

After remand, the consolidated findings indicate that the claimant left his shift early due to the mitigating circumstances of a hand injury and that he was not aware that he was expected to contact the Project Manager in addition to his immediate supervisor. Thus, the claimant did not have the requisite state of mind under § 25(e)(2).

**Board of Review
19 Staniford St., 4th 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: 0019 6872 38

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric Sullivan, 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 September 10, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 7, 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 December 21, 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 the opportunity to testify and present evidence in the case. Only the claimant 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 the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant received permission from his supervisor to leave work in order to seek medical attention for a hand injury.

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 for the instant employer as a landscape laborer from March 2016 until his separation on 9/10/2016.
2. The employer has a company policy titled Attendance and Punctuality which states that if you are unable to report to work on time, you are required to telephone your supervisor or another company officer with full explanations. Repeated failure to report to work on time or poor attendance may result in termination.
3. The claimant was provided the Attendance and Punctuality [policy] in the company handbook at the time of hire.
4. The claimant was never issued any warnings for attendance or punctuality issues.
5. During the course of his employment, the claimant had missed a few days of work due to sickness or the flu.
6. On 9/7/2016, while working, a 250 pound trailer door fell on the claimant's hand and he was unable to use his hand.
7. The claimant informed the Foreman and the Project Manager of his hand injury and he was told to take the rest of the day off.
8. On 9/8/2016 & 9/9/2016, the claimant reported to work and continued to work however the pain in his hand kept increasing.
9. On 9/10/2016, the claimant reported to work and reported to his foreman that his hand felt worse.
10. The foreman suggested that the claimant did [sic] not work if in pain and, as a result, he left the claimant on the side of the road to obtain a ride.
11. The claimant called for a ride to go to [City A] General Emergency room for medical care.
12. After being dropped off [on] the side of the road, the Project Manager called the claimant and told him that he was let go for missing too many days.
13. The claimant was seen at the [City A] General Emergency room on 9/10/2016 and diagnosed with a sprained right finger which was placed in a splint and informed by the doctor to remain out of work from 9/10/2016 through 9/12/2016.

Credibility Assessment:

The claimant's testimony is accepted as credible in all contested [areas] since the employer did not appear at the remand hearing, thus leaving the claimant's representative without the opportunity to cross examine the testimony produced by the employer from the original hearing.

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 discussed more fully below, we conclude, contrary to the review examiner's decision prior to the remand hearing, that the consolidated findings now establish that the claimant's actions were not deliberate or in wilful disregard of the employer's interests, because there were mitigating circumstances requiring the claimant to leave his shift and he received permission to do so from a supervisor.

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 the foregoing provision, the employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). To meet its burden, the employer must show that the claimant committed the conduct alleged, that the claimant's actions were deliberate or intentional, and that he was aware that he was acting in a manner contrary to the employer's expectations.

Here, it is undisputed that the claimant was discharged as a result of leaving his shift early on September 10, 2016. The review examiner originally concluded that the claimant was discharged specifically for leaving without the permission of a supervisor. After remand, having now had the benefit of the claimant's testimony and contemporaneous text messages between the claimant and the Project Manager¹, the review examiner instead concluded that the employer discharged the claimant for "missing too many days" in general. In either case, the employer has not met its burden, as the consolidated findings establish that the claimant did not have the requisite state of mind, under G.L. c. 151A, § 25(e)(2).

¹ See Remand Exhibit # 7.

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). Specifically, 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).

To the extent that the putative misconduct was the claimant leaving his shift at all, the consolidated findings indicate that there were mitigating circumstances requiring him to leave work. Specifically, the review examiner found that the claimant left work due to a hand injury which made it difficult and painful to perform his job duties. These findings are substantiated by medical documentation indicating that the claimant visited an emergency room on the date in question and was excused from work for three days². Due to these mitigating circumstances, it cannot be concluded that the claimant's departure from work was in wilful disregard of the employer's interest.

To the extent that the putative misconduct was the claimant having left his shift without receiving the permission of the Project Manager, the record indicates that the claimant was not aware of such an expectation. The claimant left at the suggestion of his foreman, and testified that he was not aware that he additionally needed the permission of the Project Manager³. The employer's Attendance and Punctuality policy refers only to the requirement to "telephone your supervisor or another company officer" when unable to report to work, and does not distinguish between a foreman and a Project Manager⁴. The claimant testified that he had previously left a shift due to illness after speaking to his foreman and that he was never instructed to inform the Project Manager as well. This is corroborated by a text message conversation between the claimant and the Project Manager about this earlier incident⁵. The findings also indicate that, on September 7, 2016, the claimant was sent home early by the foreman. As the claimant was not aware of any expectation to inform the Project Manager that he was leaving work, it cannot be concluded that failing to do so was deliberate or in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit's interest within the meaning of G.L. c. 151A, § 25(e)(2).

² Exhibit # 6.

³ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

⁴ Exhibit # 7.

⁵ Remand Exhibit # 6.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 17, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 28, 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.

JRK/rh