

Claimant bus driver who failed to submit to drug and alcohol testing quit in lieu of discharge for non-disqualifying conduct, where review examiner credited his direct testimony over employer written statements that nobody told him he had to submit to testing after he had an accident with the employer's bus in its garage.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. Ferullo, 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 separated from his position with the employer on September 16, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 3, 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 7, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and without urgent, compelling, and necessitous reasons and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). 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 take additional 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 quit without good cause attributable to the employer and without urgent, compelling, and necessitous reasons 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 as a full-time Bus Operator for the employer, a provider of transportation services, from October 17, 2011 until becoming separated from employment on September 16, 2016.
2. The claimant held a Commercial Driver's License while working for the employer.
3. The claimant initially received the employer's Drug and Alcohol Policy. The claimant signed for receipt of the employer's August 1, 2001 Drug and Alcohol Policy.
4. The employer revised that Drug and Alcohol Policy with a date of February 24, 2014. Within that revised policy, there was a section dealing with "Post Accident Testing", indicating that "as soon as practicable following an accident, the Employer shall test for alcohol and/or controlled substances according to the following criteria: any accident that involved the loss of human life on each surviving covered employee who operates the mass transit vehicle, any accident that result in bodily injury for which immediate medical attention away from the scenes provided; or The removal from service of the mass transit vehicle, when the mass transit vehicle is a rapid transit or trolley vehicle or a vessel; or Disability in damage to any vehicle involved in the accident, when the mass transit vehicle is a bus, electric bus, van, or automobile." Under the section of the policy dealing with "Refusal to Submit to a Required Test" id [sic] indicated that a refusal to submit to a drug and alcohol test is considered a violation of the employers' Drug and Alcohol Testing Policy. It further indicated that it would be considered a refusal if an individual were to "leave the scene of an accident before submitting to the required testing."
5. It is unknown what revisions were made from the August 1, 2001 Drug and Alcohol Policy and the revised policy of February 24, 2014.
6. It is unknown if the claimant received the revised Drug and Alcohol Policy of February 24, 2014.
7. During the course of the claimant's employment, he had submitted to a pre-employment drug testing and a return to work drug test.
8. The claimant had been involved in two prior accidents while operating the employer vehicle where damage occurred to the employer vehicle or the other vehicle. The claimant was not required to submit to a drug test after either of those incidents.
9. The claimant suffers with depression and mood swings. The claimant was being treated for hypertension.

10. The claimant was out sick from work beginning on August 14, 2016 and remaining out until his return to work on August 19, 2016.
11. On Saturday August 20, 2016, the claimant was scheduled to work for the employer from 11:06 am until 5:01 pm. The claimant reported to work as scheduled on Saturday August 20th. As the claimant was driving the bus out of the garage, he had a slight accident. The mirror of the bus that the claimant was driving struck the window of another stationary bus. There was damage incurred to the window of the other bus, causing it to be taken out of service.
12. The claimant attempted to call in the accident to the employer, but was unable to do so utilizing his radio. The Pull-Out Supervisor then called it in, stating to the employer that it was a minor accident.
13. The claimant was present when the Inspector arrived to view the vehicles.
14. The claimant then called the Desk Sargent [sic] to request to go out for the day on Family Medical Leave. The claimant thought that maybe he wasn't fit to work that day, due to stress and anxiety. While speaking with the Desk Sargent [sic], the claimant's call was disconnected. The claimant believed that the Desk Sergeant would call back if they needed further information. (The claimant did not receive any call back after the call was disconnected.) The claimant then left the work premises.
15. Since the claimant had used the employer vehicle and disabled another vehicle taking it out of service, the employer wanted to send the claimant for a drug test under the Post Accident Testing Policy. (The only exception to that testing policy was is if the operator's vehicle was stationary when the accident occurred.)
16. Prior to leaving the work premises, the claimant had not been given any directive to go for a drug and alcohol screening. The claimant was unaware that he was required to submit to the test at that time, as he had been previously involved in accidents where he had not been required to do so by the employer.
17. The claimant did not report to work on Sunday August 21, 2016, because he was not feeling well. The claimant contacted the employer on that date. The claimant was informed that they wanted to send out a car to his home to take him for the drug and alcohol test. The claimant stated that he would take it the next day when he returned to work. At no time was the claimant informed that he would not be allowed to take the test or that he would be disciplined for not taking the test within a specific time period.
18. The claimant reported to work as scheduled on Monday August 22, 2016. The claimant intended upon submitting to a drug test when reporting to work. The claimant completed an accident report. After which the claimant was

