Claimant, who was warned about his workplace attendance, and who was aware that he needed to report to work or timely call out from work if he was going to be absent, is disqualified under G.L. c. 151A, § 25(e)(2) for a final incident of no call/no show, where he showed no evidence of mitigation.

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Issue ID: 0022 4246 45

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by John Cofer, a review examiner of the Department of Unemployment Assistance (DUA), to deny 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 July 17, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 8, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on October 14, 2017.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 accepted the claimant's application for review and remanded the case to the review examiner to make subsidiary findings of fact from the record regarding the reason for the claimant's discharge and prior warnings issued to the claimant.[1] 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 is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant was warned about his attendance problems but continued to be unreliable, including on July 12, 2017, when he did not report to work and failed to properly notify the employer about it.

[1] Based on the content of the claimant's appeal, the Board did not see reason to remand the case for additional evidence to allow the claimant the opportunity to testify. In his appeal, the claimant did not state that he failed to receive notice of the hearing. He indicated that he was "unaware [he] had to call" the day of the hearing. The notice sent to the claimant, Exhibit # 6, pp. 5–6, specifically states what the claimant needed to do to participate in the hearing.

Findings of Fact

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

1. The employer is a staffing agency. The claimant worked as a full-time associate staffing coordinator for the employer. The claimant worked for the employer from 10/17/16 to 7/17/17.

2. The claimant was not a temporary employee for the employer. The claimant worked a set shift. The employer assigned the claimant to work 9:00 a.m. to 5:00 p.m.

3. The employer created a document titled "Recommendations for Improvement." The document was dated 3/29/17. The document read, "This document supports [the claimant's] 90 day Performance Review and the areas which he needs to improve as discussed. On Monday, March 28, 2017 [the claimant] emailed out of work even after a verbal conversation about expectation and reliability took place on Thursday, March 23rd. We also covered the importance of notifying the appropriate members of the team and designate a TPS to obtain proper coverage in cases when [the claimant] would be absent or late. This call out did not have an accompanying plan for coverage as discussed." The document read, "Consistent call out and absences noted below: 12.13.16 Late; 12.30.16 Called Out; 1.16.17 Called Out; 3.2.17 Late; 3.9.17 Late; 3.13.17 Called Out: 3.15.17 Late; 3.23.17 Late; 3.24.17 Half Day; 3.27.17 Called Out." The document continued, "If [the claimant] is reported to have another performance Issue subsequent/within the next 30 days to this meeting and no improvement is noticed, then he will be placed on a Performance Improvement Plan." The claimant signed the document on 3/30/17.

4. The employer gave written discipline to the claimant. The document was titled "Warning and Action Plan." The document was dated 5/24/17. The document read, "This Action Plan is being issued as a result of continuous performance issues in relation to [the claimant's] communication, task management and reliability that have not only affected [the claimant's] reliability and daily focus that pertain to his job duties, but other members of the team and the organization as a whole." The document featured a section titled "Direction and consequences." The section read, "[The claimant] is to report to work on time and sign in upon arrival and sign out at the end of each day with HR." The document read, "If the claimant is reported to have another Performance issue subsequent/within the next 15 working days to this meeting and no improvement is noticed, then this violation of our policies becomes amplified and will result in immediate termination." The claimant signed the document.

5. The claimant understood that he must work his scheduled shifts. The claimant understood that he must arrive on time for scheduled shifts.

6. Prior to 7/06/17, the employer told the claimant that he must report his absences to his supervisor before the shift start time. The employer told the claimant that he must call the supervisor and not text message the supervisor. The claimant understood this expectation.

7. Prior to 7/12/17, the claimant's supervisor told the claimant that he faced discharge if his attendance problems persisted.

8. The employer scheduled the claimant to work a shift on 7/06/17. The claimant did not present for this scheduled shift. The claimant did not report his absence to the employer.

9. The employer scheduled the claimant to work a shift on 7/10/17. The claimant arrived thirty minutes late for this scheduled shift. Before the claimant arrived at work, he did not report a late arrival to the employer.

