

Based upon the employer's new evidence showing that the claimant knew she was driving its vehicles on a suspended license, the claimant is disqualified for engaging in deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0018 3330 00

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Margaret Blakely, a review examiner of the Department of Unemployment Assistance (DUA), to award 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 March 17, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 3, 2016. The claimant 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 awarded benefits in a decision rendered on June 16, 2016. The Board of Review initially denied the employer's application for review. However, on June 27, 2017, the Board issued an Order to Revoke Denial of Application for Review and remanded the case to the original review examiner to consider material evidence that was unavailable at the original hearing.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(2). The Board remanded the case to consider additional evidence pertaining to the claimant's awareness about her driver's license suspension. Only the employer 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 before the Board is whether the review examiner's original conclusion, that the claimant was not aware that her driver's license had been suspended when she drove the employer's vehicle in January 2016, and, therefore, did not engage in deliberate misconduct, 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 worked as a full-time executive assistant for the employer, an alcohol monitoring company, between 05/28/2013 and 03/17/2016, when she separated.
2. The claimant's direct supervisors were the general manager and the owner.
3. No written policies regarding driver's licenses were presented.
4. The employer expected employees to maintain a valid driver's license if operating a company vehicle.
5. The purpose of this expectation was to ensure compliance with Massachusetts motor vehicle laws.
6. The claimant was aware of this expectation.
7. Operating a company vehicle without a valid driver's license can have an impact upon the operation of the employer's business.
8. The claimant was involved in a motor vehicle accident in April 2015 resulting in criminal charges in the [Town A] District Court.
9. On 08/03/2015, the claimant emailed the employer's administrative assistant stating, "Im [sic] VERY nervous about having my license suspended... That's my worst case scenario... I'm praying that wont [sic] be the case."
10. On 01/13/2016, a [Town B] police officer (police officer A) stopped a vehicle driving forty seven (47) miles per hour in an area where the speed limit is thirty (30) miles per hour. The claimant was driving the vehicle and provided her driver's license to police officer A.
11. Police officer A "put [the claimant's] [l]icense information into [his] laptop and ran [the claimant's] information through CJIS. [The claimant's] status came back Suspended/NRE as of [11/15/2015] for 7 surchage able [sic] events." Police officer A contacted a dispatch police officer (police officer B) who confirmed the claimant's license status and contacted a tow truck for the vehicle.
12. On 01/13/2016, police officer A issued the claimant a criminal citation (Massachusetts Uniform Citation number [Y]) for operating after suspension and speeding (the citation). The citation was for docket number [X]. Police officer A handed the citation to the claimant and informed her of her license status. Police officer A also informed the claimant that "she needed to arrange for a ride as [police officer A] was going to have to tow the vehicle."
13. Thereafter, police officer A faxed an affidavit of suspension to the Registry of Motor Vehicles (RMV).

14. Police officer A completed a [Town B] Police Department Incident Report, incident number [Z], regarding his motor vehicle stop of the claimant on 01/13/2016.
15. After the claimant's interaction with police officer A on 01/13/2016, she was aware that her driver's license was suspended.
16. On 01/13/2016, the claimant did not hit a curb, pop her tire, and need her car towed as a result.
17. The owner was not present with the claimant on 01/13/2016.
18. On 01/13/2016, the claimant sent a text message and photograph to the employer stating, "cars [sic] being towed, im [sic] watg [sic] for a ride, I whave [sic] to get this fixed im [sic] sorry ill [sic] call u [sic] within hour[.]"
19. On 01/20/2016 and 01/27/2016, the claimant drove the company vehicle for company training. At these times, the claimant was aware that her driver's license was suspended.
20. On 01/27/2016, the [Town A] District Court issued a summons, docket number [X], to the claimant requiring her to appear in court on 02/24/2016 for her arraignment. The claimant was charged with two (2) counts: operating a motor vehicle with a suspended license and speeding on 01/13/2016.
21. The [Town A] District Court maintained a "Criminal Docket" for docket number [X]. Per this docket sheet, the claimant did not appear for court on 02/24/2016 and a "straight warrant" was issued for the claimant.
22. On 02/25/2016, the RMV issued the claimant a letter stating, "effective 90 days from the date of this letter, on 05/25/2016, without further notice, your license/right to operate a motor vehicle will be suspended for an indefinite period as a result of the existence of the outstanding default or arrest warrants [from the [Town A] District Court, issued in 2016]...If you do not clear [this warrant] before the end of the ninety day grace period, your license/right to operate a motor vehicle will be suspended effective on the date noted above... When your license/right to operate motor vehicles has been suspended or revoked, you must immediately cease to operate all motor vehicles until your license/right to operate has been reinstated...Note: If you are suspended as a result of this notice, a \$100 reinstatement fee is required before this license will be reinstated."
23. The letter dated 02/25/2016 was referring to the claimant's failure to appear at her arraignment in the [Town A] District Court on 02/24/2016.
24. The letter dated 02/25/2016 was sent to the claimant's address of:

Apt [A]
[Street Address A]
[Town B], MA [zip code A]

25. The claimant received the letter dated 02/25/2016 on an unknown date shortly after 02/25/2016.

26. On 03/15/2016, the claimant worked for the employer in the morning and took the afternoon off.

27. On 03/15/2016, the Registrar of the RMV issued the claimant a letter stating, "You are hereby notified that your pending license suspension as the result of outstanding default or arrest warrants [from the [Town A] District Court, issued in 2016] has been removed because those warrants have been cleared."