- instructed to meet with the Superintendent. Upon meeting with the Superintendent, the Superintendent indicated that he had heard that the claimant was involved in a minor accident in the garage. The Supervisor informed the claimant that he was being sent home at that time pending an investigation. The claimant was instructed just to call in each day at 10:00 am.
19. The claimant was suspended on August 22, 2016 pending an investigation of his failure to submit to a drug and alcohol test after the August 20th accident. From August 22, 2016 through September 16, 2016, the claimant was suspended without [sic] pay.
 20. Thereafter, the claimant followed the procedure as dictated by the Superintendent, calling the employer each day.
 21. While the claimant was out of work, he was informed by the employer that the accident was considered by the employer to be a preventable accident.
 22. During the period of time when the claimant was out of work, the claimant saw his doctor for a routine check-up. The claimant discussed his symptoms of depression and anxiety. The claimant was not provided with any recommendation regarding his employment.
 23. The claimant was called in to meet with the Superintendent on September 16, 2016. The claimant was informed by the Superintendent that he was going to be discharged due to his refusal to submit to a drug and alcohol test. The union representative inquired of the Superintendent if the claimant could resign his position instead. The Superintendent indicated that he would check. The claimant and his union representative were asked to step out of the room.
 24. At that time, the claimant was informed by the union representative it would be best for him to resign to protect him when attempting to obtain future employment. After speaking with his union representative, then being notified by the Superintendent that he would be allowed to offer his resignation, the claimant decided to resign in lieu of discharge.
 25. On that date, the claimant provided a written letter of resignation, indicating that his last day of work for the employer would be September 16, 2016. The claimant did not provide a reason for his resignation within that document.
 26. At the time of the claimant's exit interview with the employer, the reason for his resignation was cited on the employer paperwork as "personal".
 27. The claimant's last day at work for the employer was September 16, 2016.
 28. On November 3, 2016 a Notice of Approval was issued under Section 25(e)(1) of the Law, indicating that "the claimant was notified that he or she was to be terminated. Because no work was available to the claimant after the

intended separation date, his or her leaving is determined to be for good cause attributable to the employing unit. The claimant was to be terminated on 09/16/2016.” The employer filed an appeal to that determination.

CREDIBILITY ASSESSMENT:

The employer witness [sic] presented strictly hearsay testimony, asserting that the claimant resigned his position on September 16th when providing his written resignation. The witness admittedly had no knowledge as to what was discussed between the claimant and the employer during the meeting on that date, or if the claimant was going to be discharged had he not resigned. However, the witness clearly testified that the claimant was considered by the employer to have refused to take a drug test, prompting his suspension of August 22, 2016, which was a 70-day suspension pending his discharge. As such, the claimant’s testimony that the employer informed him that he was being discharged is credible.

The claimant provided consistent testimony throughout the hearing that at no time did he receive a specific directive to take a drug and alcohol screening, as a result of the August 20, 2016 accident, nor did he refuse any such directive. The claimant’s direct and consistent testimony that he did not receive a directive and did not believe he had to submit to a drug and alcohol screening on that date was accepted as credible for the following [reasons]. First, the claimant testified that after the accident on August 20th, he remained on the work premises speaking to the Pull-out Supervisor and waiting for the Inspector, before leaving work ill, whereupon at no time prior to leaving work, was he given the directive by anyone on behalf of the employer to submit to the test. Although the employer witness provided written statements of individuals who had purportedly given the claimant such directive, those individuals were not present at the hearing to provide any direct testimony and undergo cross examination. Second, the claimant provided direct unrefuted testimony that, during the course of his employment, he had been involved in other accidents, where damage had occurred, and he was not subject to a drug and alcohol screening by the employer, making it plausible that he would not be subject to a screening on the August 20th date. Finally, it was the claimant’s direct testimony that the drug and alcohol screening was first mentioned on August 21st, when he called out sick to work and was informed that the employer would send a car to take him for a test. On August 21st, the claimant notified the employer of his willingness to take that test upon his anticipated return to work the next day, whereupon he was not informed during that discussion that his failure to submit to the test that day would be considered a refusal. Moreover, when returning to work on August 22, 2016, with the intent to submit to the test, the claimant was not given the opportunity to do so before being suspended.

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.

Because the claimant quit his job, his eligibility for benefits is governed by G.L. c. 151A, § 25(e)(1), 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] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent

Where an employee leaves his employment under the reasonable belief that he is about to be fired, his leaving cannot be fairly regarded as voluntary within the meaning of the above provision. Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–401 (1984). The belief need not be demonstrably accurate, so long as it is objectively reasonable. Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985).

After the initial hearing, at which only the employer was present, and relying on the claimant's resignation note, which gave no reason for his decision to quit (Hearings Exhibit # 5), the review examiner concluded that the claimant quit his job without good cause attributable to the employer or urgent, compelling, and necessitous reasons. We remanded the case to determine whether the claimant quit in lieu of imminent discharge; and, if so, to determine whether the reason for his imminent discharge would have disqualified him from benefits.

After remand, the review examiner found that the employer had a policy requiring its employees who operate vehicles to undergo drug and alcohol testing if they are involved in an accident that involves bodily injury or damage to its vehicles. The claimant received a copy of the 2001 version of the policy upon hire in 2011, but it was unknown if he received a copy of the policy that was revised in 2014.

