

**That the claimant formed a business which competed with the employer's business does not mean that he is subject to disqualification under G.L. c. 151A, § 25(e)(2), because the claimant did not sign a non-compete covenant when he was hired; he only signed a non-solicitation agreement, which does not address the formation of a competing company.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Judith M. Neumann, Esq.  
Member  
Charlene A. Stawicki, Esq.  
Member**

**Issue ID: 0018 9688 49**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Dena Lusakhpuryan, 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 May 18, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 24, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on April 25, 2017.

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 accepted the claimant's application for review and 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 subject to disqualification, under G.L. c. 151A, § 25(e)(2), for starting a business which competes with the employer, is supported by substantial and credible evidence and is free from error of law, where the claimant signed a non-solicitation provision, rather than a covenant not to compete, and the employer provided only scant evidence and argument that the claimant was discharged for violating the non-solicitation provision.

### **Findings of Fact**

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

1. On January 11, 2006, the claimant started working for the employer, a commercial collections company, as a fulltime salesperson.
2. The claimant was scheduled to work Monday through Friday from 8AM until 5PM.
3. The claimant was paid an annual salary of \$50, 000 plus commissions.
4. The employer expected the claimant not to formulate a competing business. The claimant was aware of this expectation as the claimant signed a document titled Agreement with the employer.
5. The employer maintained a written document with the claimant titled 'Agreement' listing:

"I will not either during my employment with the company or for a period of twenty four (24) months thereafter, either directly or indirectly for myself or any third party, solicit, induce, recruit or cause another person in the employ of [employer's name omitted] to terminate his/her employment for the purpose of joining, associating or becoming employed with any business or activity which is in competition with any business activity engaged in by [employer's name omitted] (Exhibit 6A Page 3)."

6. In December 2005, the claimant signed the document titled 'Agreement' with the Employer (Exhibit 6A Page 5)."
7. The employer expected the claimant not to formulate a [competitive] business in order to ensure a profitable business for the employer.
8. The employer will always terminate an employee for formulating a competitive business.
9. In February 2015, the claimant formed a company, an LLC, with the 1<sup>st</sup> co-worker (Exhibit 7). The 1<sup>st</sup> co-worker also worked for the employer. This business is a commercial collections agency.
10. The claimant's business is a competing business of the employer's establishment.
11. The claimant did not disclose to the employer that the claimant had formed a commercial collections agency. The claimant knew the employer would not be happy that the claimant had formulated a collections agency.
12. The claimant was performing tasks for his business on his own personal time while he was still an employee for the employer's establishment. The claimant was performing such tasks as getting his business started.

13. In May 2016, the 1<sup>st</sup> co-worker resigned from his job position at the employer's establishment. The 1<sup>st</sup> co-worker was vague regarding his reason for resigning from the employer's establishment.
14. The employer subsequently did a search on the Secretary of State's website and discovered that the claimant and the 1<sup>st</sup> co-worker were listed on the Certificate of Organization for a commercial collections agency company (Exhibit 7).
15. On May 18, 2016, the employer discharged the claimant during an in person meeting. The President, the 1<sup>st</sup> Vice President, the 2<sup>nd</sup> Vice President, and the claimant attended this meeting.
16. The employer discharged the claimant for forming a competing collections agency company.
17. The claimant filed an initial claim for unemployment insurance benefits that is effective the week beginning June 5, 2016.
18. On February 24, 2017, the Department issued a Notice of Disqualification denying the claimant benefits under Section 25(e)(2) of the Law commencing the week beginning May 15, 2016 and until he met the requalifying provisions of the Law (Exhibit 10).

### Ruling of the Board

In accordance with our statutory obligation, we review the decision 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 is free from error of law. After such review, the Board adopts the review examiner's findings of fact and credibility assessment, except as follows. The second sentence of Finding of Fact # 4 is not supported by the record. As we discuss below, the claimant did not sign a provision prohibiting him from forming a competing company. Therefore, any finding that the claimant was aware he could not form a competing company due to the signing of the Agreement is not supported by the findings or the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude, contrary to the review examiner, that the claimant is not subject to disqualification based on his formation of a competing business.

Because the claimant was terminated from his employment on May 18, 2016, his 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Based on her conclusions that the claimant deliberately and intentionally formed a business which competed with the employer's business, the review examiner decided that the employer had carried its burden. Because we disagree with the review examiner's interpretation of the contractual provision at issue, we disagree that the claimant is disqualified from receiving benefits.

The review examiner found that the claimant was discharged "for forming a competing collections agency company." Finding of Fact # 16. This finding is supported by the employer's testimony from the hearing. When asked why the claimant was discharged, the employer's president specifically indicated that the claimant had started a competing company, he incorporated it in February, 2015, and that the company's name was [Company A]. When specifically asked again by the review examiner if the claimant was discharged for starting the company, the president confirmed that this was the reason. A vice-president of the company subsequently echoed the president's testimony that the claimant was discharged because of his "involvement in establishing a competing business with" the employer. Thus, the employer's initial burden is to establish that the formation and existence of [Company A] violated its rule or expectation.

