

Where the claimant had prior discipline for attendance, he is subject to disqualification under G.L. c. 151A, § 25(e)(2), when he accumulated another absence for being out on a Friday without any valid excuse.

**Board of Review
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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 affirm.

The claimant was discharged from his position with the employer on March 27, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 17, 2017. 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 September 15, 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 make subsidiary findings of fact from the record regarding the claimant's state of mind at the time of the alleged misconduct and whether mitigating circumstances prevented the claimant from meeting the employer's expectations. 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 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 claimant received warnings for his attendance issues, did not report to work on March 24, 2017, and did not provide any medical documentation to the employer to excuse the March 24 absence.

Findings of Fact

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

1. The claimant was the member a union (the Union).
2. The claimant was employed as a full time material handler for the employer, a warehouse and furniture sales business, from November 14, 2016, until March 27, 2017.
3. The claimant's immediate supervisor was the Warehouse Manager.
4. The employer maintains a Collective Bargaining Agreement (CBA) with the Union, which contains an attendance policy. Section 1B of the policy states: "Except for circumstances as described in Section 1(C) below, points will be assigned for any absence or tardiness regardless of the reason. Any and all of the reasons for assigning points will be subject to the grievance and arbitration procedures." The attendance policy also states:

"Points will be assessed in the following manner:

Arriving late from 0-5 minutes: 0 point

Arriving late beyond 5 minutes or leaving early by up to 15 minutes: ½ point

Arriving late or leaving early by up to 2 hours: 1 point

Arriving late or leaving early by over 2 hours: 1 ½ points

Absence for 4 hours to a day: 2 points

An employee who accumulates five (5) points in any six (6) month period will receive a verbal warning.

An employee who accumulates six (6) points in any six (6) month period will receive a written warning.

An employee who accumulates eight (8) points in any six (6) month period will receive a three (3) day suspension.

An employee who accumulates ten (10) points in any six (6) month period will be subject to discharge."

5. The employer expected the claimant to work as scheduled and not to accumulate ten (10) points in a six (6) month period.
6. The purpose of the expectation is to ensure proper staffing.
7. The claimant was given information regarding absenteeism in the form of a written policy in the CBA at the time he was hired.
8. After a six (6) month period, an absence was removed from the accumulating six (6) month period.

9. If the employer was slow with no work available in the afternoon and an employee requested to leave early, the Warehouse Manager allowed the employee to leave without assessing points.
10. On January 17, 2017, the claimant received a verbal warning for accumulating five and a half (5.5) points.
11. On January 18, 2017 and January 19, 2017, the claimant was absent from work and accumulated four (4) additional points, bringing his total points accumulated points in six (6) months to nine and a half (9.5) points.
12. On January 20, 2017, the Warehouse Manager and the human resources representative suspended the claimant for three (3) days, from January 23, 2017, until January 25, 2017, for accumulating more than eight (8) points in a six (6) month period. The suspension notice the employer gave the claimant stated if he received another ½ point before May 27, 2017, he would be subject to discharge.
13. On March 23, 2017, the claimant asked the Warehouse Manager if he could leave early from work. The Warehouse Manager allowed the claimant to leave work early and did not assess points because work was slow.
14. On March 24, 2017, the claimant sent the Warehouse Manager a text message stating he would not be at work because his chest hurt and he was going to check in to the hospital. The claimant asked that the Warehouse Manager to [sic] medically excuse his absence for the day so he would not lose his job. The Warehouse Manager told the claimant he hoped he felt better and told him they could talk on Monday.
15. The claimant did not go to the hospital on March 24, 2017.
16. On March 27, 2017, the claimant arrived to work and told the Warehouse Manager he did not go to the hospital on March 24, 2017 and did not have paperwork excusing his absence.
17. On March 27, 2017, the Warehouse Manager, the human resources representative and the employer's chief operations officer discussed the claimant's absence on March 24, 2017, reviewed his attendance history and decided to terminate the claimant for accumulating over ten (10) points in a six (6) month period.
18. On March 27, 2017, the claimant met with the Warehouse Manager, the human resources representative [sic] and a Union representative. During the meeting, the Warehouse Manager discharged the claimant for accumulating over ten (10) points in a six (6) month period.

Credibility Assessment:

The claimant contended that he did not have a copy of the CBA and was not aware of the attendance policy. He then gave conflicting testimony demonstrating that he knew of the policy as it had been explained to him on multiple occasions, including when he received a verbal warning on January 17, 2017, and when he received the written warning with a three (3) day suspension on January 20, 2017.

It was the claimant's testimony that he failed to report on March 24, 2017, because he experienced chest pains. However, it cannot be concluded that the chest pains were such that would have prevented the claimant from working. But, if the claimant's chest pains had been enough to cause him to leave work early on March 23, 2017, and stay out of work on March 24, 2017, his testimony that he wanted to "toughen himself up" and did not go to the hospital because the hospital staff would give him ibuprofen and tell him to rest was not reasonable. The claimant's testimony he did not go to the hospital or any other doctor was unreasonable since the claimant also testified he had gone to a doctor on previous occasions and provided the employer with doctor's notes to excuse other absences without being asked. The claimant also testified he thought the employer would "have mercy" on him when he reported his absence on March 24, 2017, because he reported that he had chest pains.

