

A car salesman, whose driver's license was not necessary for him to remain employed because the employer would have altered his job duties if he had notified the employer about it, is disqualified under G.L. c. 151A, § 25(e)(2), where he lost his license, did not inform the employer about, and then lied about the circumstances of the loss when confronted about it by the employer.

**Board of Review
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Issue ID: 0019 9895 62

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joan Berube, 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 separated from his position with the employer on October 11, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 14, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on April 7, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, by losing his driver's license, voluntarily left employment without good cause attributable to the employer 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 regarding the claimant's job duties, whether he needed a driver's license for his job, and the reason for his separation from work. Both parties attended the remand hearing. 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 is subject to disqualification, under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact indicate that the claimant's job as a salesman required him to operate the employer's vehicles, the employer would have assigned him a different job if it knew he lost his license, but the employer fired the claimant for being dishonest with the employer about losing his license.

Findings of Fact

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

1. The claimant worked full-time in a sales position for the employer's automobile dealership from 3/1/16 until 10/7/16. The claimant worked on Monday through Thursday, Saturday, and alternating Sundays; he averaged 45 hours of work per week. The claimant was paid a salary plus commissions.
2. The claimant's job duties included selling cars; taking customers on demonstration rides; filling vehicles with gas; and driving vehicles from the employer's lot across the street to the dealership. The employer employs a lot [of attendants] who assist sales staff with moving vehicles and filling them with gas. The lot attendant does not work on Sundays. Sales staff were required to pick up vehicles from other locations, including locations outside of Massachusetts. The claimant was not allowed to pick up vehicles outside of the local area due to his poor driving record.
3. The employer has internet sales staff whose job duties do not include selling cars or driving the employer's vehicles; these employees respond to online inquiries. In the past, the employer reassigned an employee from the sales staff to the position of internet sales manager after the employee lost his license and informed the employer of the loss. The claimant was not a member of the internet sales staff.
4. The employer maintains an employee handbook which contains a policy related to dealership vehicles. The policy reads in relevant part: "If your job duties include the driving of any vehicle, Dealership or customer owned, it is essential that your motor vehicle license records are accurate and current...You must inform the Dealership of any tickets or traffic citations that you receive, or any change in your driving status (including suspensions) at any time. Falsification of license records or failure to provide notification of traffic violations will result in disciplinary action, including possible termination of employment." On 2/15/16, the claimant signed an acknowledgment form, confirming his receipt of the handbook which contains this policy.
5. On 2/11/16, the claimant signed an employer document which indicated that the claimant would engage in limited driving due to having a poor merit rating. This meant that the claimant was limited to driving only in the local area and could not pick up vehicles for the employer from out-of-state locations. The claimant could not do "limited driving" without a license. The employer's document contains a section which reads: "Any employee of the organization who's responsibility includes the driving of an automobile while acting as an agent for the organization, must report any incident that may negatively affect the person's driving record, and subsequent ability to drive a

- vehicle while acting as an agent for the group, whether or not they are on the clock, or in a company or personal vehicle.” The claimant marked the form to indicate that he was legally eligible to drive an automobile. The employer requires employees to report incidents which may affect their driving record because this may affect the employee’s insurability and the employer’s potential liability.
6. The claimant was aware that he needed to have a valid license in order to keep or have his job as a salesperson. The claimant had been allowed to continue working as a lot attendant when he previously lost his license. The employer did not allow the claimant or any other person without a valid license to work on its sales staff.
 7. During a period in 2011, while working as a lot attendant, the claimant lost his driver’s license and informed the employer of this loss. The general manager provided the claimant a letter, addressed to the Registry of Motor Vehicles, requesting that the license be reinstated because the claimant needed it in order to perform the duties of his position.
 8. In August 2016, the claimant’s driver’s license was suspended due to his operating under the influence. This was the claimant’s second such offense. The claimant was told by his attorney in August that he could not drive. The attorney told the claimant that if the charges against him were dismissed that he would have his license back soon. The claimant did not inform the employer that his license had been suspended or that he was unable to operate the employer’s vehicles. The claimant’s immediate supervisor observed the claimant operate the employer’s vehicles during the period of August through 10/7/16. The claimant subsequently pleaded guilty to the charge(s) against him and his license was suspended for one year.
 9. On 10/7/16, the claimant’s immediate supervisor was notified by the employers’ insurance carrier that a license verification check revealed that the claimant did not have a valid driver’s license and was therefore uninsurable. The supervisor met with the claimant to inquire about this report. The claimant told the supervisor that he had not lost his license; the claimant insinuated that the Registry of Motor Vehicles made a mistake. The claimant was told that he had two weeks to resolve the issue and that he must provide proof of having a valid license.
 10. On 10/11/16, the claimant met with the supervisor and area general manager about the status of his license. The claimant admitted to having lost his license months earlier due to a drunken driving arrest. The employer terminated the claimant’s employment because he failed to inform the employer of the loss of his license and because he lied to the supervisor when asked about the status of his license.

