

Where the claimant was discharged for a positive cocaine test based on his use of cocaine on the weekend outside of working hours, the claimant is not subject to disqualification under § 25(e)(2), because the employer had no reasonable business interest in prohibiting such off-duty behavior.

**Board of Review
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Issue ID: 0019 9788 97

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Dena Lusakhpuryan, 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 October 19, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on January 13, 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 April 6, 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 obtain additional testimony and make specific findings about the claimant's drug use. Both parties attended the first remand hearing, while only the claimant attended the second session. Thereafter, the review examiner issued her 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 engaged in deliberate misconduct in wilful disregard of the employer's interest 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 assessments are set forth below in their entirety:

1. On July 18, 2007, the claimant started working for the employer, a food manufacturer, as a fulltime sanitation associate.

2. The claimant was scheduled to work either Sunday through Thursday or Monday through Friday from 10:30PM until 6AM.
3. The claimant was paid \$14.50 per hour.
4. The claimant's job duties included cleaning and maintaining the employer's machines. The claimant operated the machines in order to perform his cleaning tasks. The claimant did not drive forklifts at the employer's establishment.
5. The employer expects workers not to test positive for illegal drugs.
6. The employer does not have a policy addressing this expectation.
7. The claimant was aware of this expectation.
8. The claimant was aware that the employer subjected the employees to post-accident drug tests. The claimant was aware of this as other workers at the employer's establishment had commented to the claimant that the employer tests for illegal drugs.
9. The claimant was never warned in the past for violating this expectation.
10. The employer has this expectation to ensure safety in the work place.
11. The employer will always terminate a worker for violating this expectation.
12. On October 6, 2016, the claimant was involved in an accident at work. The claimant was pulling a heavy object from one side to the other and hurt his back. The claimant informed his supervisor that he hurt his back. The supervisor did not make the injury report until the following day.
13. The claimant's accident of October 6, 2016 was not the result of cocaine use.
14. On October 7, 2016, the employer sent the claimant to participate in a post-accident drug screening at a medical facility (Exhibit 4).
15. The employer suspended the claimant without pay pending the results of the drug screening results.
16. The employer subsequently received the results of the drug screening from the medical facility listing that the claimant had testified positive for cocaine.
17. The claimant did not report to work under the influence of cocaine.
18. The claimant had used cocaine. The claimant did not take cocaine while at work. The claimant used cocaine as he was depressed due to the passing of his wife. His

wife had passed away in February 2016. About September 2016 or October 2016, the claimant used cocaine at a weekend gathering with friends. The claimant used cocaine two days before his next shift. This was the only occasion the claimant used cocaine.

19. The claimant had conversations with the Director of Human Resources and the Human Resources Specialist regarding the positive cocaine result. The claimant admitted to the Director of Human Resources and the Human Resources Specialist that he had used cocaine.
20. The claimant had requested for the employer to allow him to take another drug screening test. The claimant was hoping the next drug screening test would be negative. The employer denied this request.
21. On October 19, 2016, the employer discharged the claimant during an in person meeting.
22. The employer discharged the claimant for testing positive for cocaine on a post-accident drug screening test that was administered on October 7, 2016.
23. On October 20, 2016, the claimant filed for unemployment insurance benefits (Exhibit 1). The effective date of the claim is the week beginning October 16, 2016.
24. The employer has subsequently rehired the claimant. The claimant is anticipating on returning to work for the employer on July 24, 2017.

Credibility Assessments

During the initial hearing session and the Remand Session held on June 23, 2017, the employer contended that the employer maintains a drug policy. However, such a contention is not deemed credible where the employer failed to produce the drug policy for the initial session of the hearing or the remand sessions of the hearing. The employer participated in the remand hearing session held on June 23, 2017, where the employer was given the opportunity to present the policy during the continued remand session of July 21, 2017. However, the employer failed appear at the remand hearing session held on July 21, 2017.

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 reject the review examiner's legal conclusion that the claimant's actions constitute deliberate misconduct in wilful disregard of the employing unit's interest. Rather, after remand, we believe that the review examiner's consolidated findings of fact support the conclusion that the

claimant's outside-of-work cocaine use did not constitute deliberate misconduct as it was not reasonably related to the workplace or the employer's legitimate business interests.

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 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 this provision of the statute, "the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). 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 v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979).

As the employer repeatedly failed to present a copy or provide details of its drug policy, it cannot be said that the claimant's discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

Under the deliberate misconduct standard, the employer must establish that the claimant's actions contravened a reasonable expectation of the employer. Here, the employer clearly expected the claimant not to use or be under the influence of illegal drugs at the workplace. The employer, however, neither presented evidence nor provided testimony regarding the claimant's behavior or appearance that would suggest his impairment at the workplace. The employer further failed to provide information about the incident that led to the claimant's drug test. The claimant vigorously denied ever using or being under the influence of illegal drugs at the workplace. After remand, the review examiner concluded that the claimant never did so. Specifically, the review examiner concluded that the claimant only used cocaine on one occasion, which was outside of work and two days before his next scheduled shift. These findings were reasonable and within the scope of the fact finder's role. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463 (1979) ("[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence.").

Because of the absence of the employer's drug policy, it is unclear whether the employer also expected employees to refrain from this kind of off-site off-hours drug use. To the extent that the employer expected this, the employer has not established that such an expectation is reasonably related to any of its legitimate business interest. *See, e.g., Board of Review Decision 0011 4906 96* (Aug. 4, 2014); *see also Thomas O'Connor & Co. v. Comm'r of Department of Employment and Training (No. 1)*, 422 Mass. 1007 (1996) (rescript opinion). Therefore, the claimant's breach of this expectation cannot be considered deliberate misconduct under G.L. c. 151A, § 25(e)(2).

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 or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer 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 October 22, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 15, 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.

JRK/rh