was that she would become an "employee at will," which Pulde and her union interpreted as being in derogation of her rights under the prevailing collective bargaining agreement. When Pulde refused to agree to those terms, the employer discharged her. The court stated that Pulde's refusal to change the terms of her employment "does not mean she left voluntarily. In simple terms, the hospital fired her from a job she wanted to keep." Id.

Similarly, in the instant case, the entirety of the record suggests that the claimant's failure to sign the Last Chance Agreement (LCA) resulted in the employer, rather than the claimant, ending the employment relationship. As the review examiner found, the LCA offered by the employer would have changed the claimant's employment status to that of a six-month probationary employee. Although the record does not reveal specifically how "probation" would have adversely affected the claimant – neither party produced the LCA despite the Board's express request – it is reasonable to assume, absent evidence to the contrary, that probationary status would have made it more difficult for the claimant to challenge a discharge decision during those six months.

In this respect, the LCA is analogous to the Conditional Reinstatement Agreement that the claimant refused to sign in Pulde. As in Pulde, the instant claimant's refusal to sign the LCA "does not mean she left voluntarily." Pulde at 2. Rather, as the court held in Pulde, the claimant's entitlement to benefits here must be determined pursuant to G.L. c. 151A, § 25(e)(2), which applies to discharges from employment.

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. On the record before us, we cannot conclude that the employer has carried that burden.

Approaching this case as a discharge, the first question that arises is whether the claimant was discharged for refusing to sign the LCA or instead for the underlying conduct that prompted her employer to condition her future employment on signing the LCA. While the examiner's Finding #2 accurately states that the claimant's separation occurred because she refused to sign the LCA "as an alternative to dismissal for poor work performance," it is also clear that, while signing the LCA would have at least temporarily prolonged the claimant's employment, the dismissal itself was "for poor work performance." The claimant's history of work-related discipline, recited in Finding #3, reinforces this point.

Moreover, nothing in the record suggests that refusing to sign the LCA, in and of itself, would have resulted in discipline apart from the underlying performance problems. Indeed, it is difficult to imagine circumstances in which an employee might have an independent obligation to sign an LCA or other arrangement that reduces the claimant's employment status, such that refusing to sign would itself constitute a knowing policy violation or deliberate misconduct so as disqualify her from benefits. Certainly no such circumstances are evident here. Rather, the question of whether the employer has met its burden of establishing disqualifying misconduct on the part of the claimant will largely, if not exclusively, depend upon the evidence of record concerning the underlying work-related conduct that put her job in jeopardy to begin with.[2]

The evidence concerning the claimant's alleged misconduct is sparse, as the employer did not appear at the hearing and the exhibits are limited to the claimant's and the employer's initial statements to the DUA adjudicator. In reciting the claimant's prior discipline in his Finding #3, the examiner appears to have quoted from the list of disciplinary documents that the employer set forth in its statement to the adjudicator. Hence, the record tells us only that the claimant had been warned and disciplined several times prior to dismissal. To the extent the examiner's findings and/or the exhibits indicate the nature of the claimant's conduct, such conduct appears to relate to the claimant's failure to perform her cleaning duties in a satisfactory manner, which the review examiner characterized as "poor work performance" in Finding #2.

As the statute itself states, however, conduct generated by an employee's "incompetence" is not disqualifying misconduct. *See also* Garfield v. Dir. of Div. of Employment Security, 377 Mass. 94, 97 (1979) ("When a worker is ill equipped for his job … , any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault ….") Nothing in this record satisfies the employer's burden to establish that the claimant willfully or deliberately performed her work poorly, as opposed to ineptitude or incompetence.

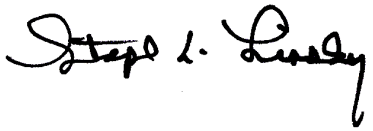
[2] The court in Pulde did not expressly address whether the misconduct analysis it ordered should focus on the claimant's refusal to sign the agreement, on the one hand, or her underlying alleged misconduct, on the other hand. Given the court's view that the proposed agreement "raised legitimate concerns" as to Pulde's working conditions and the court's concluding discussion, which emphasized the "strict" construction traditionally given the misconduct provisions in the unemployment statute and the employer's corresponding burden of proof, we think our approach, focusing on the underlying conduct, is consistent with the Pulde rationale.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits was based on an error of law, because G.L. c. 151A, § 25(e)(2), rather than G.L. c. 151A, § 25(e)(1), was applicable to this case; and the employer did not carry its burden to show that the employee was discharged for disqualifying misconduct within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits, pursuant to G.L. c. 151A, § 25(e)(2), for the week ending May 12, 2013, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 9, 2014

Paul T. Fitzgerald, Esq.
Chairman



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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.

SF/rh