

Claimant engaged in deliberate misconduct when he ignored the employer's instructions to work a particular shift and not to get a coworker to cover for his absence. He failed to establish any mitigating circumstances.

**Board of Review
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Issue ID: 0022 0538 17

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 his position with the employer on June 8, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 24, 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 January 17, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest and, thus, 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 additional testimony and other evidence pertaining to the events leading to the claimant's separation from employment. 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 conclusion, which stated that claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where, following remand, the findings provide that the claimant failed to report for a scheduled shift after being advised by the employer that such a failure would result in the claimant's discharge.

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 restaurant, from approximately August, 2008, until June 8, 2017. He was most recently employed as a full-time line cook. Prior to May 20, 2017, he worked as a full-time kitchen manager.
2. The employer's Scheduling policy stated that requests for specific days off must be submitted at least two weeks in advance. The claimant signed for receipt of the policy on August 27, 2008. No consequences were indicated for failing to request time off in accordance, and the president regularly provided verbal approval of time off requests with less than 2 weeks' notice.
3. While employed as a kitchen manager, the claimant was authorized to arrange his own shift swaps with the second shift cook. He did so on approximately 5 occasions prior to May 20, 2017, without consequence.
4. On approximately May 10, 2017, the claimant informed the employer that, for a temporary period, he would be unable to work nights while his wife attended to a family emergency out-of-state.
5. The employer modified the claimant's schedule based on his reported availability.
6. On May 20, 2017, the claimant was unable to obtain childcare for his 8 kids after his babysitter cancelled with minimal notice.
7. The claimant informed the business president by text that he was unable to appear for his scheduled shift of daytime hours.
8. The president responded that the claimant's absence would be unacceptable, as he had given the second shift cook the day off due to the scheduling requirements of the upcoming week, and the owner's need for the claimant to perform his managerial duties. The president again stated that the cook needed to have the day off and the claimant was required to appear as scheduled.
9. The claimant contacted the cook and swapped shifts with his coworker in order to obtain coverage for his May 20, 2017, shift.
10. Effective May 21, 2017, the employer demoted the claimant to the role of line cook at a decreased rate of pay. The claimant agreed to continue work in the new role.
11. The claimant was demoted because of his failure to appear for work on May 20, 2017, and because he arranged for the second shift cook to cover his shift though instructed not to do so.

12. If the claimant had appeared for work as scheduled, he likely would not have been demoted.
13. When the claimant lost his managerial title, he also lost his authority to arrange shift swaps independently and became subject to the employer's Scheduling policy.
14. He did not perform any managerial duties after May 20, 2017.
15. On approximately June 1, 2017, the claimant requested to take time off on June 8, 2017 to attend his son's field day.
16. On June 3, 2017, the employer denied the claimant's request for time off because he had committed to attending his own children's field trip on the same day.
17. On or around June 3, 2017, the employer posted the store's schedule for the week ending June 11, 2017.
18. The claimant saw the schedule on the day it was posted and observed that he was scheduled to work from 10 a.m.–3 p.m. on June 8, 2017.
19. Sometime between June 3, 2017, and June 8, 2017, the claimant arranged for the second cook to cover his June 8, 2017, shift so that he was available to attend the event at his son's school.
20. The claimant was not authorized to modify his own schedule.
21. On the morning of June 8, 2017, the claimant notified the employer that he had secured coverage for the entire day by changing shifts with the second cook.
22. This arrangement was not acceptable to the employer because it would result in the second cook going into overtime.
23. The president notified the claimant that, if he did not appear for his scheduled June 8, 2017 shift, he could look for another job.
24. The claimant did not appear for his scheduled shift on June 8, 2017.
25. On June 8, 2017, the claimant was discharged for failing to appear for his 10 am shift after receiving notice that his absence would result in termination of employment.

NOTE:

The claimant's failure to appear for the March 15, 2018, remand hearing precluded the Review Examiner from addressing the entirety of the questions presented in the February 13, 2018, Board Order. Specifically, the following questions were not explored:

- 2a)
- 2b)
- 3)
- 6)
- 7)

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 6 that states that the claimant was caring for his eight children on May 20, 2017, as the claimant testified at the initial hearing that only four of his children lived with him.¹ We reject the portion of Consolidated Finding # 21 that states the claimant informed the employer he had secured coverage for the *entire* day on June 8, 2017. The texts in the exhibits and the texts that the review examiner read into the record during the remand hearing establish that the claimant switched shifts with the second cook, so that the claimant was available to work as of 3:00 p.m. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest.

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

After remand, the review examiner found that on or about June 1, 2017, the claimant requested to have June 8, 2017, off in order to attend his son's field day. On June 3rd, the employer denied the claimant's request because he needed the claimant during the morning shift that day for business reasons. The review examiner found that the claimant did not notify the employer until the morning of June 8th that he still planned on being out during the first shift, as he had switched his shift with a coworker who was working in the afternoon. The employer notified the claimant

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

that this was not acceptable, and he would be discharged if he did not appear for his scheduled shift. Despite this warning, the claimant did not report to work for his shift on June 8th.

In order to deny benefits under G.L. c. 151A, § 25(e)(2), it must be shown that the claimant acted with “intentional disregard of [the] standards of behavior which his employer has a right to expect.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Thus, “the critical issue in determining whether disqualification is warranted is the claimant’s state of mind in performing the acts that cause his discharge.” Id. Here, the consolidated findings establish that the claimant acted with intentional and wilful disregard of the employer’s interests when he did not report for his original shift on June 8th, as instructed. He has also not established any mitigating circumstances to excuse his failure to comply with the employer’s expectation that he report to work. *See Id.* Although the claimant indicated at the initial hearing that he had committed to attending his son’s field day, his absence at the remand hearing prevented him from giving more specific and detailed information to show that at the time his request for time off was denied, he was unable to excuse himself from that commitment. Absent mitigating circumstances, the claimant is disqualified under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant’s discharge is attributable to 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 ending June 10, 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 - May 29, 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)**

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.

SVL/rh