11. The employer would not have discharged the claimant and would have tried to reposition him, as it had done in the past, if he notified the employer of the loss of his license. The employer would allow a salesperson to remain employed without a license if the individual informed the employer of the loss of license. The employer did not allow the claimant to remain employed without a license because he was dishonest when asked about the status of his license and by not notifying the employer at the time his license had been suspended.

Credibility Assessment: At the initial hearing, the claimant testified that sometime, approximately in September, he informed the General Manager of the loss of his license and that the General Manager told him that this might be a problem. During the second session, the claimant testified that he did not inform the employer of the loss of his license because he did not believe he needed one in order to work in a sales position. The contradictions in the claimant's testimony diminished his overall testimony.

Likewise, the claimant testified throughout the remand hearing that he did not believe he was required to have a valid license in order to keep his job as a salesperson. Yet, when asked by the employer about the status of his license, the claimant misrepresented the truth. Had the claimant genuinely believed it was not necessary to possess a license in order to continue working in the sales position, there would have been no reason for him to misrepresent the status of his license. Further, the claimant was aware that a salesperson who informed the employer of having lost his license had been reassigned to a position which was different from the sales position he previously held, which was also the same position held by the claimant. Thus, the claimant was aware that the employer did not retain a sales person who lost his license in the same position held by sales staff with valid licenses. In light of the above, the claimant's testimony was not credible. Therefore, greater weight was given to the testimony of the employer in disputed areas.

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 reject the review examiner's legal conclusion that G.L. c. 151A, § 25(e)(1), applies in this case. However, application of G.L. c. 151A, § 25(e)(2), nevertheless results in a conclusion that the claimant is not eligible to receive unemployment benefits.

In the agency's initial determination in this case, the DUA applied G.L. c. 151A, § 25(e)(1), the section of law applying to voluntary separations, quits, or resignations. The review examiner also applied this section of law. Both levels of the agency applied this provision, because both concluded that possession of a driver's license was necessary for the claimant's job, and the loss

of his license was due, at least in part, to the fault of the claimant. Indeed, although employers may eventually discharge a person for losing a license which is necessary for his job, the courts and the Board view such separations as voluntary and apply G.L. c. 151A, § 25(e)(1). *See Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002 (rescript opinion) (1985) (noting that “voluntarily” under the statute is a term of art and G.L. c. 151A, § 25(e)(1), applies if a person brings his unemployment upon himself). Here, in her original decision, the review examiner found that it was possible to work on the employer’s sales staff without being a licensed driver but concluded that “the claimant created the impediment [loss of his driver’s license] which barred him from continued employment with the employer.” Since the conclusion appeared to be at odds with the findings, we remanded the case for further clarification about the claimant’s job duties and reasons for separation.

After taking further testimony at the remand hearing, the review examiner has now found that the employer discharged the claimant, because he “failed to inform the employer of the loss of his license and because he lied to the supervisor when asked about the status of his license.” Consolidated Finding of Fact # 10. As to whether the separation occurred due to the loss of the claimant’s license, the review examiner revised her findings to indicate that “[t]he employer would not have discharged the claimant . . . if he notified the employer of the loss of his license.” Consolidated Finding of Fact #11. Thus, the reviewing examiner has now found that the loss of the license did not cause the separation. We recognize that these findings are different from what the review examiner initially found in her April 7, 2017, decision. In fact, the employer’s testimony on this point was at times unclear during the hearing, or, at most, contradictory.¹ However, as noted in the review examiner’s credibility assessment, the claimant’s testimony was also not entirely consistent, logical, or reliable. We conclude that the review examiner’s new findings, as well as her credibility assessment, are supported by the full record, even though there was some confusion inherent in the employer’s testimony. It seems more likely that the employer required the claimant to have a license, as he had to sign various documents relating to the possession of a license. *See Exhibit # 2*. Moreover, the review examiner is allowed to credit the testimony of the employer’s witness in disputed areas, including that the employer was never told, prior to October 7, 2016, that the claimant did not have a valid license (suggesting that the claimant did not tell the general manager and his brother about the loss of his license in August 2016), that the claimant was seen driving employer vehicles after the loss of license (which the claimant admitted was in August, 2016), and that the claimant initially informed the employer that the loss of license noted on the license verification check was an error made by the Registry of Motor Vehicles. “The review examiner bears ‘[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony. . . .’” *Hawkins v. Dir. of Division of Employment Security*, 392 Mass. 305, 307 (1984), *quoting Trustees of Deerfield Academy v. Dir. of Division of Employment Security*, 382 Mass. 26, 31-32 (1980). The review examiner’s findings and assessment here are reasonable; therefore, we will not disturb them.

