

Claimant was disqualified erroneously under § 25(e)(1), when in fact he was discharged after he requested and received an extension of his employment to an unknown date, and the employer decided to replace him.

**Board of Review
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Issue ID: 0021 3491 22

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Krista Tibby, 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 February 18, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 18, 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 August 12, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant 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 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 initiated his separation when he submitted his resignation to the employer 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 maintenance worker for the employer, an assisted living facility, from November, 2015, until February 18, 2017.
2. In December, 2016, the claimant was 68 years old and thought about of retiring.

3. On December 28, 2016, the claimant submitted a notice (the Notice) in writing that he was planning to retire and his projected last day of work would be January 28, 2017.
4. When the claimant submitted the Notice, he had been experiencing forgetfulness, unsteadiness and did not feel safe working on a ladder as require.
5. The claimant did not see a physician about his forgetfulness and his unsteadiness.
6. The claimant was unaware if his forgetfulness and unsteadiness was caused by an illness.
7. The claimant was not advised by a physician to leave his job.
8. On an unknown date prior to January 28, 2017, the claimant requested an extension to his intended separation date to an unknown date in the future. The claimant requested the extension because he wanted to remain employed for personal reasons.
9. On an unknown date, the employer granted the claimant's request to extend his separation date to an unknown date.
10. On an unknown date, the claimant's supervisor, the Maintenance Director, gave the claimant a separation date of February 18, 2017. He told the clamant he needed to ensure the efficient operation of business and they needed the claimant to be "off the books" to search for the claimant's replacement and they were afraid he would retire at a later date.
11. On February 18, 2017, the claimant quit his employment.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Finding of Fact # 11, which states that the claimant quit his job on February 18, 2017. We do so, as explained more fully below, because we conclude that the findings of fact support a conclusion that the employer initiated the claimant's separation. They do not support a conclusion that the claimant quit. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The review examiner denied benefits after analyzing the claimant's separation under G.L. c. 151A, § 25(e)(1) 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent. . . .

The review examiner concluded that the claimant left work voluntarily, without good cause attributable to the employer. We disagree. The findings establish that the claimant submitted his notice on December 28, 2016, stating that he would be retiring on January 28, 2017. Prior to that separation date, however, the claimant requested an extension to an unknown future date because he wanted to continue working for the employer. The employer granted the claimant's request. Subsequently, on an unknown date, the employer discharged the claimant when it told the claimant that it decided to end the claimant's employment because it wanted to replace the claimant. The employer further advised the claimant that it needed to have him "off the books", and that February 18, 2017, would be the claimant's last day of employment. Based upon the review examiner's findings of fact and the record in this case, we conclude that the employer initiated the claimant's separation on an unknown date when it told the claimant his last day of employment would be February 18, 2017.

Because we have concluded that 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. . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and 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). We conclude on the record before us that the employer has not met its burden.

We note at the outset that the employer has not established the existence of any relevant work policy, which the claimant is alleged to have knowingly violated. Thus, we do not believe that the employer has established that the claimant knowingly violated a reasonable and uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may sustain its burden by showing that the claimant engaged in deliberate misconduct 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). Since the employer has characterized the claimant's separation as a resignation, it has provided no evidence of any intentional and wilful misconduct on the claimant's part. Rather, the record indicates that the employer discharged the claimant for its own benefit, because it wanted to replace the claimant.

We, therefore, conclude as a matter of law that the employer has failed to show that the claimant was discharged from his employment for either a knowing policy violation or deliberate misconduct, 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 beginning February 12, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 19, 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.

SPE/rh