

The claimant's anxiety and panic attacks constituted mitigating circumstances which prevented him from complying with the employer's call-in expectations.

**Board of Review
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Issue ID: 0019 8222 41

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by John P. Cronin, 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 1, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 21, 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 March 10, 2017. 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 provide the claimant with an opportunity to testify and present evidence. Both parties attended the remand hearings. 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 was subject to disqualification for violating the employer's reasonable attendance policy by failing to notify the employer that he would be late for his shift on August 31, 2016, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings establish that, on the day of the final incident, the claimant called his supervisor and reported that he would be late because he was in the midst of a panic attack, and was later admitted to a hospital overnight.

Findings of Fact

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

1. From April 21, 2016 until August 31, 2016, the claimant worked for the employer, a health goods store.
2. The employer maintains a policy entitled “**Attendance**,” which was provided to the claimant, and which stated, in pertinent part, “your attendance and punctuality are extremely important. [. . .] This means that you should be at your work place and ready to work at your starting time. [. . .] We recognize that there may be times when your absence or tardiness cannot be avoided. In that event and prior to the beginning of your scheduled work shift, you are expected to give reasonable notice to your immediate supervisor. [. . .] Failure to give your immediate supervisor notice of your absence or tardiness is serious [. . . and] may also result in corrective action[.]”
3. The claimant was made aware that the employer expected him to report for his scheduled shifts on-time.
4. Although the claimant began as a full-time employee, the claimant mutually agreed with the employer to switch to a part-time (10-25 hours per week) employee in June of 2016, due to his repeated attendance issues to that point.
5. The claimant’s tardiness resulted from severe anxiety that he had begun suffering after the death of his father. The claimant’s anxiety greatly impeded various activities – including work – in his daily life and subjected him to frequent panic attacks.
6. As a result, even after the change to a part-time schedule, the claimant continued to have issues arriving timely.
7. On May 22, 2016, the claimant was issued a counseling by the employer regarding his attendance issues.
8. On August 24, 2016, the claimant, whose anxiety again landed him in the hospital, attempted to call out of his shift multiple times before the scheduled start time thereof, but was unable to reach anyone.
9. On August 26, 2016, the claimant provided his supervisor (the employer’s store manager) with a doctor’s note for his absence on August 24, 2016. The note notwithstanding, the supervisor issued the claimant a written warning for his failure to timely report his unexpected absence on August 24, 2016. The warning advised, “this will be [the claimant’s] last Corrective Action.”
10. At the time, the supervisor also verbally informed the claimant that any further instances of failing to call in advance of his shift to report a tardiness or absence therefrom would lead to his discharge.

11. Prior to the scheduled start time of his shift (1 pm) on August 31, 2016, the claimant began suffering from a panic attack.
12. Although the claimant had an inclination to call out of his shift as a result, because of the prior warning from his supervisor, the claimant's girlfriend convinced him to attempt to go into work.
13. Due to dealing with his anxiety, however, the claimant was going to be late to arrive for his shift.
14. The claimant called the employer's store and the supervisor's cell phone prior to the start of his shift, but was not able to get in touch with her until approximately 1:10 pm.
15. At that time, the claimant reported that he was going to be late due to his anxiety. The supervisor indicated that he would be discharged if he did not report for work. As a result, the claimant indicated that he would take a cab into the office and was waiting for the cab to arrive.
16. The claimant arrived late for shift and apologized to the supervisor for being late.
17. Later that night, as the result of his anxiety, the claimant was admitted to a local hospital, where he remained until the following day.
18. Concluding that the claimant's actions on August 31, 2016 constituted a violation of its policies and expectations, the employer decided to discharge the claimant.
19. The employer discharged the claimant on September 1, 2016.
20. The claimant filed a claim for unemployment insurance benefits with an effective date of October 2, 2016.

CREDIBILITY ASSESSMENT:

During the remand hearing, the claimant appeared and testified for the first time in this matter. Although the employer's district manager – both during the initial and remand proceedings – offered credible testimony regarding many of the facts and circumstances surrounding the claimant's employment and his separation therefrom, she admittedly did not witness any of the conversations that the claimant had with his supervisor (the employer's store manager), who did not participate in any of the hearings in this case. I find that the hearsay testimony about such conversations provided by the district manager were effectively rebutted by the testimony of the claimant who — contrary to the assertions of the supervisor — asserted that he did, in fact, inform her that his anxiety was the reason for his tardiness on August 31, 2016. As the claimant

submitted medical documentation to corroborate his assertion that he suffered a panic attack on that date, and given that his testimony was direct and consistent throughout the remand proceedings, I accept the claimant's testimony as the substantial and credible evidence regarding all matters in which the testimony of the parties differed.

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. However, as discussed more fully below, we conclude that the consolidated findings do not establish that the claimant intentionally violated the employer's expectation.

The review examiner analyzed the claimant's separation from employment under 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 above provision, it is the employer's burden to establish that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. The review examiner, solely on the basis of the employer's unchallenged testimony, initially concluded that the employer had met its burden. We remanded the case to afford the claimant an opportunity to testify and present evidence. Following remand, we conclude that, as a matter of law, the employer did not meet its burden.

In rendering his consolidated findings, the review examiner made a credibility assessment, which explains that he accepted the claimant's testimony as substantial and credible evidence in all disputed areas. The review examiner addressed the fact that the employer's testimony was hearsay, as its witness did not participate in any of the claimant's conversations with the claimant's supervisor. He further noted that the claimant submitted medical documentation to corroborate the fact that he suffered a panic attack on August 31, 2016. 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.

On the basis of his credibility assessment, the review examiner found that the claimant was tardy because of severe anxiety that began after the death of his father. The anxiety greatly affected the claimant's daily life and subjected him to panic attacks, for which he had been hospitalized. On August 24, 2016, the claimant was in the hospital again. He had attempted to call out before the

scheduled time for his shift, but couldn't reach anyone. Although, on August 26, 2016, the claimant provided his supervisor with a doctor's note for his absence on August 24, 2016, his supervisor still issued him a final written warning for failing to timely report his unexpected absence on August 24, 2016. On August 31, 2016, the claimant suffered a panic attack, and, because of his anxiety, he was going to be late for his shift. He tried to reach his supervisor prior to the beginning of his shift but couldn't reach her until ten minutes after his shift started. When he told his supervisor that he was going to be late due to anxiety, she told him he would be discharged if he didn't report to work. The claimant waited for a taxi, arrived late, and apologized. Later that day the claimant was admitted to the hospital. The employer decided to discharge the claimant on September 1, 2016, for violating its policies and expectations regarding attendance.

Mere violation of an employer's rule or expectation does not automatically disqualify a claimant from unemployment benefits. Torres v. Dir. of Division of Employment Security, 387 Mass 776 (1982). In determining whether a claimant should be disqualified for wilful misconduct, a critical factor is the claimant's state of mind, taking into account his knowledge of the employer's expectation, the reasonableness of the expectation, and whether there were any mitigating factors. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). Mitigating factors are those factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepard v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). In the matter before us, the review examiner found that it was following the death of his father that the claimant began to suffer from severe anxiety and panic attacks that on several occasions made him unable to timely report for his scheduled work shifts. The review examiner further found that this was the reason he could not timely report for work on August 31, 2016. Consolidated Findings ## 11 and 13. Consequently, it was the claimant's medical condition and not a wilful disregard of the employer's interest which caused the claimant's conduct. On the record before us, we conclude that mitigating circumstances prevented the claimant from complying with the employer's expectation that he report to work as scheduled on August 31, 2016.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to 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 reversed. The claimant is entitled to receive benefits for the week ending September 3, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 26, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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