

Although the claimant, the program manager of a residential house, had been warned previously about the cleanliness and sanitary conditions of the house, his failure to meet the employer's expectations was due to poor performance, rather than to deliberate misconduct, and, thus, he is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 November 7, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 26, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties,¹ the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on April 5, 2018.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding his separation from employment. Both parties attended the remand hearing, which took place over the course of two days. 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 decision, which concluded that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact show that the failures cited by the employer prior to the claimant's

¹ The hearing was conducted over the course of two days. Both parties attended the first day of the hearing, which consisted mainly of testimony from the employer. The claimant did not attend the second day of the hearing.

discharge occurred as a result of poor performance, rather than an intentional failure to perform his job duties.

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 as a clinical program manager for the instant employer, a human services agency, and he was employed from 7/18/11 until his separation on 11/7/16.
2. The claimant worked in a residential program. [This] was a home at which nine clients with developmental or mental health challenges resided.
3. At the time of hire, the claimant was issued a job description for the job of Clinical Program Manager. The description listed the following as an Essential Function:
 - Ensure a clean, safe and home-like environment for clients.
4. On 8/3/16, the claimant was issued a written warning for failure to follow through on deadlines and this warning listed the following as Expected Outcomes:

As a result of this warning I would like you to begin working on improving your communication with myself and the staff you are supervising. You must follow through with all job duties listed on the attached job description.

- Favorable assessment that you are communicating important documentation, programmatic issues and concerns with the staff you supervise and your supervisor.
 - Favorable assessment that you are adhering to (agency name) policies and procedures.
 - Favorable assessment that you are following through with deadlines
 - Favorable assessment that you are providing adequate supervision to the staff you supervise.
5. On 10/4/2016, the claimant was asked to meet with the assistant director of clinical services and the assistant director of psychiatric rehab for behavioral health services. At this meeting the claimant's work performance was again discussed. The claimant was offered the opportunity to work with a mentor. The claimant declined to work with a mentor saying he most likely would not follow up with a mentor. The claimant had also been offered the opportunity to work as a clinician at another program or to work as a program manager at a smaller program and he declined these offers.

6. The claimant declined working with a mentor or any of the other options given to him at the 10/4/16 meeting, because he believed that that management wanted him out. The claimant did not bring these concerns to anyone's attention because he did not know who to bring the concerns to.
7. According to the employer's records at the 10/4/16 meeting, the claimant's work performance was discussed and he was informed that going forward he was expected to:
 - Complete monthly Quality Assurance checks for the (residence) by the last calendar day of each month and communicate by email to your supervisor that they have been completed and indicate any outstanding concerns.
 - To clean and sanitize the (residence) and keep the program clean and sanitary at all times.
 - You will report and submit any MORs within 72 hours of the date the error was found.
 - You will respond to emails from the Fiscal/Rep payee department within 48 hours of receiving them.
 - You will consult with your supervisor prior to making any changes to rent/payment plans for the individuals living in the (residence).
8. On 10/26/16, a Quality Management Review was conducted at the home that the claimant managed the score of that report was a 88% (a B+). The review was conducted by the quality department and he was told by the reviewer that the results of this report were very good.
9. On 11/1/16, the assistant clinical director reported to the residence to assess the conditions. She found the residence in terrible condition including strong odors in the area of the kitchen and the bathroom, soiled areas on the rugs, open food containers in the refrigerator, charred food on the stove and in the oven, mold in the tub area.
10. Due to the conditions found in the home on 11/1/16, the claimant was issued a final warning which stated in part:

Going forward you are expected to:

- Complete monthly Quality Assurance checks for the (House) by the last calendar day of each month and communicate by email to your supervisor that they have been completed and indicate any outstanding concerns.
- To clean and sanitize the (house) and to keep the program clean and sanitary at all times.
- You will report and submit any MORs within 72 hours of the date the error was found.
- You will respond to all emails from the Fiscal/Rep payee department within 48 hours of receiving them.

- You will consult with your supervisor prior to making any changes to rent/payment plans for the individuals living in the (house).
11. The claimant was shocked to receive the final warning after receiving the good review and he wanted to write a written rebuttal, but he was told he had to sign it, and that he would be able to discuss it in the coming days.
 12. As a result of the final warning, the claimant worked very hard on cleaning the stove and the other areas that he was made aware of. He found the stains on the stove were impossible to remove. He contacted facilities to clean the rug. He set up a check list for the overnight staff so they could check off all of the cleaning that they did.
 13. The claimant was unaware of the mold issue or the freezer issue as these were not mentioned in the review nor were they mentioned in the Quality Management Review.
 14. On 11/4/16, the clinical director returned to the home to determine what progress had been made and she found the conditions unchanged. The clinical director consulted with the human resource department about her findings and she was advised to take the claimant off of his shift until they could meet.
 15. The claimant was instructed by the clinical director to leave his shift on 11/4/16.
 16. On 11/7/16, the vice president of human resources met with the claimant and he was given a letter of termination which stated:

The purpose of this letter is to notify you that your employment as a Clinical Program Manager at (agency name) is terminated, effective today due to your failure to follow through to clean and sanitize (house name) as directed.

As you know, you received a final warning on November 1, 2016 for continued failure to complete basic job responsibilities. One of the basic tasks you failed at was for keeping a cleaned and healthy program for the clients we serve. As a result of a Quality Assurance review the program was found unsanitary and in general disarray. Odors were found coming from the kitchen, back stairway and bathrooms. The oven had a strong odor and was not cleaned, walls were soiled, floors soiled and stained and the bathrooms were found to have strong odors and mold and mildew present in all showers.