28. The letter dated 03/15/2016 was sent to the claimant's address of:

[Street Address B]
[Town C], MA [zip code B]

29. The claimant received the letter dated 03/15/2016 on an unknown date after 03/15/2016.

30. The claimant did not work on 03/16/2016.

31. In the claimant's absence on 03/16/2016, the general manager emailed the employer's insurance provider to inquire about the claimant's license status and her eligibility to drive on 01/20/2016 and 01/27/2016.

32. The insurance agent emailed the general manager on 03/16/2016 stating, "When I input the inquiry as of [01/20/2016] and [01/27/2016], the RMV says license suspended...."

33. The employer prepared an "Incident Description and Supporting Details" document identifying three (3) issues regarding the claimant and terminating her employment. Issue 1 was "fail[ing] to follow company policy and document equipment swaps and discounts onto client accounts within [the employer's] database" and that notes are missing in accounts. Issue 2 was "using the company email account throughout the business days for personal use. Issue 3 was "failing to notify the company that [the claimant's] license was suspended" and "operat[ing] the company vehicle without a valid license."

34. The claimant returned to work on 03/17/2016. Upon the claimant's return, the employer terminated the claimant's employment for issue 3, driving a company vehicle with a suspended license on 01/20/2016 and 01/27/2016.

35. If the claimant had not driven the employer's vehicle while her license was suspended, the employer would not have terminated her employment on 03/17/2016 for issues 1 and 2.
36. If issues 1 and 2 had not occurred, the employer would have terminated the claimant solely for driving the employer's vehicle while her license was suspended.
37. On 03/29/2016, the claimant contacted the employer regarding payment for unused vacation time. The owner replied to the claimant's request stating, "In order to process the check we would need your current mailing address." The claimant responded to the owner stating, "The check should be mailed to the address on file: [Street Address A], #[A], [Town B]."

Credibility Assessment:

During the original hearing, the owner asserted that the claimant knew her license was suspended as of 01/13/2016, because her car was towed and a police officer was present. While the owner was not present with the claimant on 01/13/2016, and had no direct knowledge of the events of 01/13/2016, the owner presented documents to corroborate her assertion during the remand hearing. Specifically, the employer presented 1) the 01/13/2016 criminal citation (Massachusetts Uniform Citation number [Y], docket number [X]) that police officer A issued to the claimant during the vehicle stop, 2) the [Town B] Police Department Incident Report, incident number [Z], that police officer A completed regarding his motor vehicle stop of the claimant on 01/13/2016, 3) the [Town A] District Court summons, docket number [X], to the claimant issued on 01/27/2016 regarding her arraignment scheduled for 02/24/2016, and 4) the docket sheet for docket number [X]. All of these documents detail a chronological sequence of events following the initial traffic stop of the claimant on 01/13/2016. All of these documents (except the Incident Report) cite the same docket number. None of these documents were prepared by the claimant or the employer with an interest in the instant unemployment case. In fact, these forms were standard forms, completed in the normal course of business, as well as court documents. For these reasons, the additional documentation presented during the remand hearing has a heightened indicia of reliability with respect to the events on 01/13/2016 and thereafter. Such documentation explicitly contradicts, refutes and rebuts the claimant's assertion that she had no knowledge that her license was suspended at the times she operated the employer's vehicle on 01/20/2016 and 01/27/2016. The claimant did not participate in the remand hearing to offer any further testimony or documentation regarding the status of her license or the nature of her interaction with police officer A on 01/13/2016. As such, the claimant's testimony about her state of mind regarding the status of her driver's license when operating the employer's vehicle on 01/20/2016 and 01/27/2016, as well as her assertion that she had no knowledge of any issue with her license until the RMV letter dated 02/25/2016, is not credible, reasonable or plausible in this case.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the consolidated findings now establish that the review examiner's original decision to award the claimant benefits was incorrect.

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 . . . 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

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The consolidated findings show that the employer's primary reason for discharging the claimant was that she drove its vehicles with a suspended driver's license on January 20 and 27, 2016. Consolidated Findings ## 34–36. Inasmuch as there was no written policy about maintaining a valid driver's license, there is no basis to analyze the separation as a knowing violation of a reasonable and uniformly enforced policy of the employer. Thus, we turn to the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2).

In order to determine whether an employee's actions constitute deliberate misconduct, 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 v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

In the present case, there is no question that the claimant was aware that the employer expected its employees to maintain a valid driver's license if operating a company vehicle. *See* Consolidated Findings ## 4 and 6. The question is whether, on January 20 and 27, 2016, she was aware that her license had been suspended. In her original decision, the review examiner concluded that the claimant was not aware of the suspension at the time she drove the vehicles, and only found out when she received a letter from the Registry of Motor Vehicles, dated

February 25, 2016, which notified her that it could be suspended. Upon considering new evidence presented at the remand hearing, the review examiner has now found that the claimant knew that her license was suspended as early as January 13, 2016, when a police officer gave the claimant a citation during a traffic stop. Consolidated Finding # 15. More precisely, the review examiner has found that the claimant knew that she was driving the company vehicles with a suspended driver's license on January 20 and 27, 2016.

Because the claimant did not participate in the remand hearing, she has not offered any further explanation for driving with a suspended license, nor has she presented any mitigating circumstances. Therefore, we conclude as a matter of law that the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 13, 2016, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 15, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
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.

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