

Employer did not meet its burden where claimant was discharged without being given a specific reason, possibly based on the employer's suspicion of theft, with no specific allegation or evidence of misconduct.

**Board of Review
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Issue ID: 0022 2277 09

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 her position with the employer on June 11, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 19, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 8, 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, 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 allow the employer an opportunity to testify and present evidence. 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 employer has not carried its evidentiary burden under G.L. c. 151A, § 25(e)(2) is supported by substantial and credible evidence and is free from error of law, where the consolidated findings of fact do not indicate that the claimant engaged in any misconduct or policy violations.

Findings of Fact

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

1. The employer provides services for elderly people. The claimant worked as a part-time CNA for the employer. The claimant worked for the employer from 3/06/17 to 6/11/17.
2. The claimant worked twenty hours per week for the employer. The claimant provided care for the employer's clients in the clients' homes.
3. The employer's care coordinator supervised the claimant. The care coordinator assigned shifts to the claimant.
4. The employer's care coordinator told the owner that the claimant created problems and that she spent a lot of time solving these problems. The care coordinator threatened to leave her employment due to the claimant.
5. On 6/02/17, the employer received a call from a client's daughter. The daughter reported that the client had a bottle of perfume and that it disappeared from the client's home. The claimant provided care for this client. The employer's owner suspected that the claimant was involved in the perfume disappearance.
6. The owner wanted to speak to the claimant about the perfume. On 6/02/17, the owner instructed the care coordinator to call the claimant and tell the claimant to come into the employer's office.
7. On 6/02/17, the care coordinator asked the claimant to come to the employer's office. The care coordinator wanted the claimant to come to the office after the claimant visited a client at 5:30 p.m. that evening. The claimant said that she would not come to the office because the client was several towns away from the employer's office and she did not want to navigate traffic. The care coordinator did not demand that the claimant come to the office. The owner did not participate in this conversation. The claimant did not know that the employer wanted her to come to the office on 6/02/17 in order to discuss the perfume situation. The employer never told the claimant that it wanted her to come to the office on 6/02/17 to discuss the perfume situation.
8. After 6/02/17, the claimant spoke to the care coordinator for various work-related reasons. The owner did not participate in these conversations. After 6/02/17, the employer never ordered the claimant to come to the office. After 6/02/17, the employer never demanded that the claimant come to the office.
9. After 6/02/17, the employer's owner never spoke to the claimant.
10. The claimant worked her scheduled shifts in the period 6/03/17 to 6/11/17.
11. At 8:00 p.m. on Sunday 6/11/17, the claimant received a text message from the care coordinator. In the message, the care coordinator told the claimant that the claimant was discharged. In the message, the care coordinator told the claimant

that the employer no longer needed her services. The care coordinator did not provide any details about this.

12. The employer never told the claimant why it discharged her.

CREDIBILITY ASSESSMENT: In the hearing, the employer's owner testified that the claimant abandoned her employment. She insisted that the employer did not discharge the claimant. In the hearing, the claimant testified that the employer discharged her. In the hearing, the claimant testified that the care coordinator discharged her via a text message. Given the totality of the testimony and evidence presented, the claimant's testimony in its entirety is accepted as more credible than the employer's testimony. The care coordinator did not testify at the hearing and the owner's account of the care coordinator's conversations with the claimant was hearsay. The owner did not participate in the conversations between the care coordinator and the claimant.

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 ultimate 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 relationship to the evidence in the record. As discussed more fully below, we agree with the review examiner's initial conclusion that the claimant is not disqualified under G.L. c. 151A, § 25(e)(2).

The review examiner analyzed the claimant's separation as a discharge 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

Under this section of law, the employer has the burden to show by substantial and credible evidence that the claimant is not entitled to unemployment benefits. After the initial hearing, at which the employer did not give evidence, the review examiner concluded that the employer had not carried its burden. Following our review of the record, including the consolidated findings of fact made by the review examiner, we agree with the review examiner's conclusion.

As an initial matter, in all discharge cases, the employer must first show that the claimant engaged in the alleged conduct which led to the claimant's separation from employment. The employer

suspected that the claimant may have been involved in the disappearance of a bottle of perfume that had disappeared from the home of a client for whom the claimant provided care. However, the employer did not make an allegation that the claimant was involved with the missing perfume. There is no evidence in the record that would indicate that the claimant had anything at all to do with the missing perfume.

The record shows that the owner wanted speak with the client about the perfume. On June 2, 2017, the employer instructed the employer's care coordinator to call the claimant and to tell her to come to the employer's office. The care coordinator did so, asking the claimant to come to the office after she had visited with a client at 5:30 p.m. that same evening. The claimant did not want to visit the office in the evening because the client was several towns away from the office, and the claimant did not want to have to navigate the traffic. The care coordinator did not order the claimant to visit the office that evening. The claimant was not told, and had no idea that the employer wanted her to come to the office to discuss the missing perfume. The employer never told the claimant to come to the office to discuss the perfume. After June 2, 2017, the employer never raised the subject of the perfume with the claimant and never ordered the claimant to come to the office. *See* Finding of Fact # 8.

The claimant continued to work her scheduled shifts after June 2, 2017, until she received a text message on Sunday, June 11, 2017 at 8:00 p.m., from the care coordinator, terminating the claimant's employment. In the text message, the care coordinator told the claimant that the employer no longer needed her services. The care coordinator provided no details, and the employer never told the claimant why it had discharged her. In this case, there is only an unconfirmed "suspicion" and nothing more. In the absence of findings of fact based on substantial and credible evidence that the claimant engaged in misconduct or violated a policy, the claimant cannot be denied benefits.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits under G.L. c. 151A, § 25(e)(2), is based on substantial and credible evidence and free from error of law, because the employer failed to carry its burden to show that the claimant engaged in any prohibited conduct.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning June 18, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 24, 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.

SPE/rh