The review examiner's consolidated findings after the remand hearing reflect that, on August 20, 2016, the claimant reported to work and had a "slight accident" as he was driving his bus out of the employer's garage. His bus struck the window and damaged the window of another stationary bus, causing the other bus to be taken out of service. The claimant reported the accident to the pull-out supervisor, who called and reported the incident to the employer as a "minor accident." The claimant then called a desk sergeant off-site to request that he go home that day on "Family Medical Leave"; the claimant no longer believed he was fit to work that day, due to stress and anxiety. While speaking to the desk sergeant, the claimant's call was disconnected. The claimant did not call back, believing the employer would call him if more information were needed, and left the workplace. The claimant did not receive any call back after his initial call was disconnected. Although the employer had wanted to send the claimant to be tested for drugs and alcohol pursuant to its policy, the claimant was not informed of this before he left the workplace. The claimant was scheduled to work on August 21 but did not

report to work that day because “he was not feeling well.” At some point during the day, he contacted the employer. The claimant was told that the employer wanted to send a car to pick him up for a drug and alcohol test, but the claimant replied he would submit to testing the next day, when he reported to work. The review examiner found that nobody informed the claimant that he would be disciplined for not taking the test within a specified time period. The review examiner credited the claimant’s testimony that, when he reported to work on August 22, 2016, he intended to submit to drug testing and filled out an accident report. *See* Remand Exhibit # 21. The claimant was then sent to meet with the superintendent, who told him that he was being sent home pending an investigation following his August 20 accident. The claimant was suspended pending investigation into his failure to submit to a drug and alcohol test after the accident. The claimant was summoned to meet with the superintendent and his union representatives on September 16, 2016. At the meeting, the superintendent informed him he was going to be discharged for refusing to submit to a drug and alcohol test. The union representative asked if the claimant could quit rather than be discharged, suggesting that it would be better for the claimant’s prospective employment to be able to say he quit rather than was discharged. The superintendent permitted the claimant to quit in lieu of discharge, and the claimant submitted his resignation note that day. *See* Hearings Exhibit # 5.

The foregoing findings make it clear that the claimant quit in lieu of discharge, which is involuntary for purposes of G.L. c.151A, § 25(e) and (e)(1), set forth above. In this situation, he will be eligible for benefits so long as the discharge thus preempted would have been for non-disqualifying reasons, within the scope of G.L. c. 151A, § 25(e)(2). That section provides, in pertinent 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, 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 knowing violation portion of G.L. c. 151A, § 25(e)(2), “knowing” means that at the time of the act, the employee was “. . . consciously aware that the consequence of the act being committed was a violation of an employer’s reasonable rule or policy.” Still v. Comm’r of Department of Employment and Training, 423 Mass. 805, 813 (1996). Under the deliberate misconduct standard, the claimant must have intentionally violated a reasonable expectation of the employer and done so in wilful disregard of the employer’s legitimate business interest. *See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979). Under both prongs, therefore, a critical issue is the claimant’s state of mind at the time of the alleged infraction.

The employer’s policy requires drivers who have accidents while driving its vehicles to promptly to submit to drug and alcohol testing. It is undisputed that, after his accident on August 20, 2016, the claimant did not undergo a test for drugs and alcohol, but rather went home sick and remained out of work the next day. By the time the claimant returned to work on August 22,

2016, approximately 48 hours had elapsed after his accident, which may have interfered with the efficacy of any substance abuse test conducted at that time.

The question before us is whether the claimant possessed the requisite state of mind for disqualification under G.L. c. 151A, § 25(e)(2). While the review examiner found that the claimant had received a prior version of the employer's drug and alcohol testing policy, it was not known whether the claimant had received the updated version in evidence.

While the review examiner found the policy required testing "as soon as practicable following an accident," the review examiner credited the claimant's testimony that he had been in two previous minor accidents while driving the employer's vehicles and had not been required to submit to substance testing after those accidents.

The employer proffered purportedly contemporaneous, written statements from four of its employees who had interactions with the claimant between the time of his accident and the time of his suspension. *See* Remand Exhibits ## 13 through 16. While these statements generally supported the employer's position that the claimant was told at some point on August 20 and 21 that the employer wanted to send a car to pick him up to be drug tested, the review examiner found the claimant's direct testimony that nobody told him to stay on site for testing more credible than these hearsay statements, which were from individuals not present to testify and be cross-examined at the hearing. 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). We see no reason to disturb the review examiner's credibility assessment in this case. In light of that credibility assessment, we cannot conclude that the claimant possessed the requisite state of mind to support disqualification from benefits.

We, therefore, conclude as a matter of law that the claimant did not voluntarily leave his employment, since he resigned in lieu of imminent discharge. We further conclude that the claimant's discharge for refusal to take a drug and alcohol test following an accident while driving the employer's bus would not have been disqualifying, pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 11, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 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

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