10. The employer scheduled the claimant to work a shift on 7/11/17. The claimant met with a client at 1:00 p.m. on that day. The employer expected the claimant to return to the office after this meeting. The claimant did not return to the office after he met with the client.

11. The employer scheduled the claimant to work a shift on 7/12/17. The claimant did not present for this scheduled shift. The claimant reported his absence to the employer at 8:30 a.m. He reported his absence to another worker via text message. He did not call his supervisor.

12. The employer determined that the claimant failed to uphold the Warning and Action Plan on 7/06/17 when he did not present for work and did not report his absence to his supervisor. The employer determined that the claimant failed to uphold the Warning and Action Plan on 7/10/17 when he arrived thirty minutes late and did not report his late arrival to his supervisor. The employer determined that the claimant failed to uphold the Warning and Action Plan on 7/11/17 when he did not return to the office after he met with a client. The employer did not discharge the claimant for these incidents because it saw potential in the claimant and it wanted to give extra chances to him.

13. The employer discharged the claimant because it determined that he failed to uphold the Warning and Action Plan on 7/12/17 when he did not present for work, did not report his absence until after his shift had started, and reported the absence via text message instead of a telephone call to his supervisor.

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. As discussed more fully below, we now conclude that the review examiner's initial decision to deny benefits is supported by the record and his consolidated findings of fact.

During the hearing conducted on October 11, 2017, the employer's operations manager testified that the claimant was discharged. 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Following the hearing, the review examiner concluded that the employer carried its burden. We agree with this assessment of the evidence.

In his decision, the review examiner concluded, in part, the following:

> The employer expected the claimant to work his scheduled shifts. The claimant understood this expectation yet he nevertheless did not work his scheduled shift on 7/12/17. Prior to 7/12/17, the claimant knew that he faced discharge if he did not work his scheduled shifts. The record does not support a conclusion that any mitigating circumstances existed.

While this conclusion is supported by the full record, the Board remanded the case, because the review examiner's decision lacked certain critical findings regarding the claimant's separation. It is imperative that the review examiner make findings of fact on each factual issue essential to the decision. Reavey v. Dir. of Division of Employment Security, 377. Mass. 913, 914 (1979) (rescript opinion), *citing* G.L. c. 30A, § 11(8). Here, the review examiner's decision lacked findings about why the claimant was discharged and whether the claimant received warnings prior to May of 2017 regarding his attendance. Both of these pieces of information are relevant and important to determining whether the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2).

The review examiner has now found that the employer discharged the claimant on July 17, 2017, for failing to follow the May 24, 2017, Warning and Action Plan. He did not abide by the plan when he did not report to work on July 12, 2017, and failed to properly report his absence. *See* Consolidated Finding of Fact # 13. The findings indicate that the claimant was aware that he needed to work his scheduled shifts. *See* Consolidated Finding of Fact # 5. On May 24, 2017, the employer issued the Warning and Action Plan, which specifically stated that the claimant needed to "report to work on time and sign in upon arrival and sign out at the end of each day with HR." The review examiner also found that, prior to the final incident on July 12, 2017, the

claimant was made aware that, if he was going to be out of work, he needed to notify his supervisor. *See* Consolidated Finding of Fact # 6.

In violation of these expectations, the claimant "did not present for [his] scheduled shift" on July 12, 2017, and "reported his absence to another worker via text message," rather than contacting his supervisor. *See* Consolidated Finding of Fact # 11. These actions constituted misconduct, as they were directly contrary to the employer's expectations. Given the prior warnings about reporting to work and the lack of evidence to show that he was mistakenly out of work or that something prevented him from getting to work, the findings support a conclusion that the claimant's misconduct was deliberate.

As to whether the final incident was done in wilful disregard of the employer's interest, we examine whether the claimant was aware of the employer's expectation, whether the expectation was reasonable, and whether any mitigating circumstances are present. *See* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). As noted above, the claimant was aware of the employer's expectation that he report to work or properly call out from work. The expectation is certainly reasonable, as the employer has a strong interest in ensuring that its workplace is properly staffed so that its customers can be adequately served. No substantial and credible evidence was shown to indicate that the misconduct was mitigated.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, as the employer has carried its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning July 16, 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 - January 31, 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.

SF/rh