

0019 6517 85 (Mar. 21, 2017) – After a 6-month probationary period was extended due to the employer’s concern about the claimant’s work effort, he was caught playing video games on his cell phone instead of cleaning the shop. This was deliberate misconduct, not non-disqualifying poor performance.

**Board of Review**  
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**Issue ID: 0019 6517 85**

## **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 affirm.

The claimant was discharged from his position with the employer on September 2, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 15, 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 October 29, 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 allow the claimant an opportunity to present testimony and evidence. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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’s discharge for failing to take initiative and perform work as assigned constituted deliberate misconduct in wilful disregard of the employer’s interest, rather than merely non-disqualifying poor performance, 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 assessment are set forth below in their entirety:

1. The claimant worked full-time as a laborer for the employer's water and sewer department from 1/5/16 until 9/2/16. The claimant worked from 7:00 a.m. until 3:30 p.m. on Monday through Friday and was paid approximately \$17 per hour. The claimant's position was represented by a labor union. Members of the union are not entitled to engage the grievance process until they have completed one year of employment and are no longer considered probationary employees.
2. The employer considers new employees to be on probation for the first six months of their employment. The employer may extend the probationary period by two months.
3. At the time of hire, the Superintendent found the claimant exhibited a good attitude and was eager to do whatever work was needed. Through the time of his second performance review in February, the employer was satisfied with the claimant's overall performance. The Superintendent sent the claimant to training in order to obtain a water Class 1 (D1) license. The training was intended to provide the claimant with increased knowledge and potential promotional opportunity. The employer provides a pay stipend to employees after they obtain such licenses. The claimant attended training classes during the April-May time period but was short three hours needed to complete the D1 classification and take the licensure exam. The claimant did not attend any classes after May.
4. After the claimant's second performance review, the employer observed a change in the claimant's attitude. The Superintendent received complaints, alleging that the claimant was not being helpful at dig sites. The Foreman and Superintendent spoke with the claimant about his performance during a third performance review on 6/7/16. The claimant was specifically cited for a lack of enthusiasm and sitting in the truck while at dig operations. The claimant admitted that his performance had been slipping; the claimant told the Superintendent that he had been distracted and would improve and become more involved.
5. On 6/30/16, the City Engineer notified the claimant in writing that his probationary period would be extended by two months. The written notice reads in relevant part: "As discussed in your performance evaluation with (Foreman) and (Water & Sewer Superintendent) you are expected to be more conscientious, show more interest in your duties, take the initiative and spend less time sitting in the truck. In the event that your performance is not satisfactory your employment with (Employer) may be terminated." The notice was signed by the claimant, the City Engineer, and the Superintendent.
6. The employer issued the claimant a cell phone to be used for work purposes. The employer expected the claimant to carry the phone with him during the work day.

7. On 8/29/16, the claimant reported to the Foreman's office at approximately 2:00pm because the employee he had been working with was leaving work early. The Foreman directed the claimant to clean the shop while waiting for the next job assignment. Approximately ten minutes later, the Foreman requested a third employee take the claimant and respond to a call regarding a sink hole. The third employee notified the Foreman that he was unable to locate the claimant. The Foreman attempted to reach the claimant on the employer-issued cell phone but the call was forwarded to voice mail. The third employee went to the work site alone. Approximately forty minutes later, the Foreman observed the claimant sitting in an office, with the lights turned off, playing chess on a cell phone. The claimant told the Foreman that he had not swept the shop because he could not find a broom; that he did not answer the employer-issued cell phone because it was at home charging; and that he was not around when the third employee was looking for him because he was looking for other employees on the sewer crew in order to work with them. The Foreman notified the Superintendent of the 8/29/16 incident.
8. The Superintendent informed the employer's Personnel department that the claimant was nearing the end of his probationary period and he did not wish to retain the claimant because his performance continued to be unsatisfactory. The Superintendent concluded that the claimant was failing to exert effort in the performance of his duties. The Superintendent subsequently obtained a written statement from the Foreman, detailing the 8/29/16 incident, because he was asked by the Personnel department for the reason he was not retaining the claimant.
9. On 9/2/16, the employer notified the claimant that his employment was terminated due to a lack of performance.
10. The claimant filed a claim for unemployment insurance benefits, effective 9/4/16.

Credibility Assessment:

The claimant confirmed the details of the incident which occurred at the employer's shop on 8/29/16, with the exception of the game playing. The claimant testified that he was in the office where the Foreman reported finding him; however, he contended that he was speaking with someone and was not playing a game. The claimant's testimony on this point was given no weight due to his diminished overall credibility.

During the hearing, the claimant testified that he did not realize his job was in jeopardy, that he was confused, the employer did not make clear its expectations, and that he was unaware that signing the 6/30/16 letter would result in his employment being terminated. The letter issued to the claimant on 6/30/16 plainly states that the claimant may be terminated if his performance

did not improve. It details the employer's expectations, including that the claimant must take more initiative. The fact that the claimant did not go back to the Foreman, after allegedly being unable to find a broom, and spent more than 30 minutes idle after being directed to perform cleaning duties and while on an extended probation, supports the employer's position that the claimant exhibited a lack of effort in the performance of his duties. Given the weight of the evidence, the employer's version of events was more credible than the claimant's and is reflected in the findings of fact.

