

**Board of Review
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Issue ID: 0008 9910 74

BOARD OF REVIEW DECISION

0008 9910 74 (June 9, 2014) – When the claimant failed his probationary period as a newly promoted supervisor and told that he had to reapply for a cashier position, he was effectively discharged.

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 his position with the employer on May 30, 2013. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 3, 2013. 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 November 7, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons 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 remanded the case to the review examiner to take further evidence on the circumstances of the claimant's separation, and to allow the claimant to offer testimony and evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 quit his employment after failing to return to a cashier position following a failed promotion, is supported by substantial and credible evidence and is free from 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 was employed as a full-time Customer Service Supervisor for the Employer, a supermarket, from January 26, 2012 until May 30, 2013.

2. The Employer did not present any relevant policies.
3. On February 25, 2013, the Claimant was promoted to a Customer Service Supervisor from a Cashier position. The Claimant was on a 90 day probationary period in the new position. The Claimant's pay was \$13.50 as a Customer Service Supervisor and \$12.50 as a Cashier.
4. As a Customer Service Supervisor, the Claimant worked as a cashier as well as assisted other cashiers with problems.
5. The Employer determined that the Claimant failed his probationary period and sent the Claimant a letter. The Employer determined that the Claimant failed his probationary period on May 7, 2013. The Claimant was notified on May 7, 2013. (1b) The letter prepared by the Employer and signed by the Claimant is Remand Exhibit # 7. (1c)
6. The Claimant testified that he was told that he failed his probationary period because he left sales receipts and store credits in a register overnight. The Employer testified that the Claimant failed his probationary period because he twice left cash in a register, on dates unknown. (1a) The letter said the Claimant had two weeks to transfer to an available cashier position in one of the Employer's stores. The Claimant had to affirmatively apply for another position after he failed the probationary period. (2a) Another position was not guaranteed. (2b) No cashier positions were available at the store where the Claimant worked. (2c) Cashier positions were available at other stores. (2d) The Employer testified that cashier positions were available at the Medford store, which was close to the Claimant's home. (2e)
7. If the Claimant did not transfer, the Employer would consider that he voluntarily resigned. The Claimant did not contact the Employer after that date.
8. The Claimant was hospitalized for a 2 week period around the time he last worked for the Employer.
9. The Claimant quit on May 30, 2013 by not transferring to an available cashier position.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment, with the exception of consolidated finding of fact # 9, which states that the claimant quit his employment. Consolidated finding of fact # 9 is a mixed question of

fact and law. As to its factual content, it is not supported by substantial and credible evidence, for the reasons set forth below. As to its legal content, we reject the review examiner's conclusion that the claimant quit his employment. We adopt the remaining findings of fact and deem them to be supported by substantial and credible evidence,

G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . No disqualification shall be imposed if such individual establishes . . . that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

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 . . . 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, 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

Although the review examiner concluded that the claimant quit his employment by not transferring to an available cashier position, the record reflects that the claimant was discharged from his employment when he failed his probationary period as a supervisor. The review examiner found that the employer notified the claimant by letter that his employment as a supervisor had ended (Remand Exhibit # 7). Indeed, the letter states that the claimant was "relieved of [his] position and responsibilities as Supervisor based on a failed probationary period." Furthermore, the review examiner found that the employer directed the claimant to affirmatively apply for cashier positions in order to continue his employment with the employer. No cashier positions were available in the claimant's store; and, even if he applied for a position in a different store, the review examiner found that the claimant was not guaranteed to be accepted into any position. Under the circumstances, the record reflects that the claimant was separated from his employment, a separation initiated by the employer when it discharged him from his position as a supervisor and required him to affirmatively re-apply for an alternative cashier position at a different location with no guarantees of continued employment. We, therefore, view the claimant's separation from employment as a discharge, not a voluntary separation, and we examine it under G.L. c. 151A, § 25(e)(2).

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was

deliberate, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield, 377 Mass. at 97. Here, the consolidated findings of fact reflect that the claimant's employment was terminated because he left sales receipts and store credits in a register overnight. There are no findings or evidence that the claimant did so intentionally, and the review examiner found that the employer did not present any relevant policies.

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 or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, 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 for the week ending June 22, 2013, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 9, 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.

AM/rh