As the review examiner has now found that the claimant was discharged for failing to inform the employer of the loss of license and for being dishonest about it, we think that G.L. c. 151A,

¹ During the remand hearing, both the review examiner and the employer’s agent noted the confusing nature of the employer’s assertions about whether the claimant needed his license to do his job, whether the employer would have continued with the claimant as an employee if he got his license back in a reasonable amount of time, and why the claimant was ultimately discharged.

§ 25(e)(1), does not apply to the claimant's separation. Instead, G.L. c. 151A, § 25(e)(2), the provision of law pertaining to discharges or employer-initiated separations, applies. That section of law 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, 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 section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Based on our review of the testimony, the review examiner's consolidated findings of fact, and the documentary evidence, we conclude that the employer carried its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As an initial matter, as in all discharge cases, the employer must show that the claimant has done the conduct alleged. Here, the employer alleged that the claimant did not notify the employer when his license was suspended, and that he was dishonest when the employer confronted him about it. The claimant signed two documents, which both state that an employee whose job duties include driving an employer vehicle must notify the employer of any changes to the employee's driving status. *See Consolidated Findings of Fact ## 4–5 and Exhibit # 2.* After the claimant's license was suspended at some point in August, 2016, and after his attorney told him that he could not drive a vehicle, he did not tell the employer about the issue. Only when he was confronted with the problem did the claimant admit that there was problem with the status of his license. *See Consolidated Findings of Fact ## 8 and 9.* Although the claimant testified that he had told the general manager about the license issue in August, 2016, and although the review examiner found that to be true in her April 7, 2017, decision, she did not include such a finding with her revised consolidated findings of fact. Based on her new findings, it is clear that the claimant engaged in the conduct prohibited by the employer's written policies and expectations.²

However, our analysis does not end at the conclusion that the claimant engaged in misconduct. The employer must also show that the claimant's misconduct was deliberate and done in wilful disregard of the employer's interest. In order to determine whether an employee's misconduct was deliberate, the proper factual inquiry is to ascertain the employee's state of mind at the time

² Although slightly unclear, during the remand hearing, the claimant suggested that he had notified the employer of the suspension either (1) when he notified the general manager about it in August 2016, or (2) in October 2016, when he was confronted with the issue and he could not get his license back. We give little weight to these assertions and arguments. First, the review examiner did not credit in her new findings the testimony that he told the general manager. Second, telling the employer about it in October, several months after the suspension, after the employer saw him continuing to drive the employer's vehicles, and after being confronted about the issue by the employer, does not show compliance with the policy. Nothing about his actions, as depicted in the review examiner's findings, indicate that he planned to tell the employer the truth prior to October 7 and 11, 2016.

of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). To evaluate the claimant's state of mind, 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). However, a specific finding on state of mind is not required where a claimant's act is obviously intentional. Sharon v. Dir. of Division of Employment Security, 390 Mass. 376, 378 (1983).

Here, as noted above, the claimant acknowledged several policies which contained the employer's expectation that he notify the employer if there was a change to the status of his license. The review examiner also found that the claimant's job duties included driving the employer's vehicles, and that he drove the employer's vehicles from time to time. Although the claimant argued that he did not need a license to do his job, because driving was not a part of the job, he did not, and could not, genuinely assert that he could have driven the employer's vehicles without a valid driver's license. Based on his use of the employer's vehicles, his receipt of the employer's policies, and his knowledge of another employee who was taken off sales duties when he notified the employer of his loss of license, we think that there is substantial evidence in the record to conclude that the claimant was aware that he needed his license to do his job, and that he was aware that he needed to notify the employer of any change to the status of the license. Such an expectation is also reasonable, as having unlicensed drivers operating its vehicles could have extremely negative and harmful consequences for the employer if there was an accident with the vehicles. *See Consolidated Finding of Fact # 5*. Moreover, we see nothing here which mitigates the claimant's behavior. The findings of fact do not show that the claimant was confused about the employer's expectations, nor do they show that the claimant's failure to inform the employer about his loss of license was accidental or unintentional. In addition, his assertion on October 7, 2016, that he had not lost his license, but that the Registry of Motor Vehicles had made a mistake, was clearly not true and an obvious and intentional effort to avoid the consequences of losing the license.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is supported by substantial and credible evidence in the record. However, application of G.L. c. 151A, § 25(e)(1), was an error of law, because the claimant was discharged from his position for not notifying the employer about the loss of his license and being dishonest about it, and his disqualification is, thus, governed by G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning October 2, 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 - June 29, 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.

SF/rh