At the time of this warning you were instructed to go through the program and sanitize it. To day you have made no effort to clean or sanitize the program or address any of the issues outstanding.

The recent incidents involving client cleanliness, safety and the numerous other problems at the program have caused (agency name) to lose confidence

in your willingness or ability to lead the program. Client safety must be (agency name) top priority, and your recent conduct has demonstrated that you are unable or unwilling to act consistent with this priority. Accordingly, your employment is being terminated.

[Credibility Assessment:]

Based on the evidence (the Quality Management Review), the claimant's testimony that he believed he was doing an acceptable job and that he was trying to meet the employer's expectations, is credible testimony. The claimant made an effort to clean the areas that he was made aware of and he set up a check list so that going forward there were be no problems. The claimant's performance failed to meet the employer's expectations. [His] actions were not intentional.

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 original 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we consequently conclude that the claimant is not subject to disqualification from the receipt of unemployment benefits.

There is no dispute that the claimant was discharged from his position as a clinical program manager on November 7, 2016. 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 this section of law, the employer has the burden to show that the claimant is not eligible to receive benefits. In her original decision, the review examiner concluded that the employer had carried its burden. Following our review of the entire record, including the consolidated findings of fact, we disagree.

Although the discharge letter mentions "cleanliness, safety and numerous other problems at the program," the bulk of the testimony centered around the cleanliness issue in the fall of 2016. According to the findings of fact, the claimant was initially told about issues with cleanliness and sanitation during a meeting on October 4, 2016. Following that meeting, the employer's Quality Assurance department conducted a Quality Management Review (Quality Review). The results, which were produced on October 26, 2016, indicated that "all the bathrooms in the house (4)

were clean and looked great,” that the “front of the refrigerator was dirty and needed to be cleaned,” and that the “stovetop was clean but oven needs to be cleaned.” *See* Remand Exhibit # 12. The employer then issued a final written warning on November 1, 2016. The warning specifically mentioned that the claimant needed to “clean and sanitize” the program house and “keep the program clean and sanitary at all times.” Consolidated Finding of Fact # 10; Exhibit # 7, pp. 4–6. Because the employer did not see improvement in the cleanliness of the house following the November 1, 2017, warning, it terminated the claimant six days later.

The claimant’s job duties included ensuring that the program house was a “clean, safe and home-like environment for clients.” Consolidated Finding of Fact # 3. Based on this job description, and the warnings issued to him, there is no doubt that the claimant was aware that he needed to keep the house clean and sanitary. We recognize that there is some conflict between the October 26, 2016, Quality Review and the subsequent observations by the clinical director on November 4, 2016. While the Quality Review noted only a few issues with the kitchen in regards to cleanliness, the clinical director’s observations on November 4, 2016, included strong odors in the kitchen, soiled areas on the rugs, open food containers, mold, and charred food on the stove. *See* Consolidated Findings of Fact ## 9 and 14. The review examiner did not explicitly credit one piece of evidence (the Quality Review versus the clinical director’s testimony) over the other. However, because the review examiner made a finding that the clinical director saw poor sanitary conditions in the house on November 4, 2016, *see* Consolidated Finding of Fact # 14, we conclude that the claimant was not keeping the house in a clean and sanitary condition, as he was expected to do. The claimant therefore engaged in misconduct by not doing so.

However, evidence of misconduct alone will not result in the denial of unemployment benefits. The claimant must have had a deliberate state of mind, per G.L. c. 151A, § 25(e)(2), to disqualify him. 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). Thus, in this case, to disqualify the claimant, there must be sufficient findings of fact and evidence to show that the claimant deliberately failed to keep the house clean and sanitary, or that he was deliberately disregarding the employer’s expectations that he keep the house clean.

The evidence in this case, and, most importantly, the review examiner’s consolidated findings of fact, do not indicate that the claimant had a disqualifying state of mind. The review examiner found that the claimant “worked very hard” to clean the areas of the kitchen cited in the Quality Review. He also had set up a checklist for his employees to use, in an apparent attempt to ensure that the house stayed clean even while he was not physically present. In her credibility assessment, the review examiner found credible the claimant’s assertions that “he was trying to meet the employer’s expectations.” As noted above, we see no reason to disturb the review examiner’s credibility assessment or overall view of the claimant’s state of mind. The Quality Review, which was completed mere days prior to the clinical director’s observations, indicates a program which was running well, with minimal cleanliness issues. Had the claimant been intentionally disregarding the employer’s cleanliness and sanitary standards, the Quality Review (which, according to the testimony of the parties, was done by the employer’s central office), would presumably not have been so favorable. In the end, the claimant’s supervisors were not happy with certain aspects of his performance, especially with regard to cleanliness. It is widely accepted that poor performance of a worker’s job duties, absent any intent to disregard his work,

is not a basis for disqualification under G.L. c. 151A, § 25(e)(2). *See Trustees of Deerfield Academy v. Dir. of Division of Employment Security*, 382 Mass. 26, 31 (1980).

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence in the record or free from error of law, because the claimant's discharge is attributable to poor performance relating to the upkeep and cleanliness of his program's house, rather than to any deliberate or intentional disregard of the employer's cleanliness standards and expectations.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning November 6, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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