

Although the claimant was absent for many days between October and December 2016, his absences were due to illness and, therefore, the misconduct is mitigated and he is not disqualified pursuant to 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 Peter Sliker, 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 separated from his position with the employer on December 24, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 2, 2017. 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 18, 2017.

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. Both parties attended the remand hearing. 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 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 has found that the claimant was discharged for his poor attendance from October through December, 2016, and a final instance of no call/no show on December 23, 2016, but the claimant's absences were due to illness.

Findings of Fact

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

1. The claimant worked as a freight person for the employer, an automobile parts retailer. The claimant began work for the employer in 2012.
2. The employer does not have an attendance policy.
3. The claimant was scheduled to work Tuesday through Saturday from 8 am to 4:30 pm. He earned \$10 per hour.
4. During the week beginning October 16, 2016, the claimant became ill and began missing work. On October 19, 2016, he went to the hospital emergency room and was diagnosed with pneumonia.
5. Between October 19, 2016, and December 3, 2017, the claimant missed approximately 17 days of work.
6. The claimant always called his supervisor, the store manager, to let him know he was not going to be at work.
7. The claimant was hospitalized overnight four times because of pneumonia between October 19, 2016, and December 3, 2016. He followed up with his primary care physician.
8. The claimant's providers gave him notes excusing him from work for one week on October 19, 2016, and for three days on November 10, 2016. They gave the claimant a note on November 17, 2016, returning him to work on November 22, 2016, and on November 28, 2016, returning him to work on December 1, 2016. The claimant gave the notes to the employer.
9. On December 17, 2016, the claimant called out of work because he felt ill. He did not go to the hospital or see his physician.
10. On Thursday, December 22, 2016, the claimant called out of work because he felt ill. He did not go to the hospital or see his physician.
11. On Friday, December 23, 2016, the claimant felt ill. He did not call or go to work. He did not see a physician.
12. The claimant did not believe he needed to call out because the store manager knew he was ill.
13. The store manager and the owner discussed the claimant's attendance. They decided to discharge him.
14. On Saturday, December 24, 2016, the claimant arrived for work at approximately 8:15 a.m. The store manager told the claimant he [thought] he quit. The claimant asked the store manager not to fire him. He told the store

manager he needed his job. The store manager told the claimant he assumed he quit. The claimant left the store.

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 conclude that the consolidated findings of fact support a conclusion that the claimant is not disqualified from receiving unemployment benefits.

Although the store manager verbally told the claimant on December 24 that he thought that the claimant had quit, the employer was, in reality, firing him for not reporting to work the day before. Indeed, the review examiner found that the employer decided to discharge the claimant on December 23, when the claimant failed to appear for work that day. Consolidated Findings of Fact # 13. The discharge then occurred on December 24. 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 unemployment benefits. In the absence of any testimony or evidence given by the claimant, the review examiner concluded that the employer had carried its burden following the initial hearing. After reviewing the evidence and testimony from both hearings, as well as the review examiner's new findings, we now disagree.

As indicated in Finding of Fact #13, the employer decided to discharge the claimant for his ongoing attendance problems. There was no dispute between the parties that, beginning in October, 2016, and continuing through December, 2016, the claimant was absent on many occasions. Although no policies or expectations are noted in the findings, the claimant's testimony from the remand hearing clearly suggested that he knew that he needed to report to work or inform the employer if he could not do so. After all, his continued history of giving the employer medical notes and calling out show that he was aware that he needed to keep in touch with the employer if he was not going to work on any given day. Based on the testimony given by the employer's witnesses during the hearing, as well as the review examiner's ultimate finding that the employer decided to discharge the claimant after the store manager and owner "discussed the claimant's attendance," we conclude that the employer ultimately severed the employment relationship due to the claimant's excessive absenteeism and attendance issues. The final incident appears to have been the no call/no show from December 23, 2016.

Even if we were to conclude, in the absence of any explicit findings, that not appearing for work on December 23 or not calling out from work on December 23 was an act of misconduct, we could not conclude that the claimant is subject to disqualification, under G.L. c. 151A, § 25(e)(2). A showing of misconduct alone is insufficient to deny benefits. “Such misconduct must also be in ‘wilful disregard’ of the employer’s interest. Deliberate misconduct in wilful disregard of the employer’s interest suggests intentional conduct or inaction which the employee knew was contrary to the employer’s interest.” Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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). 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) (citation omitted).

In this case, we cannot conclude that the claimant acted intentionally when he was out on December 23, or that he acted intentionally and in wilful disregard of the employer’s interest by not calling out on that day. First, the review examiner found that the claimant felt ill on that day. Consolidated Finding of Fact # 11. The claimant’s apparent inability to work on December 23 does not suggest a deliberate or intentional attempt to not report to work. Second, in reference to the failure to call out, the review examiner made a specific finding regarding the claimant’s state of mind. He found that the claimant “did not believe he needed to call out because the store manager knew he was ill.” Consolidated Finding of Fact # 12. We recognize that the claimant did not state this, word for word, during the hearing. When asked by the review examiner whether he ever failed to call out of work if he was not going to report, the claimant admitted that it happened one time. He testified that he had called and said that he would be out for a few days with pneumonia. The next day, he was sleeping and had a fever and he forgot to call for that one day. The claimant then indicated that he believed that the day in question was December 23. From this testimony, the review examiner found that the claimant believed that he did not have to call on December 23, because the employer knew that he was ill. Although the review examiner failed to explain why he made the findings he did,¹ it appears that he is crediting the portion of the claimant’s testimony we have just described. From the testimony, the review examiner appears to have inferred that, since the claimant had informed the employer about his illness already, and indicated that he needed to be out for a few days, he did not think he had to call again on December 23. While this could have been explained better by the review examiner, we see no reason to disturb the findings. Clearly, the review examiner has determined that the claimant was not intentionally or willfully disregarding the employer’s interests. The claimant was dealing with an ongoing illness and, for one day, failed to call out. Under these circumstances, we conclude that the claimant is not subject to disqualification.

¹ In our remand order, we specifically requested that the review examiner issue a credibility assessment. Such an assessment would have assisted the Board with understanding why he may have believed portions of the testimony offered by the parties. Here, it would have helped to explain why the review examiner believed the claimant’s testimony about being ill in December 2016, when the claimant did not have medical documentation from that time period. See Consolidated Findings of Fact ## 9–12. Nevertheless, from what we can tell, the review examiner has consistently believed the claimant’s testimony with regard to his illness(es). His findings are supported by testimony given during the hearing.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits, pursuant to G.L. c. 151A, § 25(e)(2), was not supported by substantial and credible evidence or free from error of law, because the review examiner's consolidated findings of fact indicate that, although the claimant was absent several times prior to his separation and the final incident consisted of a no call/no show, he did not have the deliberate, intentional, and wilful state of mind necessary for disqualification under the statute.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 22, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 18, 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