### 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 and credibility assessment 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 credibility assessment and deems them to be supported by substantial and credible evidence.

The review examiner denied benefits after analyzing the claimant's separation under 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 . . . 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either 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. Based on the employer's undisputed testimony at the initial hearing, the review examiner concluded the employer had met its burden. We remanded the case to take the claimant's testimony. After remand, we also conclude that the employer has met its burden.

The review examiner initially concluded that the claimant was discharged after failing to exhibit adequate effort in the performance of his assigned duties, a lack of effort which rose to the level of deliberate misconduct, rather than being discharged simply for poor performance, which, in itself, is usually non-disqualifying. Because the review examiner found the claimant was discharged for poor performance resulting from lack of effort, we remanded the case to take additional evidence to clarify whether the discharge was for disqualifying misconduct, or mere non-disqualifying poor job performance.

After remand, the review examiner provided more detailed findings of fact and a credibility assessment to clarify the nature of the claimant's actions which brought about his separation.

The review examiner found that the employer hired the claimant on a probationary basis, which would last six months. The employer retained the right to extend the claimant's probationary period by two months.

The employer's superintendent found the claimant exhibited a good attitude and willingness to do whatever work was needed from the time of hire through his second performance review in February 2016. The superintendent sent the claimant to training for additional licensure that could have provided potential promotional opportunities. But by the time of the claimant's second performance review, the superintendent had begun to receive complaints that the claimant was not being helpful at worksites.

The superintendent and foreman spoke with the claimant at his third performance review on June 7, 2016. At that meeting, the employer specifically cited the claimant's lack of enthusiasm and his habit of sitting in the work trucks while on job sites. The claimant admitted his work performance had been slipping and told the superintendent he would improve and become more involved.

Because of the claimant's lack of effort at the employer's job sites, the employer notified him, on June 30, 2016, that his probationary period would be extended by two months, with an expectation that he would "be more conscientious, show more interest in [his] duties, take the initiative and spend less time sitting in the truck." *See* Remand Exhibit # 5. The notice cautioned that if the claimant's performance remained unsatisfactory, his employment may be terminated. *Id.* As of the claimant's June 7 performance review and with his receipt of the June 30 notice of extended probation, the claimant was aware that the employer expected him to demonstrate more effort and initiative on the job, and that continued lack of effort would jeopardize his employment.

On August 29, 2016, the claimant reported to the foreman's office at approximately 2:00 p.m. The foreman told the claimant to clean the shop while waiting for his next assignment. About ten minutes later, the foreman asked another employee to bring the claimant and respond to a call about a sink hole. The other employee told the foreman he could not find the claimant. The foreman tried to call the claimant on his employer-issued cell phone, but his call went directly to voicemail. The other employee went to the worksite without the claimant. About 40 minutes later, the foreman observed the claimant sitting in an office with the lights off, playing chess on his personal cell phone. The claimant told the foreman he had not swept the shop because he could not find a broom; that he had not answered the foreman's call because he had left his employer-issued cell phone at home to charge; and the other employee had not been able to find him because he had been looking for other employees to work with on the sewer crew.

The foreman sent an email to the superintendent regarding the incident; the superintendent forwarded the email to the employer's personnel department. *See* Remand Exhibit # 7. The superintendent concluded the claimant was failing to exert effort in the performance of his duties and advised the personnel department that the claimant was nearing the end of his extended probationary period and that he did not wish to retain the claimant. The employer notified the claimant he was discharged on September 2, 2016, due to a lack of performance.

The review examiner's consolidated findings of fact support the conclusion that the claimant was not discharged merely for non-disqualifying "poor performance," but for deliberate lack of effort in the performance of his duties. Quite simply, sitting in an unlit office playing games on his personal cell phone, claiming he had not swept the floor because he could not find a broom, and leaving his employer-issued cell phone at home to charge together evince a conscious effort to avoid performing work-related tasks, rather than simply performing those tasks poorly.

The review examiner issued a detailed credibility assessment, noting that both parties' accounts of the events that took place on August 29 and that precipitated the claimant's discharge were similar, except that the claimant denied playing games on his cell phone. However, the review examiner found not credible the claimant's testimony that he did not realize his job was in jeopardy and that the employer was unclear about its expectations regarding the work effort it expected of him, in view of the clear expectation that the claimant take more initiative, as set forth in the June 30 notice. Further, the review examiner noted that rather than going to the foreman when he could not find a broom, the claimant spent more than 30 minutes idling after being told to perform cleaning duties. Taken as a whole, the review examiner credited the employer's version of events rather than the claimant's testimony. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

The review examiner's findings thus do not support the conclusion that the claimant's discharge was precipitated by mere unsatisfactory performance. We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 10, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 21, 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.

JPC/rh