

Employer proved that its hair stylist engaged in deliberate misconduct, when he put his name on incorporation papers to open a competing salon, worked there, and solicited the employer's customers for the competing business.

**Board of Review
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Issue ID: 0021 7951 15

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by J. Cofer, 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 his position with the employer on May 4, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 3, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 25, 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 claimant's appeal, we remanded the case to the review examiner to obtain further evidence about the claimant's training and the circumstances surrounding his termination from employment. 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 original conclusion that the employer failed to show that the claimant engaged in the deliberate misconduct of opening, owning, or soliciting the employer's clients for a competitor business 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 hair salon. The claimant worked as a full-time stylist for the employer. The claimant worked for the employer from 2/06/15 until 5/04/17.
2. The Massachusetts Board of Cosmetology and Barbering issues two types of cosmetology licenses. These licenses are called Cosmetologist Type 1 and Cosmetologist Type 2. A Cosmetologist Type 2 license holder is licensed to cut hair and to color hair. A Cosmetologist Type 2 license holder must work under someone who has a Cosmetologist Type 1 license. A Cosmetologist Type 1 license holder is allowed to open his or her own salon. A Cosmetologist Type 2 license holder can gain a Type 1 license if he has worked as a cosmetologist for two years and a Cosmetologist Type 1 license holder signs off for him or her.
3. The claimant completed cosmetology school before he worked for the employer. In cosmetology school, the claimant received extensive training on how to color hair. When the claimant completed cosmetology school, he knew how to cut hair and he knew how to color hair. When the claimant completed cosmetology school, he gained a Cosmetology Type 2 license. The claimant gained his Type 2 license on 3/26/15. The expiration date for this license is 7/15/18.
4. Upon hire, the claimant presented his Cosmetologist Type 2 license to the employer. The claimant's Cosmetologist Type 2 license allowed the claimant to cut hair and color hair. The Cosmetologist Type 2 license was confirmation that the claimant was trained on how to cut hair and on how to color hair.
5. The claimant cut hair for the employer. He did not color hair for the employer. The employer did not offer hair color services.
6. The employer created a handbook. The handbook featured a policy titled, "3.5 Outside Employment." The policy read, "Occasionally, employees may wish to perform outside work for another employer. Employees may hold outside jobs after working hours or actively participate in an outside business under certain circumstances. Employees are prohibited from engaging in employment with another organization that may harm the Company's good image, involve a business which competes with a product, process, or service of the Company, involve the release of confidential or proprietary information, or otherwise interfere with their work with the Company including limiting schedule availability. The Company reserves the right to review any outside employment held by an employee and may request the employee to terminate the outside employment. Employee must notify management of any outside employment." The claimant read this policy. The claimant knew that the employer did not allow him to open his own salon that would compete with the employer's business.

7. A certain individual (Person X) worked for the employer. Person X's employment with the employer ended. Person X has [a] Cosmetologist Type 1 license.
8. Person X and the claimant decided to go into business and start a salon together (Salon Z). Salon Z was incorporated in Massachusetts on 5/01/17. The claimant is a corporate officer for Salon Z. He is the corporation's treasurer and a director. Person X is the corporation's president, secretary, and a director. The claimant became the corporation's treasurer and director because Person X and the claimant planned to operate the business together. When the claimant and Person X went into business together, the claimant planned to work full-time for Salon Z once the salon became more established. The claimant planned to gain a Cosmetologist Type 1 license and take on an ownership role with Salon Z.
9. Salon Z is located in close proximity to the employer's salon. Salon Z is located in the plaza next to the employer's salon.
10. When the claimant and Person X went into business together, the claimant knew that Salon Z would compete with the employer's business. The claimant intended to compete with the employer.
11. The claimant solicited the employer's customers to seek services at Salon Z.
12. Some of the employer's workers told the employer's owner that the claimant opened Salon Z and solicited the employer's customers. The employer's owner reviewed the Articles of Organization for Salon Z. He learned that the claimant was listed as the treasurer and a director.
13. On multiple occasions prior to 5/04/17, the employer's owner saw the claimant's car at Salon Z. He saw the car there two or three times per week. He did not check every day. As of 10/25/17, the owner still sees the claimant's car at Salon Z.
14. The claimant never told the employer about his activities with Salon Z.
15. On 5/04/17, the employer's owner discharged the claimant because the claimant started Salon Z and because the claimant solicited his customers to seek services at Salon Z.
16. On 8/17/17, the Massachusetts Board of Cosmetology and Barbering issued a Cosmetologist Type 1 license to the claimant. This license will expire on 7/15/19. Person X signed off for the claimant so he could gain the Cosmetologist Type 1 license. The claimant gained the Cosmetologist Type 1 license in connection with his work for Salon Z.

