

The employer failed to support its contention that the claimant engaged in intentional wrongdoing of using the employer's wood finishing technique for a competing business and relied solely on suspicion, supposition, and assumption.

**Board of Review
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Issue ID: 0019 1788 45

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Stephen A. Dougal, 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 affirm.

The claimant was discharged from his position with the employer on July 6, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 29, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 15, 2016. We accepted the employer's application for review.

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, was not 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 employer's appeal, we remanded the case to the review examiner to provide the employer an opportunity to testify and present documentary 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 there was no evidence of a substantiated intentional act by the claimant that warranted disqualification from unemployment benefits 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 full-time for the employer, a wood décor company, as a general laborer, from August 24, 2015, until July 6, 2016. The claimant was paid \$12.00 per hour.
2. The employer has a sanding and staining finishing technique it uses on its wood products, such as signs.
3. The employer considered his finishing technique proprietary.
4. At the time of hire the employer told by the claimant he could "do stuff on his own" but could not use his finishing technique.
5. The claimant understood he was not to use the finishing technique.
6. On the July 4, 2016, weekend, the employer noticed a company on Facebook selling what he considered the exact same products with the same finishing technique the employer used.
7. The products were being sold by an employee (Employee 1) under the name [Business A].
8. The employer looking at the products on the Employee 1's Facebook page concluded Employee 1 used the employer's finishing technique.
9. The employer did not conduct any tests on Employee 1's products concerning the finishing technique.
10. The claimant had "liked" Employee 1's Facebook page for [Business A]. Employee 1 "tagged" the claimant on his Facebook page.
11. When the employer "clicked" on the claimant's name on Employee 1's Facebook page, it linked to someone with the claimant's name.
12. On July 6, 2016, the employer asked if the claimant knew about Employee 1's Facebook page and [Business A].
13. The claimant first denied any knowledge of Employee 1's Facebook page and [Business A].
14. The employer told the claimant he could be fired.
15. The claimant admitted he "liked" Employee 1's Facebook page.
16. The claimant then told the employer he found a 2007 internet video in which others making wood products using the same technique as the employer and told the employer's his finishing technique was not protected.

17. On July 6, 2016, the employer spoke with Employee 1 who admitted "everything".
18. Employee 1 told the employer he had found a 2007 internet article in which others making wood products using the same finishing technique as the employer so the employer did not have any rights to the finishing technique.
19. The employer believed the claimant was working with Employee 1's business based upon the Employee and the claimant each stating separately they found a 2007 internet article in which others making wood products using the same technique as the employer.
20. On July 6, 2016, the claimant was issued a termination letter which stated in part:
 1. "The termination is for cause as we have become aware that you have become involved in a business that directly competes with [Employer]." (Exhibit 9)
21. The employer believed, but did not know, if the claimant made any of the signs shown on Employee 1's Facebook page or what help the claimant may have given Employee 1.
22. The claimant did not have anything to do with Employee 1's business.
23. The claimant has never been to Employee 1's home.
24. The claimant did not use the employer's technique outside of the workplace.

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. 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, as outlined below.

Because the claimant was discharged, his qualification for benefits is governed by 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 . . .] (e) 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

Under the foregoing provision, it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. After hearing from only the claimant at the initial hearing, the review examiner concluded that the employer had not met its burden. We remanded the case to take testimony and evidence from the employer, as well as to obtain evidence about what prompted the claimant's discharge. After remand, we agree with the review examiner that the employer has not met its burden.

The review examiner's consolidated findings establish that the claimant did not engage in any intentional wrongdoing. The claimant had nothing to do with the coworker's business and did not use the employer's finishing technique outside of the workplace. The review examiner found that, although the employer believed the claimant was involved in some way, that belief was not based upon actual knowledge, but instead upon suspicion, conjecture, and assumption. After reviewing the employer's evidence and concerns, the review examiner concluded that the employer's belief was mistaken and that the claimant did not engage in the alleged wrongdoing.

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 affirmed. The claimant is entitled to receive benefits for the week beginning July 3, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – May 12, 2017



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, 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

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.

SPE/rh