

Pursuant to G.L. c. 94C, § 32L, the claimant customer account executive may not be denied unemployment benefits based solely upon a positive marijuana test. Because the review examiner found that he was not working under the influence and did not refuse to take a drug test, he may not be disqualified under G.L. c. 151A, § 25(e)(2).

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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 affirm.

The claimant was discharged from his position with the employer on April 21, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 10, 2017. The employer 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 awarded benefits in a decision rendered on August 26, 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, he 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 obtain further evidence pertaining to the circumstances that led to his discharge. 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 may not be disqualified under G.L. c. 151A, § 25(e)(2), because the employer did not prove that the claimant was working under the influence of marijuana or deliberately refused to take a drug test, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer is a telecommunications services provider. The claimant worked as a full-time customer account executive for the employer. He worked for the employer from 9/28/15 until 3/02/17.
2. The employer created a document titled "Safety and Drug-Alcohol Policies." The document featured a subsection titled "Drug & Alcohol Policy." The policy read, "[The employer] is committed to providing a safe, healthy, and productive work environment for all employees. Our business culture has no room for illegal or inappropriate drug or alcohol use. In addition, we have a public responsibility to provide our customers with quality service through an efficient and safety-conscious workforce. In order to accomplish these goals, [the employer] prohibits employees from using or abusing drugs that are illegal under federal, state, or local law." The document featured a policy titled "Drugs." The policy read, "[The employer] prohibits the use, possession, sale, purchase, manufacture, distribution, dispensation, or transfer of drugs that are illegal under federal, state, or local laws by any employee, on duty or off duty. Employees may not work under the influence of illegal drugs to any extent. Illegal drugs under this policy include, but are not limited to, controlled substances such as marijuana (including in those states/cities that have legalized recreational or medicinal use)...[The employer] will take disciplinary action, up to and including termination of employment, against employees for violations of this policy (including for recreational or medicinal use of marijuana) unless such employment-related action is specifically prohibited by applicable state or local law." The document featured a policy titled "Testing." The policy indicated that the employer may require workers to undergo a drug or alcohol test "where reasonable suspicion of drug and/or alcohol use exists." The policy read, "Employees who are tested may be required to sign certain forms, including consent forms authorizing the company and/or its representatives to receive the results of the testing. The following actions are considered violations of this policy and may result in disciplinary action (up to and including termination of employment): (a) refusing to consent to or undergo testing; (b) not promptly proceeding to a collection facility; (c) providing a contaminated or substituted specimen; (d) failing to attempt to provide specimens; (e) failing to sign testing and other required forms; and (f) other conduct which obstructs or interferes with the testing (which may include, in some cases, failing to provide a sufficient sample)."
3. The claimant electronically signed an acknowledgement that he received the employer's drug and alcohol policy. The claimant electronically signed the document shortly after he was hired.
4. The employer will discharge all employees who interfere with its drug test procedures.

5. The claimant worked a shift on 3/02/17. The claimant was not impaired by any drugs while he worked on 3/02/17.
6. On 3/02/17, the employer suspected that the claimant worked under the influence of drugs. The employer's senior care manager told the claimant that he must submit to a drug test. The claimant asked her to show the drug test policy to him. The senior customer care manager showed the policy to the claimant. The claimant then agreed to submit to the test. The senior customer care manager told the claimant that he was suspended with pay until further notice.
7. The employer contracted with a certain drug test provider. This provider was not open when the employer wanted to send the claimant for the test. The employer decided to send the claimant to [City A] General Hospital for the test. The employer summoned a taxicab to drive the claimant to the hospital. The senior customer care manager instructed the driver to drive the claimant to [City A] General Hospital. She did not give an address to the driver. The driver then drove the claimant to [City A] General Hospital [B] Campus.
8. During the taxicab ride, the claimant did not attempt to divert the taxicab driver to a different location.
9. A supervisor (Supervisor X) followed the taxicab in his own vehicle. Supervisor X had a drug test consent form with him. The drug test consent form would allow the hospital to release the test results to the employer. The form had the employer's address and contact information on it. The employer anticipated that the hospital would send the test results to it. The employer never told the claimant that he himself must return the form to it.
10. When the claimant arrived at the hospital, he went to the hospital gift shop. Supervisor X entered the hospital shortly after the claimant and encountered the claimant in the gift shop. The claimant purchased a few items, including water.
11. After the claimant left the gift shop, the claimant and Supervisor X went to the reception desk at the hospital's emergency room. Supervisor X talked to a nurse at the reception desk. He explained that the claimant was there for a drug test. He presented the drug test consent form to the nurse. The nurse said they did not typically perform drug tests without an appointment. The claimant confirmed that he was the subject for the drug test. He did not say anything else. The nurse then handed the drug consent form back and the claimant took it. The nurse told the claimant and Supervisor X to wait in the emergency room waiting area.
12. After Supervisor X and the claimant checked in with the nurse, they waited in the emergency room waiting area. The claimant's cousin then arrived.

