

0018 1936 49 (Oct. 21, 2016) – Claimant did not engage in deliberate misconduct in wilful disregard of the employer’s interest merely by having unsubstantiated larceny charges brought against her. She was not aware that she had to inform the employer of the open charges, and MA law prohibits the employer from inquiring about criminal charges that did not result in a conviction.

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Issue ID: 0018 1936 49

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 her position with the employer on February 12, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 24, 2016. 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 April 21, 2016. 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 give the claimant an opportunity to present evidence, as well as to ask some specific questions regarding the charges brought against the claimant. 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 on appeal is whether the review examiner’s conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest, under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the totality of the record establishes that the claimant did not commit the crime of larceny, and she was not aware that she had to report to the employer that larceny charges were brought against her.

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 by the employer from July 27, 2015, until February 12, 2016, when she was discharged from her job.
2. The claimant was employed part-time as a driver for individuals with developmental and cognitive disabilities.
3. The claimant reported to the transportation coordinator.
4. In her position as a driver, the claimant dealt with individuals who had disabilities and were unable to understand concepts of money, gas cards, property and other matters.
5. In her position as a driver, the claimant was not supervised.
6. The employer has an Employee Handbook.
7. On July 27, 2015, the claimant signed an acknowledgment that she received the Employee Handbook, read and understood the policies contained in the Handbook, and acknowledged her responsibility to adhere to the policies in the Handbook.
8. The Handbook includes a policy titled **"BACKGROUND CHECK POLICY FOR PROSPECTIVE EMPLOYEES"**.
9. The policy states that once an applicant becomes an employee, the CORI (Criminal Offender Record Information) will have to be re-submitted annually.
10. The policy states that if the CORI returns information that would affect an employee's employment, then the employer may pursue disciplinary action.
11. The policy states, "Employees must notify the Vice President of Human Resources immediately of any incidents that may impact their employment status based on CORI regulations and guidelines". The policy does not further explain what is meant by "any incidents that may impact their employment status based on CORI regulations and guidelines".
12. The employer did not provide the claimant with more specific guidance regarding what type of incidents needed to be reported to the employer.
13. The employer expected its employees to have annual CORI checks, which it conducts at the beginning of each calendar year.

14. The employer conducts CORI checks on its drivers for a number of reasons, including that it deals with individuals who have disabilities and are unable to understand money.
15. The employer expected its employees who worked in an unsupervised position with individuals who did not understand money, to refrain from having open larceny charges on their CORI records.
16. The employer has the above-stated expectation to protect the individuals it serves.
17. The employer's ability to retain an employee whose CORI report shows criminal charges is determined in part by the expectations or rules set forth by its funding sources.
18. In determining whether to retain an employee whose CORI report shows criminal charges, the employer adheres to a Code of Massachusetts Regulations Chapter titled, 'CRIMINAL OFFENDER RECORD CHECKS'. That Chapter establishes a standardized policy and procedure for the Executive Office of Health and Human Services (EOHHS), its agencies, and vendor programs regarding the review of criminal records of candidates for employment.
19. The Scope of the above-referenced Regulations is defined as follows:

Criminal history information shall be required and only considered with respect to the following categories of applicants and employees of EOHHS, its agencies, and vendor programs:

 - (A) Applicants and employees seeking a position that entails the potential for unsupervised contact with program clients;
 - (B) Applicants and employees for whom a CORI is necessary to comply with other legal requirements, or for whom a CORI is otherwise deemed by EOHHS, its agencies, or vendor programs to be relevant to the duties and qualifications of the position; and
 - (C) Employees who apply for a new position that falls within the scope of (A) or (B).
20. The Scope of the above-referenced Regulations further provides, "Current employees in positions for whom a CORI is required may be subject to a criminal record review at other times in the hiring authority's discretion. Notwithstanding the foregoing, the hiring authority shall not take any action based on the CORI unless the CORI reveals criminal activity since the prior CORI".

21. The Regulations include a provision about a hiring authority's consideration of certain factors (ex., time since the conviction or pending offense, age of the candidate at the time of the offense) in the hiring authority's decision to hire or not hire a candidate.
22. On February 1, 2016, the employer requested a CORI check on the claimant.
23. The CORI report indicated that the claimant had an "open" charge of larceny. That charge did not appear on the claimant's CORI check when she was hired.
24. On or about July 17, 2015, a Criminal Complaint was issued against the claimant on the charge of larceny, with a date of offense of June 11, 2015. The Statement of Facts in Support of the Application for Criminal Complaint read as follows:

"On the above date and time, the undersigned met with [Manager A] (Housing Authority Management) regarding the following alleged fraud:

[Claimant] resided at [Name of Street #1] according to [Manager A] [Claimant] Owes the housing Authority \$6,722 as a result of fraud for unreported income. Monthly rent paid by the tenant is calculated based on the income of the tenant.

