

Claimant is disqualified under G.L. c. 151A, § 25(e)(2), due to insubordination, when he did not show up for a meeting. The review examiner improperly rendered findings about commuting time without evidence from the parties.

**Board of Review
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Issue ID: 0021 7360 78

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny the claimant benefits following his separation from employment on April 27, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On July 14, 2017, the agency initially determined that the claimant was entitled to unemployment benefits. The employer appealed, and both parties attended the hearing, which was held over three days. In a decision rendered on February 3, 2018, the review examiner overturned the agency determination, concluding that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). The Board accepted the claimant's application for review.

Findings of Fact

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

1. The claimant worked for the employer, an auto glass repair/replacement company, from August 29, 2016 to April 27, 2017 as a Business Development Manager.
2. The employer had a policy, which prohibited, "Insubordination or refusal to comply with instructions from a supervisor or manager."
3. The purpose of the policy was to ensure an orderly and efficient work place.
4. The employer's policy applied to all employees.
5. The employer did not apply a progressive system of discipline to that which gave rise to the claimant's discharge from employment.

6. The claimant's work schedule was Monday through Friday from 8:00 a.m. to 5:00 p.m.
7. The claimant's wife was not employed at the time of the claimant's hire.
8. The claimant resided in [Town A] and the corporate office was in [Town B], which is approximately fifty miles away, or one hour by vehicle (notice given).
9. After the claimant began employment, the claimant's wife became employed with a schedule of 9:00 to 5:00 p.m. in [Town C].
10. The claimant's children's daycare was from 8:00 a.m. to 6:00 p.m. located in [Town D] and Oxford. [Town D] is approximately forty miles from the corporate office, or forty-five minutes (notice given). [Town D] is approximately twenty miles from [Town C], or thirty-five minutes (notice given).
11. Leading up to April of 2017, the claimant had some performance and communications issues, which resulted in additional, unnecessary work for others.
12. On March 1, 2017, the Director required call logs from her subordinates.
13. On April 24, 2017, during a conference call, the Director announced that she would be calling each of the Business Development Managers in order to schedule quarterly reviews.
14. On April 25, 2017, the claimant electronically declined a scheduling request by his Director.
15. At 4:06 p.m., the claimant emailed the Director stating, "Sorry to decline without a note. Even if I drop the kids at 8 I won't be there in time. My apologies for the scheduling difficulty."
16. On April 26, 2017 at 8:20 a.m., the Director emailed the claimant, "I tried calling you this morning so we could discuss and I am now headed into a meeting. Please find a way to make this meeting. I look forward to getting together. Thank you."
17. At 9:02 a.m., the claimant replied, "Sorry I missed you. Funny enough, I was bringing the boys into daycare. I have been on the phone with my wife trying to figure out how I can make it up to [Town B] at 9am tomorrow but I won't be able to. She has a client meeting in Athol at 8am so she can't take them. Also, they wake at 7ish which is the time I'd need to leave to get to [Town B]

- for 9. Please, let's meet on another day or conference call tomorrow at 9. I am not trying to be difficult whatsoever and I apologize for the inability to get there before 9am but with my family commitments I just can't make it happen tomorrow. Please let me know your thoughts."
18. At 10:11 a.m., the Director emailed, "I am emailing during a quick break. Is it only this week that you have [sic] are having scheduling issues due to daycare?"
 19. At 10:22 a.m., the claimant responded, "I'm not sure how to answer that. Daycare is always a part of our schedule. If I know how far enough in advance, I can probably figure out a solution. However, my wife has had this meeting tomorrow planned for over a month, so I guess this week is an outlier."
 20. At 10:38 a.m., the Director emailed, "Please forward the specifics of your schedule and I will call to follow up."
 21. At 10:57 a.m., the claimant responded, "It's quite easy. I can be in [Town B] any day of the week any time after 10am. My family is my priority and I have expressed from the beginning that I need to drop off and pick up the boys from daycare."
 22. At 11:05 a.m., the Director emailed, "As requested, please forward me your schedule and I will call you to further discuss."
 23. At 11:21 a.m., the claimant responded, "Our goal is for me to bring the boys to daycare on Monday, Wednesday, and Friday but I cannot remember a week where that exactly happened. With the pay cut I took, [my wife] is back working full time and has networking meetings scattered throughout the week so we do our best to make everything work. As is mentioned earlier, as long as I have enough advanced notice, I can get to [Town B] whenever you schedule the meeting."
 24. At 11:27 a.m., the Director emailed, "I am asking you to simply send me your schedule. You also mentioned pick-ups. Please email me the schedule as requested and will call you to discuss. Provide day, time of drop off, time of pick up."
 25. At 1:30 p.m., the Senior Sales Rep (now Senior Account Executive) emailed the claimant, "Feeling any better?"
 26. At 1:50 p.m., the claimant replied to the Senior Sales Rep, "Yes, slightly. I talked to [Employee A] and who knows who else is on that email. Employee A expressed a lot of frustration to me too. I was happy to hear I wasn't alone. Still need to reach out to [other employees]. I want to make sure I have all of

my bases covered for the next time I talk to [the Director]. Thanks for the follow up [Senior Sales Rep]!”