Earlier, the claimant had called his cousin and asked the cousin to meet him at the hospital. The cousin waited in the waiting area with the claimant. A nurse then called the claimant into the emergency room. The claimant went into the emergency room alone. The nurse did not allow Supervisor X to accompany the claimant. Supervisor X left the hospital after the claimant was called into the emergency room.

13. After the claimant entered the emergency room, he indicated that he was there for a drug test. The nurse then left and returned with a doctor. The nurse and doctor told the claimant that the hospital did not offer drug tests there. The hospital did not offer to perform the test. The claimant asked for documentation to confirm that the hospital did not offer drug tests. The hospital gave a note to the claimant. The note was dated 3/02/17. The document read, "We do not do employer drug screening here. Any questions call [telephone number in note]. Ask for [Name]."
14. The claimant did not call the employer from the hospital after he learned that the emergency room did not offer drug tests. It did not occur to the claimant to immediately notify the employer about what happened at the emergency room. The senior customer care manager had told the claimant that the employer would contact him later. The claimant waited for the employer to contact him.
15. On 3/02/17, the claimant did not have any of the employer's telephone numbers saved in his cellular telephone.
16. The claimant had called out of scheduled shifts prior to 3/02/17. When he called out on those occasions, he called a certain telephone number. The telephone number connected to an automated system.
17. While at the hospital on 3/02/17, the claimant did not deliberately refuse to submit to a drug test. The claimant did not take a drug test at the hospital on 3/02/17 because the hospital told him that it did not perform drug tests there and the hospital did not offer to perform the drug test.
18. The claimant consulted an attorney sometime after he left the hospital. The attorney advised him to undergo a drug test. The claimant went to a drug test facility (Facility Z) on 3/08/17 and submitted to a test. The employer did not direct the claimant to submit to this test.
19. On 3/10/17, the employer's human resources manager called the claimant. The claimant explained that he did not take the test on 3/02/17 because the hospital told him that it did not perform drug tests there. He told the human resources manager that he underwent a drug test on 3/08/17 at another drug test facility and that he would submit the results to the employer.

20. The claimant never told the employer that he had taken a drug test at the hospital on 3/02/17.
21. Facility Z created a record for the 3/08/17 drug test. The record indicated that the claimant tested positive for marijuana. The record did not indicate the amount of marijuana detected. The claimant had smoked marijuana on 3/04/17. He was not at work when he did this.
22. The claimant submitted the results from the 3/08/17 drug test to the employer.
23. The claimant remained on paid leave from 3/03/17 to 4/21/17.
24. Sometime after 3/08/17, the employer had a telephone conference with the claimant. The employer's human resources director and human resources manager attended the conference. The employer acknowledged that it had received the positive test result from Facility Z. The employer told the claimant that it was reviewing the claimant's situation to determine next steps. The employer told the claimant that it might discharge him.
25. The employer did not receive the drug test consent form after the claimant's visit to the hospital on 3/02/17. The employer concluded that the claimant refused to submit to the drug test at the hospital on 3/02/17. The employer concluded that this amounted to a violation of its Drug & Alcohol Policy.
26. The employer discharged the claimant because he tested positive for marijuana on 3/08/17, because it believed he worked under the influence of marijuana on 3/02/17, and because it concluded that he refused to submit to the drug test at the hospital on 3/02/17.
27. The employer sent a discharge letter to the claimant. The letter was dated 4/19/17. The letter read, "This letter is to inform you your employment with [the employer] will be terminated effective April 21, 2017. This separation is a result of your violation of the company's Drug and Alcohol policy."