According to [Manager A] investigation [Claimant] failed to report her true income, as a result it was determine that she owes \$6,722 in back rental fees".
25. The claimant did not inform the employer that a Criminal Complaint had been filed against her.
26. Once when the claimant had to go to Court in connection with the charges filed against her, she provided documentation to her supervisor of her need to be in Court; the claimant provided this documentation so that she could take time off from work. On another occasion when the claimant had to go to Court in connection with the charges filed against her, she verbally asked her supervisor for time off. The claimant was granted time off to attend Court.
27. On March 7, 2016, a Motion to Dismiss the larceny charge against the claimant was filed.
28. The larceny charge brought against the claimant was dismissed on April 14, 2016 by the [City A] District Court.
29. The charge was dismissed after the pretrial hearing on April 14, 2016. The charge was not dismissed on the day of trial (there was no trial scheduled).

30. The disposition was not contingent on the claimant paying restitution, performing community service, serving a period of probation or any other court imposed condition.
31. The matter was not dismissed in the [City A] District Court because of indictment and transfer of the matter to another Court.
32. The employer discharged the claimant because she had an “open” charge of larceny against her and because she did not notify the employer that she had a larceny charge brought against her.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner’s decision to determine: (1) whether the consolidated findings of fact are supported by substantial and credible evidence; and (2) whether the original conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner’s consolidated findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence. However, we conclude that the consolidated findings support an award of benefits to the claimant.

Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) 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

After remand, the review examiner found that the employer expected the claimant to refrain from having larceny charges brought against her and to immediately report to the employer any incidents that might affect her employment status based on Criminal Offender Record Information (CORI) regulations and guidelines. The review examiner further found that, although the claimant received the employer’s handbook outlining the latter expectation, the employer did not provide the claimant with specific guidance regarding what type of incidents needed to be reported to the employer. In July of 2015, a criminal complaint was issued against the claimant, and she was charged with larceny. The complaint was based on an allegation that the claimant failed to report income to a housing authority. The review examiner found that the claimant did not inform the employer that these charges were brought against her, but she provided her supervisor with documentation regarding a court date in the larceny case, so that she could obtain time off from work to go to court.

The employer testified that it was subject to the same regulations as the Executive Office of Health and Human Services with respect to CORI checks. The review examiner found that, under the pertinent regulations, the employer could conduct a CORI check for applicants seeking a position where they would have unsupervised contact with program clients. The regulations

also indicate that current employees in positions for whom a CORI is required may be subject to further criminal record reviews, and the employer may take action based on any criminal activity revealed in the new CORI check. Thus, when the employer discovered that the claimant had pending larceny charges against her, which the claimant did not disclose to the employer, it discharged her.

The employer's expectation that the claimant refrain from having open larceny charges against her stemmed from the fact that the claimant worked unsupervised with individuals with disabilities who did not understand money. We can reasonably infer that the employer believed that it would be risky to entrust its clients and their personal property to the claimant, since there existed the possibility that the larceny charges were based on wrongdoing on the claimant's part rather than a groundless accusation. In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). Here, the review examiner found that the larceny charges against the claimant were dismissed on April 14, 2016. Since there is no evidence in the record that the claimant actually committed the crime of larceny or engaged in any other similar conduct that could negatively affect her ability to perform her job, we conclude that the employer's expectation was unreasonable in its application to the claimant. Garfield, *supra* at 97. Thus, the claimant's inability to meet the abovementioned expectation is not disqualifying, under the deliberate misconduct standard of G.L. c. 151A, § 25(e)(2).

The claimant was also discharged for her failure to notify the employer of the larceny charges brought against her. The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Id. at 97. Here, the employees were told to notify the Vice President of Human Resources immediately of any incidents that may impact their employment status based on CORI regulations and guidelines. The employer, however, failed to clearly or explicitly communicate to the claimant more specific guidance regarding what type of incidents needed to be reported to the employer. As a result, the claimant was unaware of the employer's expectation. Absent such knowledge, we conclude that the claimant did not have the necessary state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest. Id.¹

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to deliberate misconduct in wilful disregard of the employer's interest.

¹ While not determinative to our holding in this matter, we note that the employer's expectation that the claimant disclose the charges pending against her may have been unreasonable, given G.L. c. 151B, §§ 4(9) and (9-1/2). These provisions may limit the employer's right to require disclosure of criminal charges that do not result in a conviction.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending February 20, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 21, 2016



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member



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Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

SVL/rh