17. In September 2017, the claimant gained employment with another salon. Since 5/04/17, the claimant has continually performed work for Salon Z. He plans to work full-time for Salon Z as it becomes more established.

CREDIBILITY ASSESSMENT:

In the hearing, the claimant testified that he did not open Salon Z. He testified that he was a mere unpaid apprentice for Salon Z when the employer discharged him. He testified that he received very little training in cosmetology school on how to color hair. He testified that Person X offered to teach him how to color hair in an unpaid apprenticeship if he allowed her to list him as the corporation's treasurer and second director. The claimant's entire testimony is rejected as not credible and it is concluded that the claimant and Person X are business partners. First, the fact that the claimant is a corporate officer is a clear indication that the claimant is not a mere unpaid apprentice for Salon Z. Second, the claimant's explanation that he became a corporate officer in exchange for an unpaid apprenticeship on how to color hair is dubious because the claimant already knew how to color hair. The claimant attended cosmetology school and he had a Cosmetology Type 2 license. A Cosmetology Type 2 license is affirmation that the license holder indeed knows how to color hair. Third, in the hearing, the claimant testified that he plans to work full-time for Salon Z and that he still performs activities there. This is a clear indication that the claimant's role with Salon Z was not as a mere unpaid apprentice.

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. Based upon the consolidated findings after remand, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits, as outlined below.

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).

The employer fired the claimant because he started Salon Z, a competing hair salon, and because he solicited the employer’s customers to patronize Salon Z. Consolidated Finding # 15. Looking closely at the employer’s non-compete policy, which is set forth in Consolidated Finding # 6, it states that employees are prohibited from engaging in *employment* with another organization that, put succinctly, may compete or otherwise interfere with the employer’s business. Although the review examiner found that the claimant continually performed work for Salon Z since the day he was discharged from the employer, and that he planned to work full-time for Salon Z once it became more established, we see nothing in the record that shows that the claimant was actually paid for any of the work he performed at Salon Z. Therefore, we cannot conclude that he was *employed* by Salon Z at the time he was fired. See Consolidated Findings ## 8 and 17. For this reason, 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. In order to determine whether an employee’s actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee’s state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). 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.)

The review examiner found that the claimant knew that the employer did not allow him to open a hair salon that would compete with the employer’s business, yet the claimant did so while still employed, with the intent to compete with the employer, and solicited the employer’s customers for the competing enterprise. Consolidated Findings ## 6, 10, and 11. In doing so, the review examiner decided the claimant’s professed ignorance about this expectation, assertion about merely being an unpaid apprentice, and denial about soliciting the employer’s customers were not credible. Such assessments are within the scope of the fact finder’s role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). His assessment is reasonable in relation to the evidence presented. It is supported by the employer’s testimony that the claimant was shown the non-compete policy. The intent of the non-complete policy is clear — employees were not to engage in activities for a competing business. His assessment is also reasonable in light of the several factors listed in the credibility assessment as to why the claimant’s testimony was not believable.

We, therefore, conclude as a matter of law that the employer has sustained 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 May 7, 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 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.

AB/rh