CREDIBILITY ASSESSMENT:

In the hearing, the employer asserted that the claimant refused to take the drug test at the hospital emergency room on 3/02/17. In the hearing, the employer's senior customer care manager testified that she called the [City A] General Hospital [B] Campus. She testified that a triage nurse told her that they would perform the drug test at the emergency room there. In the hearing, the claimant testified that he went into an exam room in the emergency room and that hospital personnel told him that the hospital did not perform drug tests there. The claimant also testified that emergency room personnel gave a note to him. He submitted a note on apparent hospital letterhead that read, "We do not do employee drug screenings here." Given the totality of the testimony and evidence presented, the claimant's testimony in its entirety is accepted as credible. First,

the employer did not present any witnesses to the claimant's interactions with hospital personnel after he left the waiting area and entered the exam area. Second, in the hearing, Supervisor X testified that he spoke with a reception nurse at the hospital and that she told him that they did not typically perform drug tests without an appointment. This supports the claimant's testimony that he was not given the opportunity to take a drug test at the emergency room. Third, the employer did not submit any documentation to counteract the note that the claimant submitted. In the remand memorandum, DUA's Board of Review prompted the participants to submit documentation about whether the hospital offered drug tests. The employer did not attempt to submit any such documentation to support its claim that the hospital emergency room offered drug tests.

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. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant may not be disqualified from receiving unemployment benefits.

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 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).

In analyzing the claimant's eligibility for benefits under G.L. c. 151A, § 25(e)(2), we consider that the employer fired him for three reasons: (1) because he tested positive for marijuana on March 8, 2017; (2) because the employer believed that the claimant worked under the influence of marijuana on March 2, 2017; and (3) because the employer concluded that the claimant refused to take a drug test on March 2, 2017. Consolidated Finding # 26.

There is no question that the claimant smoked marijuana on March 4, 2017, a day that he was not working, took a drug test on March 8, 2017, and that the results were positive for marijuana. *See Consolidated Finding # 21.* The evidence also shows that the employer's drug policy prohibits the use of marijuana while off duty, and that this is a dischargeable offense. *See Consolidated Finding # 2.* The issue before us is not whether the employer was justified in terminating the claimant's employment, but whether this positive marijuana test is grounds for denying him unemployment benefits.

As noted in the review examiner's decision, the Massachusetts Legislature enacted G.L. c. 94C, § 32L, in 2008. This statute provides, in pertinent part, as follows:

Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense

Except as specifically provided in "An Act Establishing A Sensible State Marihuana Policy," neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance *including unemployment benefits*

As used herein, "possession of one ounce or less of marihuana" includes possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid [sic] metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marihuana

(Emphasis added.) Thus, to the extent that the claimant was terminated merely for failing a drug test and having marijuana metabolites in his system, G.L. c. 94C, § 32L, permits him to receive benefits, even if that test result violated the employer's policy.

We do not interpret G.L. c. 94C, § 32L's prohibition against withholding unemployment benefits to reach policy violations for working under the influence of marijuana. Had the employer established that the claimant was working under the influence of marijuana on March 2, 2017, as it alleged, it would have met its burden. It did not. The review examiner found that the claimant was not impaired by any drugs while at work on March 2, 2017. In doing so, the review examiner accepted the claimant's testimony as 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). Unless such an assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission*

Against Discrimination, 423 Mass. 7, 15 (1996). We believe his assessment is reasonable in relation to the evidence presented.

We also consider whether the claimant violated the employer's policy or expectation by not taking a drug test at the hospital on March 2, 2017, as he was instructed to do. Consolidated Finding # 17 states that the claimant did not deliberately refuse to submit to such a test. The findings show that after the employer's supervisor left the hospital, the emergency room nurse and doctor informed the claimant that they would not perform the test. The legislative intent behind § 25(e)(2) is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). In this case, the claimant did not intend to disregard the employer's instructions to get a drug test on March 2, 2017. The hospital refused to give him one. We also think that his taking a drug test several days later and giving the positive results to the employer shows that the claimant was trying to do what the employer asked of him.

We, therefore, conclude as a matter of law that the employer has failed to meet its burden of proof. The claimant is not disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning May 7, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 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