

0012 3566 59 (Mar. 5, 2015) – Discharge for failing to report a pending criminal charge on employment application was not deliberate misconduct in wilful disregard of employer's interest, because the application question was unlawful, in violation of G.L. c. 151B, § 4(9).

**Board of Review**  
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**Issue ID: 0012 3566 59**  
**Claimant ID: 1401652**

## **BOARD OF REVIEW DECISION**

### **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 December 14, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 12, 2014. 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 April 7, 2014.

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. Neither party 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 is disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2) is based on substantial and credible evidence and free from error of law, where the claimant was discharged for failing to notify the employer on his employment application that he had charges pending in an open court case.

### **Findings of Fact**

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

1. The claimant filed an initial claim for unemployment benefits May 16, 2013, effective May 12, 2013. The Department of Unemployment Assistance

determined the claimant was monetarily eligible to receive weekly unemployment benefits in the amount of \$112.00.

2. The claimant obtained new employment during the benefit year of the claim.
3. The claimant worked full time as a sales associate for the employer, a retail business, from August 2013 until December 14, 2013, when he was discharged.
4. The claimant worked 40 hours each week between Sunday and Saturday. The claimant was paid \$9.95 per hour.
5. At the time the claimant applied for the position with the employer, the claimant had an open court case with charges pending in Massachusetts. The claimant was aware of the pending charges.
6. On the claimant's employment application, the employer asked the claimant if he had any charges pending in court and the claimant responded to the employer on the application that he did not.
7. The claimant answered the question on the application incorrectly because he didn't want the truth to prevent him from obtaining a position with the employer.
8. During the claimant's employment, the employer learned of the claimant's open court case and charges pending in Massachusetts.
9. The employer discharged the claimant for falsification of his employment application.

### 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 findings of fact. In adopting the findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the claimant should not be disqualified from receiving benefits, because the employer unlawfully asked the claimant about his pending court case on his employment application.

The claimant was discharged from employment. Consequently, we analyze this case 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 . . . [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 . . . .

Under this section of the law, the employer has the burden to show that the claimant is not entitled to benefits. After the hearing, at which only the claimant offered evidence, the review examiner concluded that the employer had carried its burden. We disagree.

During the hearing, the claimant readily admitted under oath that he provided false information on his employment application. The review examiner found that the employer's application inquired as to whether the claimant had "any charges pending in court." Although the claimant had charges pending against him, he intentionally indicated on the application that he did not. As found by the review examiner, the claimant did not want such charges to affect whether or not he got a job with the employer.

In his appeal to the Board, the claimant does not argue that his falsification was unintentional. Instead, he argues that it was unlawful for the employer, on its employment application, to ask him if he had charges pending against him. Indeed, Massachusetts law provides that an employer may not inquire on an application about certain personal information. The relevant statute is G.L. c. 151B, §4, which provides, in relevant part, as follows:

It shall be an unlawful practice: . . .

(9) For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, . . . to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information . . . regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted . . . .

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

(9½). For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

Subsection 9 prohibits an employer, on an employment application, from requesting information about arrests or detentions which did not result in a conviction. Subsection 9½ then further limits the circumstances in which an employer may inquire about criminal convictions.

In this case, the review examiner found that the employer had inquired about criminal charges that, at the time the claimant applied for his job, were merely pending in court. If the charges against the claimant were merely pending, then they fall within the category of criminal cases “in which no conviction resulted.” Since the claimant had not been convicted as yet for these charges, the employer was prohibited by law from asking him about them.

Although the claimant admitted, and the review examiner concluded, that he deliberately gave false information, pursuant to G.L. c. 151B, § 4(9), such a false statement cannot be held against him. The Massachusetts Commission Against Discrimination summarizes the rule as follows: “An employer may not take action against an applicant or employee for answering an unlawful question untruthfully.” See Fact Sheet: Discrimination on the Basis of Criminal Record, available at <http://www.mass.gov/mcad/crimrec>. That is precisely what the employer did in this case. Since the employer unlawfully asked the claimant for information about pending criminal charges, and doing so is not permitted by Massachusetts law, we cannot conclude that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s unit’s interest. To disqualify the claimant under Chapter 151A would be contrary to the statutory language in G.L. c. 151B, § 4(9) which states that “[n]o person shall be held under any provision of any law to be guilty of . . . giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.”

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 the employer asked the claimant about pending criminal charges on his employment application, in violation of G.L. c. 151B, §4(9).

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending December 14, 2013, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 5, 2015**



Paul T. Fitzgerald, Esq.  
Chairman



Judith M. Neumann, Esq.  
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**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/jv