In addition, the claimant testified that he was unaware his job was in jeopardy. However, he admitted he had served a three (3) [day] suspension in January, 2017 for accumulating nine and a half (9.5) attendance points and that he knew at the time he reported his absence on March 24, 2017 he could be terminated.

Moreover, the employer's witness testified he did not discharge the claimant on March 24, 2017, when the claimant reported his absence because he believed the claimant was going to hospital, as he stated in his text message. The Warehouse Manager testified that had the claimant gone to the hospital as he stated in his text message, he would have considered that factor when making his decision whether to terminate the claimant.

Based on the inconsistencies and implausibility of the claimant's testimony, the employer's testimony is deemed more credible.

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 review examiner's decision disqualifying the claimant from receiving unemployment benefits is now supported by her findings.

The review examiner found that the claimant was discharged on March 24, 2017, “for accumulating over ten (10) points in a six (6) month period.” Consolidated Finding of Fact # 18. 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. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). After the hearing, the review examiner concluded that the employer had met its burden. Following our review of the record and the consolidated findings of fact, we agree with that conclusion.

As noted above, the claimant was discharged for violating the employer’s attendance policy. The final incident leading to the discharge occurred on March 24, 2017.¹ Under the deliberate misconduct standard, the employer must first show that the claimant engaged in misconduct. Here, the employer alleged that the claimant was absent on March 24. Generally, the employer expected that the claimant report to work as scheduled. *See* Consolidated Finding of Fact # 5. There is no dispute that the claimant did not report to work on March 24, a Friday. On that day, he sent a text message to the Warehouse Manager stating that his chest hurt and was going to the hospital. The Warehouse Manager indicated that they would talk on Monday, March 27. Because the claimant was absent on March 24, the employer’s expectation that he report to work was violated. Thus, the claimant engaged in misconduct on March 24, 2017, and this led to the accumulation of points and the subsequent discharge.

Our analysis does not end there, however. The key consideration in discharge cases is the claimant’s state of mind at the time of the misconduct. *See Grise v. Dir. of Division of Employment Security*, 393 Mass. 271, 275 (1984). Pursuant to the statute, the claimant’s misconduct must have been deliberate. As to the deliberateness of the misconduct, the claimant testified that he was not able to report to work on March 24, because he was having chest pains. The claimant knew he was to work on March 24 but chose not to go in. Thus, his decision to stay away from work was deliberate.

To deny benefits, the employer must also show that the claimant’s misconduct was done in wilful disregard of the employer’s interest. To analyze this standard, we examine “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). As to the claimant’s knowledge of the employer’s attendance expectations, the claimant gave mixed testimony. The review examiner noted this in her credibility assessment. However, the findings clearly show that the claimant was given

¹ The discharge technically occurred because the claimant accumulated more than ten points within a six-month period of time. However, the discharge would not have occurred but for the March 24 absence. Therefore, our focus is on that day.

multiple warnings for his attendance in the months leading up to the final incident on March 24, 2017. This history of discipline is sufficient to show that the claimant was aware that he needed to report to work when scheduled. The employer's expectations regarding attendance are reasonable. The review examiner found that the employer has the attendance expectations in place to "ensure proper staffing." Consolidated Finding of Fact # 6. The policy contained within the Collective Bargaining Agreement, coupled with the ongoing discipline given to the claimant, are reasonable means of making sure that employees report to work so that the employer's business can function properly.

The critical factor at play in this case is whether any circumstance mitigated the claimant's failure to report to work on March 24. In her original decision, the review examiner found that the claimant had chest pains on March 24. She then concluded that the claimant's actions were still done in wilful disregard of the employer's interest. However, if the claimant actually had chest pains on March 24, the existence of this medical condition could have been a circumstance beyond his control which may have prevented him from working. Because the review examiner's conclusion did not follow from the finding, we remanded the case for clarification.

The consolidated findings of fact do not include the finding that the claimant had chest pains on March 24, 2017. *Compare* Finding of Fact # 15 from the decision and Consolidated Finding of Fact #14. The findings now state that the claimant texted the supervisor about chest pains and that the claimant did not go to the hospital. The credibility assessment clearly casts doubt on the veracity of the claimant's assertions that he had chest pains on March 24. The review examiner noted that, whatever happened on March 24, it was not severe enough to prevent the claimant from reporting to work. Without any additional documentation or evidence to support his testimony, the review examiner did not have to believe that the claimant was experiencing chest pains, or, if he was, that they prevented him from working. A review examiner is not required to believe self-serving, unsupported evidence, even if it is uncontroverted by other evidence. McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986). Therefore, the findings and credibility assessment were reasonable in relation to the evidence. Consequently, we will not disturb them. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). In the absence of a finding that the claimant experienced chest pains on March 24, 2017, the findings do not show that the claimant's misconduct was mitigated.

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), is supported by substantial and credible evidence and free from error of law, because the claimant did not report to work on March 24, 2017, after prior instances of discipline for similar conduct, he knew he should report on that day, and nothing beyond his control prevented him from reporting to work.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning March 26, 2017, 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 - December 22, 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.

SF/rh