27. At 2:02 p.m., the Senior Sales Rep sent a playlist to the claimant, a minute later stating, “You’re doing good. Don’t forget that you will need to relax after all the phone calls are done. I have a brief meditation I can send over. I have it in my favorites on YouTube. You can’t let the kids hear it, though. You’ll have to trust me on this. I sent it to [name] and she totally relaxed.”
28. At 5:18 p.m., the Director emailed, “I hope your day went well. Can you please reply to my email today so I have the needed information before we connect. [sic] Thank you.”
29. Throughout the day, the claimant called a Senior Sales Rep complaining that the Director was giving him a hard time and kept asking him to go to the corporate office to meet, but that he could not because he had to drop off his kids at school. The other employee advised that the Director was probably just calling to arrange the quarterly review. The claimant continued to complain that the Director was “out to get him” and he continued to call the other employee asking, “What should I do?” The other employee advised the claimant to call the Director.
30. The claimant also contacted Employee A in regards to a request by the Director to complete a call log sheet and whether he was the only one who had to do it as he felt that he was being singled out. The claimant complained that he was being micromanaged and that the Director was setting him up to fail. The claimant expressed that the Director knew that he had to take his child to daycare every day and that he asked her to reschedule a meeting that was planned, which she did to the next day at a time that he could not get there.
31. The claimant contacted another employee about the call logs, asking whether that employee also had to complete them. The claimant expressed that he felt that they were unnecessary and that he felt that he did not have to do them.
32. On April 27, 2017 at 8:09 a.m., the Director emailed, “Good morning. I did not hear back from you yesterday. I would still like to meet today. Please let me know what time you can be here so we can coordinate our schedules. I look forward to getting together. Thank you.”
33. At 8:10 a.m., the Director forwarded the chain of emails to the Human Resources Manager with the comment, “FYI.”
34. The Human Resources Manager soon after called the claimant and asked him to contact his manager because she was trying to get a hold of him by email and phone and he was not responding to her. The claimant stated that he had

no intention of calling her on that day. The Human Resources manager informed the claimant that that was not a good idea.

35. The Human Resources Manager called the claimant again directing him to come to the corporate office to meet with his manager and the claimant responded that he will think about it. The claimant did not agree to come to the office until the Human Resources Manager advised him that it was mandatory.

36. The employer discharged the claimant from employment for insubordination.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's ultimate decision to deny benefits is free from any error of law affecting substantive rights. In so doing, we accept the review examiner's findings of fact as being supported by substantial and credible evidence in the record, except for the distances and commute times noted in Findings of Fact ## 8 and 10.¹ The review examiner noted in those findings and in Part III of the decision that he took "notice" of the distances and commute times. The information contained in Finding of Fact # 8 is not in accord with some of the claimant's testimony. In resolving this factual issue, the review examiner apparently referred to information not in the record and not subject to review and objection by the parties.

The hearing was conducted pursuant to the provisions of G.L. c. 30A. Although the formal rules of evidence were not applicable during the proceeding, *see* G.L. c. 30A, § 11(2), if the review examiner wanted to take notice of any fact used in the decision, the parties needed to be notified so that they could "contest the facts so noticed." *See* G.L. c. 30A, § 11(5). Moreover, evidence used to render the decision in the case should be made a part of the record, and, generally, "no other factual information or evidence shall be considered, except as provided in paragraph (5) of this section." G.L. c. 30A, § 11(4). Given these statutory provisions, it was in error for the review examiner to render findings about the commute times and distances without first discussing the noticed information with the parties or allowing them to object to the review examiner's use of the information. We therefore reject as unsupported any information about commute times and commute distances referenced in Findings of Fact ## 8 and 10.

Similarly, the review examiner should not have relied upon this information in his credibility assessment. Although we reject the portion of the credibility assessment which is based on the commute time testimony, we still generally believe that the review examiner's conclusions about the claimant's credibility are supported by the full record. In addition to the commute time testimony, the review examiner offered other reasons for disbelieving the claimant's testimony.

¹ Portions of several findings are based on the e-mail chain contained within Exhibit # 6. The file forwarded to the Board following the hearing does not contain all of the pages of Exhibit # 6 (the documents were double-sided and one side of several pages did not make it into the final case folder). However, the parties referred to the various e-mails at length during the hearing. The review examiner also clearly copied the text of the e-mails in his findings of fact. We are confident that the findings about the content of the e-mails is supported and accurate.

We note that the claimant's testimony as to the reasons for his actions (that a co-worker told him not to be in touch with his direct supervisor, that the employer was not responsive and supportive to him, and that he thought that his supervisor was inquiring about his work schedule on April 26 and 27 rather than his childcare/daycare schedule) are not supported by the documentary evidence in the record, which the review examiner clearly credited in his findings of fact. On the whole, the review examiner's conclusion that the claimant's testimony was not credible or reliable was reasonable in relation to the evidence presented to him. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

In accepting the findings and credibility assessment as we have done, we, in turn, accept the review examiner's legal conclusion that the claimant had no credible reason or mitigating circumstances for refusing to meet with his supervisor or contact her, at the very least, on April 27, 2017. *See Findings of Fact ## 32-34.* Although the claimant eventually went to the employer's offices on April 27, 2017, his prior behavior on April 26 and April 27 is sufficient to conclude that he was engaging in insubordination and was not acting in accord with the employer's reasonable expectations.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning April 23, 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.²

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 27, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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)**

² There is simply no support in the record for the claimant's arguments on appeal to the Board that he was not given an opportunity to state his case to the review examiner. He was given a full opportunity to cross-examine both employer witnesses. He was given a full opportunity to explain what happened at the end of his employment during his direct examination by the review examiner. The claimant was asked several times if he had anything else to add prior to the end of the hearing. The claimant offered some additional testimony and then ultimately indicated that he did not have anything else to add. Aside from the one evidentiary issue noted in our decision, the claimant was afforded full due process during the hearing.

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