

Although the claimant had attendance problems, it was not reasonable for the employer to expect him to forfeit his normally scheduled day off because he had taken an approved, accrued day off that week.

**Board of Review
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Issue ID: 0019 4026 35

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 July 2, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 29, 2017. The employer 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 denied benefits in a decision rendered on July 11, 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 pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the employer was concerned about the claimant's absences, the employer expected that the claimant would forfeit his normal day off if he needed "additional" time off during a workweek, the claimant called out of work on June 30, 2016, and the claimant then did not report to work on July 1, 2016, which was his usual day off.

Findings of Fact

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

1. The claimant worked full-time for the instant employer as a Sales Manager from August 2015 until his separation on 7/2/2016.

2. On 6/16/2016, the employer issued the claimant a written warning for not following his work schedule due to missing work due to his daughter's cancer.
3. The claimant was informed that if he took time off during the week then he would need to forfeit his scheduled day which was Friday.
4. The claimant signed the written warning issued by the General Sales Manager who informed the claimant that the owner was annoyed with his switching off days off since he was needed to work.
5. The written warning stated that any violation to the claimant's schedule can result in termination of employment.
6. After being issued the warning, the claimant confirmed with Human Resources how many personal days he had left which was one.
7. On Thursday 6/30/2016, the claimant called out of work for his scheduled shift after finding out that his daughter who was a cancer survivor was unable to have children due to her radiation and chemotherapy treatment. The claimant used his last personal day on 6/30/2016.
8. On 7/1/2016, the claimant did not report to work after taking off on Thursday 6/30/2016.
9. The claimant also did not report to work on 7/1/2016 because of finding out about his daughter's inability to have children.
10. The claimant did not call or text the employer that he would be absent.
11. On 7/2/2016, the claimant reported to work and the General Sales Manager informed the claimant that he was terminated for not working his scheduled day off as required by the employer.
12. The claimant was dissatisfied with the employer and felt he was singled out since other employees had absences or tardiness by [sic] they were not written up.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant engaged in conduct which is disqualifying under G.L. c. 151A, § 25(e)(2).

Because the claimant was terminated from his employment, 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. The review examiner concluded that the employer had carried its burden; however, we disagree.

At the outset of our discussion, we note that the legislative intent behind G.L. c. 151A, § 25(e)(2), is “to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield, 377 Mass. at 95.

In this case, the employer was concerned about the claimant's absences from work. On June 16, 2016, the employer issued the claimant a document stating its expectations for his attendance at work. The document, titled “Expected Work Schedule for [Claimant],” listed the claimant's daily work schedule, which included his normally scheduled day off of Friday. It also imposed the following conditions:

In the event that [Claimant] needs any additional time off and/or Needs to leave early it is to be requested in writing with an official “Time Needed Request Form” signed by Management.

If an additional day off during week is needed it is expected that Scheduled Day Off will be forfeited unless approved by Management.

If a call in absence is placed due to sickness or other emergencies he will automatically forfeit Scheduled Day Off and be expected to work the scheduled day off.

The review examiner found that the employer discharged the claimant for allegedly violating the expectations laid out in the June 16 document. The claimant called out of work on June 30, 2016, because he was dealing with the emotional effects of learning that his daughter, who was undergoing radiation and chemotherapy treatments for stage IV cancer, could not have children. Although he called out on June 30, he did not work on July 1, 2016, which was a Friday and his normally scheduled day off. The employer claimed that the claimant violated the third part of the June 16 warning.

For purposes of this decision, we assume that the claimant violated the terms of the June 16 warning. The plain language of the document indicates that, if any emergency keeps the claimant out of work, he must work his normally scheduled day off, which is Friday. However, in order to carry its burden, the employer must show that the misconduct was intentional and done in wilful disregard of the employer's interest. The question of whether the claimant was willfully disregarding the employer's interest focuses on the claimant's state of mind at the time of the conduct at issue. 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, 377 Mass. at 97 (citation omitted). As we probe into the claimant's state of mind, we are also mindful that the Legislature has instructed that Chapter 151A "be construed liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family." G.L. c. 151A, § 74.

Our focus is on whether the employer's expectation that the claimant work on July 1, 2016, his scheduled day off, was reasonable.¹ The review examiner concluded that it was, because "the employer needed him for work." We disagree with that legal conclusion. The review examiner found that the claimant used his last personal day on June 30, 2016. This covered him for his absence on June 30. While an expectation that employees will report to work as scheduled is generally reasonable, the employer had in place a scheme whereby employees were granted time off to use for personal situations. The employer's expectation that the claimant report to work on his scheduled day off on Friday effectively deprives him of the opportunity to use his personal days and obliterates the benefit of having personal time off. Thus, we conclude that the expectation that the claimant report to work on July 1 was not reasonable.²

Finally, even if it was reasonable for the employer to expect that the claimant report to work July 1 — with which we do not agree — we note that, on the record before us, the employer has not met its burden of establishing that the claimant's failure to report to work was in wilful disregard of the employer's interest. Rather, the record suggests the claimant's actions were motivated by his concern for his daughter's health situation.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), was based on an error of law and unsupported by substantial and credible evidence, because the employer's expectation that the claimant work on his scheduled day off after he used a personal day, was not reasonable.

¹ The record establishes that the claimant received and signed for the June 16 document. Consequently, he was generally aware of the provisions which were to apply to his time off going forward. However, no findings were made that the employer specifically explained to the claimant what the expectations were and how they might apply to the use of accrued time off.

² We recognize that, if the claimant did not have any accrued time off left to use, our result may have been different. Without any earned time off, the claimant's absence on June 30 would have been unexcused and uncovered, and it would have been reasonable for the employer to expect that he make up that work. In such a case, the employer would have expected that the claimant work six days during the week, no matter which days he worked. Here, since the claimant used his personal day, it was unreasonable to expect that he work on his day off.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 26, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 28, 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.

SF/rh