

Where the claimant was discharged for allegedly falsifying his employment application, the claimant is not disqualified under § 25(e)(2) merely for failing to disclose a particular past employer, where the record contains no indication as to what information the employment application specifically asked for.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member**

Issue ID: 0020 1718 83

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rorie Brennan, 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 16, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 8, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 17, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 committed deliberate misconduct, pursuant to G.L. c. 151A, § 25(e)(2), by failing to disclose a particular employer on his pre-employment application is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as a Class A Commercial Truck Driver for the employer, a transportation company, from 07/01/15 until 11/16/16. The claimant's rate of pay was \$20.00 per hour.
2. The existence of any relevant written rule or policy was not established.
3. The employer expects employees to be truthful on their employment applications.
4. The claimant understood the employer's expectation.
5. The claimant was discharged from his previous employment for testing positive for cocaine.
6. When the claimant applied for the job with the instant employer, he deliberately did not disclose he had worked for the employer that discharged him because he did not want the instant employer to learn he had been discharged for failing a drug test.
7. The claimant was hired by the instant employer.
8. In November 2016, the employer "ran a DAC report to qualify the claimant for an assignment" and discovered the claimant had been fired from his previous employment (not disclosed on his employment application) for failing a drug test.
9. On 11/16/16, the employer discharged the claimant for not disclosing his previous employment on his employment application.
10. On 11/18/16, the claimant filed a claim for unemployment benefits with an effective date of 11/13/16.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 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 these findings support a conclusion that the claimant committed any misconduct.

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 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). It is the employer's burden to establish that the claimant engaged in the alleged conduct, and that such conduct violated either a written, uniformly enforced rule or a reasonable expectation so as to constitute misconduct. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996). As the employer never indicated that the claimant was discharged pursuant to a formal rule or policy, it cannot be said that his discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

In order to establish that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, the employer must establish misconduct. The employer, via a written statement to the DUA, asserted that the claimant was discharged for "falsification of documentation," specifically by failing to disclose a previous employer on his pre-employment application. The employer did not provide any documentary evidence, did not indicate what the application specifically asked applicants, and did not participate in the hearing. While the claimant acknowledged that he failed to disclose the employer in question on the application, he maintained that he did not feel it was necessary to mention every employer and that he did not believe he was doing anything improper.

The review examiner's findings only indicate that the claimant failed to disclose the information, a fact which is undisputed. The question before us is not merely whether the claimant failed to volunteer the information on his own, but whether the claimant provided false information or was otherwise untruthful. If the claimant was not asked to disclose all of his previous employment, or if the employer in question fell outside the scope of the employment inquired about, the claimant's failure to list the employer would not have been untruthful. Because the employer failed to provide documentary evidence and failed to participate in the hearing, the record contains no indication as to what questions the employment application actually asked or what the claimant's answers were. As such, it cannot be said that there is substantial and credible evidence to show that the claimant provided any false information on his application. The employer has simply not met its burden of proof.

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 November 19, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 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.

JRK/rh