

Employer's evidence showed that claimant knew she needed to obtain or renew a medication administration protocol certification in order to remain employed. She failed to do so and did not appear at the remand hearing to present any mitigating reasons. She is disqualified for engaging in deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0021 5957 70

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from her position with the employer on January 25, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 10, 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 overturned the agency's initial determination and awarded benefits in a decision rendered on December 20, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not 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 employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to participate in the hearing and present evidence. Only the employer attended the remand hearing. 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 original decision to award benefits under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where, after remand, the consolidated findings show that the claimant lost her job because she neglected to obtain a necessary medication administration certificate.

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 for the employer, a human services organization serving clients with developmental and psychiatric disabilities.
2. The claimant was hired on 11/23/2015 as a part time awake overnight direct care worker.
3. Upon hire, the employer informed the claimant that obtaining a Medication Administration Program (MAP) certification was required.
4. The claimant moved to per diem status on 02/28/2016 at her own request for an unknown reason. Thereafter, the claimant's job title was relief direct care worker.
5. After the claimant moved to per diem status, her job duties included medication administration and other duties as assigned by the program director.
6. As a per diem employee, the claimant was required to administer medications that required MAP certification.
7. The purposes of requiring [that] employees hold MAP certifications are to ensure that staff can administer medications to clients who need medications, ensure client safety and well-being, and comply with state licensing requirements.
8. The employer had no records on file to indicate that the claimant was ever MAP certified.
9. After the claimant moved to per diem status, the employer issued the claimant a letter dated 05/13/2016 by U.S. mail and email.
10. The 05/13/2016 letter notified the claimant that her employment was in danger due to her MAP certification status.
11. The 05/13/2016 letter was regarding "Required Certifications and Employment Status."
12. The 05/13/2016 letter identified that the claimant's required MAP certification was missing, and that the deadline for obtaining her MAP certification was 12/31/2016.
13. The 05/13/2016 letter stated, "If any of your certifications are expired or missing, you must act now to remedy this situation. Specifically, please take the following actions: 821. If you have proof of the current certification,

please fax or scan the document to [the] [r]elief [p]ool [a]dministrator at [email address] or [fax number]. 822. If you need to enroll in a class or classes, contact [the relief pool administrator] at [email address] or [phone number]. ***Please be advised, if you do not meet the deadlines for obtaining or renewing your certifications by the deadline listed in the chart above for the respective recertification type, your employment with [the employer] will be terminated.*** We strongly suggest that you act now in order to register for classes and meet the deadlines.”

14. The 05/13/2016 letter further stated, “If you are missing MAP at this time, we’d also like to make you aware of an extra opportunity to take the class outside of [the employer’s] normal scheduled classes. [The employer] will offer a MAP class that will be held on three (3) Saturdays in June. We enclose a flyer about this weekend opportunity and urge you to act quickly if you would like to take this class three day class (sic).”
15. The employer regularly offers Monday to Friday MAP classes. The employer offered the Saturday MAP class in June 2016 for employees who could not attend during weekdays, and as an alternative if the weekday class was full.
16. The claimant’s last day worked for the employer as a per diem employee was 12/24/2016.
17. Any communications between the claimant and employer surrounding the claimant’s last day of work are unknown.
18. On 01/25/2017, the relief pool administrator emailed the claimant that she was terminated for failing to obtain her MAP certification.
19. The employer waited until 01/25/2017 to terminate the claimant’s employment to allow time for documentation of any MAP certification to arrive by U.S. mail following the 12/31/2016 deadline.
20. By 01/25/2017, the relief pool administrator had not received documentation proving the claimant was MAP certified, had not received any contact from the claimant to enroll in classes, and had not received any questions from the claimant about the 05/13/2016 letter.
21. The claimant filed an unemployment claim effective 04/16/2017.
22. In the claimant’s initial application for unemployment benefits completed on 04/19/2017, the claimant indicated that she was “still employed” with this employer. It is unknown why the claimant made such an initial report.
23. In the employer’s fact finding documentation, the employer reported that the claimant was terminated on 01/25/2017 for failing to maintain proper certifications, specifically the MAP certification.

Credibility Assessment:

During the original hearing, the claimant asserted that after 12/24/2016, she was calling for available hours, received no communication from the employer and assumed she was terminated. However, this testimony was not consistent with the claimant's initial application for unemployment benefits completed on 04/19/2017, wherein she reported being "still employed" with the employer. The claimant did not participate in the remand hearing to offer any testimony or evidence to 1) explain this inconsistency, or 2) rebut the testimony of the relief pool administrator. The employer's reporting to the DUA in its initial fact finding questionnaire that the claimant was terminated on 01/25/2018 for failing to maintain proper certifications, specifically the MAP certification, was consistent with the relief pool administrator's testimony during the remand hearing, which in turn was consistent with and corroborated by the 05/13/2016 letter to the claimant that she was missing her required MAP certification. The employer's consistent and corroborated testimony and evidence presented during the remand hearing about the claimant's MAP certification requirements (including as a per diem employee) is deemed to be more credible than the claimant's unexplained inconsistencies between her initial application for unemployment benefits and testimony during the original hearing.

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. However, as discussed more fully below, we disagree with the review examiner's original legal conclusion that the claimant is eligible for benefits.

Since the claimant did not voluntarily leave her job with the employer, her eligibility for benefits is properly analyzed under 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).

The employer fired the claimant for failing to obtain her MAP certification. Consolidated Finding # 18. Because there are no consolidated findings pertaining to how the employer treats other employees who fail to demonstrate current MAP certification, we cannot conclude that the claimant knowingly violated a reasonable and *uniformly* enforced policy. Alternatively, the employer may establish that the claimant deliberately engaged in misconduct in wilful disregard of the employer’s interest.

Based upon hearing only the claimant’s testimony at the original hearing, the review examiner found that the employer’s per diem employees were not required to maintain MAP certification.¹ If true, the claimant, who had transferred into a *per diem* position, did nothing wrong by not maintaining this certification. However, based upon the employer’s evidence at the remand hearing, the review examiner found that MAP certification was required in the claimant’s *per diem*, relief direct care position, because she was required to administer certain medications. *See Consolidated Findings ## 4–6*. In doing so, the review examiner found the employer’s evidence to be more credible. “The review examiner bears ‘[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .’” Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting Trustees of Deerfield Academy v. Dir. of Division of Employment Security*, 382 Mass. 26, 31-32 (1980). We see no reason to disturb these findings. Thus, the employer has shown that by not maintaining her MAP certification, the claimant engaged in misconduct.

The next question is whether the claimant’s misconduct was deliberate and in wilful disregard of the employer’s interest. In order 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). A person’s knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

The consolidated findings show that the claimant was made aware of the employer’s expectation that she be MAP-certified both when originally hired and by letter on May 13, 2016. *See Consolidated Findings ## 3 and 9–13*. Further, the letter stated bluntly that she would lose her job if she did not meet the deadline for providing proof of such certification. Consolidated Findings ## 12 and 13. Given the need to administer medications on the job, which, pursuant to state licensing requirements, had to be given by personnel with MAP certification, the employer’s expectation was reasonable. *See Consolidated Finding # 7*. Because the claimant did not appear at the remand hearing to explain why she failed to obtain or renew her MAP certification by the deadline, there is nothing in the record to suggest that her failure was due to

¹ *See* Finding of Fact # 5 in the original decision, included in the record as Remand Exhibit # 1.

mitigating circumstances. The only reasonable inference, therefore, is that she acted deliberately and in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has satisfied its burden under G.L. c. 151A, § 25(e)(2), to show that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning January 22, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 27, 2018



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.

AB/rh