To support its case that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest, the employer presented a signed agreement, which was entered into the record as Exhibit # 6A. When asked by the review examiner which provision was allegedly violated by the claimant, the employer referenced paragraph 6 on page 3 of the agreement. As stated in Finding of Fact # 5, this provision provides the following:

I will not either during my employment with the company or for a period of twenty four (24) months thereafter, either directly or indirectly for myself or any third party, solicit, induce, recruit or cause another person in the employ of [Company B] to terminate his/her employment for the purpose of joining, associating or becoming employed with any business or activity which is in competition with any business activity engaged in by [Company B].

The employer referred to this provision as a "non-compete" clause. During the hearing, and in his appeal to the Board, the claimant argued that this clause is not a non-compete, but rather a non-solicitation provision. He argues that the formation of the competing company did not violate this provision, and that he would not have been aware from this provision that forming the company was prohibited by the employer. We agree.

A non-competition clause or covenant is, as the name implies, a promise or agreement "not to engage in the same type of business for a stated period of time . . . as the employer." Black's Law Dictionary, 9<sup>th</sup> ed. (2009). A non-solicitation agreement is a promise, sometimes contained within an employment contract, to "refrain . . . from either (1) enticing employees to leave the company, or (2) trying to lure customers away." Id. The two types of clauses are certainly related, but they address different aspects of the employment and post-employment relationship.

In her conclusion, the review examiner noted the claimant's argument that he did not know he violated any employer expectation. She found that testimony not credible, based on the terms of paragraph 6 of the Agreement. The review examiner suggests that the presence of this paragraph, which is clearly a non-solicitation provision, put the claimant on notice that he could not start a competing company. We disagree with that rationale, since the terms of the provision in this case are quite clear: it is a non-solicitation provision. The provision mentions nothing about forming a competing business, and we decline to impute such an expectation into the written contract.

Our above discussion is sufficient for us to conclude that the review examiner's decision is based on an erroneous premise: that the agreement signed between the parties prohibited the formation of a competing company by the claimant. Since the agreement did not prohibit this, and since none of the review examiner's other findings of fact indicate that the employer informed the claimant of this expectation at any time, we conclude that the mere formation of the competing business was not an act of misconduct which would subject the claimant to disqualification, under G.L. c. 151A, § 25(e)(2).<sup>1</sup>

Even if the employer had argued that the claimant violated the non-solicitation provision as such, the evidence in the record was insufficient to show a breach of the clause. The employer entered several emails onto the record. The first, Exhibit # 13, appears to show the claimant emailing someone the person's new email address, which address was associated with the claimant's company, [Company A]. The employer entered the email apparently to show that the business was operating, not necessarily to show that the claimant was soliciting its customers or employees. However, in terms of solicitation, it is not clear what the email could really show. Exhibit # 14 is an email from the claimant to his email address at [Company A]. The claimant appears to have forwarded himself an email from one of the employer's workers ([Employee A]). The employer suggested that the claimant forwarded himself collection information which was privy only to the employer. This is possibly true, but still would be insufficient to show that the claimant was soliciting customers away from the employer. The email could possibly have been used to assert violations of paragraphs 4, 7, and 8 of the Agreement. However, the employer did not directly contend that it discharged the claimant for violating those paragraphs, and the review examiner made no findings of fact suggesting that such violations occurred or factored into the employer's discharge decision. It is unclear in the record why the claimant forwarded himself this information. Accordingly, there would not have been substantial and credible evidence in the record to show a violation of the non-solicitation provision had this been the employer's asserted basis for discharge.

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<sup>1</sup> We also note that forming a competing company, absent a specific contractual provision prohibiting it, is allowed under the law. "An at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed. Such an employee has no general duty to disclose his plans to his employer, and generally he may secretly join other employees in the endeavor without violating any duty to his employer. The general policy considerations are that at-will employees should be allowed to change employers freely and competition should be encouraged. If an employer wishes to restrict the post-employment competitive activities of a key employee, it may seek that goal through a non-competition agreement." *Augat Inc. v. Aegis, Inc.*, 409 Mass. 165, 172 (1991) (citations omitted).

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to the provisions of G.L. c. 151A, § 25(e)(2), was not supported by substantial and credible evidence or free from error of law, because the claimant's formation of a competing business did not violate the non-solicitation provision agreed to by the parties, and there is insufficient evidence in the record to conclude that the claimant violated the non-solicitation provision.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 15, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 30, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Judith M. Neumann, Esq.  
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**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](http://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.

SF/rh