Although the claimant properly notified the employer of his absences, he did not present any medical evidence or other mitigating circumstances to excuse his failure to report to work as scheduled.

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Issue ID: 0022 4393 86

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 11, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 4, 2017. The claimant 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 denied benefits in a decision rendered on November 22, 2017. We accepted the claimant's application for review.

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 remanded the case to the review examiner to obtain additional testimony and other evidence pertaining to the employer's policy and the claimant's absences. Only the claimant 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 engaged 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 the claimant did not provide medical documentation to substantiate his assertion that he was too sick to work.

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 part-time as a concierge/front desk person for the employer's non-profit shelter organization. The claimant started working for the employer on May 29, 2015.

2. The claimant had no other employment during his base period (July 1, 2016 through June 30, 2017).

3. The employer has a written "Attendance and Punctuality" policy. The policy states that "[a]ll employees are expected to report for work as scheduled. In the event that an employee cannot report as scheduled, it is the responsibility of that employee to notify his/her supervisor, or the supervisor on duty, at **least 4-8 hours** prior to the beginning of the shift (unless it is a case of sudden emergency). The employee shall make notification personally." The policy goes on to state that "[i]t is the responsibility of the employee to notify the appropriate supervisor for each day he/she is unable to report for work as scheduled, unless a specific number of days has been established and communicated to the employee's supervisor and the supervisor has approved that number of days."

4. The "Attendance and Punctuality" policy also states that "[f]ailure to provide proper notification for unscheduled absences or lateness may result in disciplinary action up to and including termination of employment." In addition, "[e]xcessive absenteeism or lateness may result in disciplinary action up to an including termination of employment. The policy defines "excessive" to be three or more days of absence, or three late arrivals, within any six month period.

5. In practice, if the claimant was going to be absent from work, he would call the front desk worker and inform that person that he was not going to be in to work. The front desk worker would attempt to find coverage for the claimant. The claimant did not regularly contact his direct supervisor or the on call supervisor if he was going to call out of work. Prior to the incident which led to his discharge, the claimant received no discipline for not communicating his absence to his supervisor or an on call supervisor.

6. The policy was given to the claimant at the start of his employment. He read the policy at that time.

7. The claimant did not sign a document confirming that he had received the "Attendance and Punctuality" policy.

8. The employer expected that employees work their scheduled shifts. If an employee was going to be absent, he or she needed to contact the employer in advance of the shift. The program manager verbally told the claimant about these two expectations.

9. The employer's expectations are in place to ensure adequate staffing coverage at its place of business.

10. The claimant was aware of the expectation that he work as scheduled. He was aware that, if he was going to be absent, he needed to notify the employer.

11. The employer has a progressive disciplinary process. The steps of the process are: verbal, first written, second written, and then termination. Depending on the severity of the offenses engaged in, the employer may use its discretion to skip steps in the process.

12. The claimant was regularly scheduled to work 16 hours per week. He worked the 4:00 p.m. to midnight shift on Saturdays and Sundays.

13. During the week (Monday through Friday), the claimant regularly worked on his own business. Towards the end of his employment with the employer, he was working on a website during the week. He once had an active limited liability company (LLC). The LLC was involuntarily dissolved by the Commonwealth of Massachusetts in June of 2017.

14. The claimant last worked for the employer on June 17 and 18, 2017. He was next scheduled to work on June 24 and 25, 2017.

15. On June 23, 2017, the claimant called the program manager and asked for the weekend off. The program manager told the claimant that he had to work. The claimant verified that he would be in the following day.

16. During the June 23 phone call, the claimant did not indicate that he was feeling ill.

17. At 3:21 a.m. on June 24, 2017, the claimant called 9-1-1 and requested that an ambulance take him to [Hospital A]. The ambulance arrived at the claimant's residence at 3:27 a.m. The claimant's chief complaint was hiccups.

18. The claimant arrived at the hospital at 3:34 a.m. He was seen at the hospital for hiccups. While at the hospital, the claimant was given several tests. All tests were negative. The claimant was not prescribed any medication at the hospital. The claimant was not given any discharge instructions.

19. The claimant stayed at the hospital for four hours. When he left the hospital, he no longer had the hiccups.

20. The claimant has chronic hypertension. The claimant has worked for many years with hypertension. He does not take any medication to control his hypertension. He was not given any medication on June 24, 2017 to deal with the hypertension.

21. The claimant did not provide any medical documentation to show that his hypertension led to the hiccups. He did not provide any medical documentation to show that he had any exacerbated symptoms of hypertension at the hospital on June 24.

22. The claimant took a taxi home from the hospital on June 24, 2017. Once he arrived home, at approximately 7:30 a.m., he called the employer's office and spoke to the front desk person. The claimant stated that he would not be in that day. The front desk person indicated that he would try to find coverage for the claimant.

23. The claimant did not talk with his direct supervisor on the morning of June 24, 2017.

24. The claimant did not report to work on June 24, 2017.

25. Soon after the claimant called the front desk person, the program manager called the claimant. She asked if the claimant was going to work on June 25, 2017. The claimant said that he would not work that day.

26. No medical issue prevented the claimant from working on June 24 and June 25, 2017. The claimant's hypertension did not prevent him from working those days.

27. On or about June 26, 2017, the program manager spoke with the claimant. The claimant indicated that he had been in the hospital and he would provide documentation of it. The claimant and the program manager decided to meet on June 28, 2017 at the employer's business location, so that the claimant could provide the program manager with documentation of his hospital visit. The program manager indicated that the claimant needed to submit the documentation in order for him to return to work.

28. The claimant did not attend the June 28, 2017 meeting, because he was working on his own business. He was working on a website for his business.

29. On June 29, 2017, the program manager sent the claimant an e-mail to his correct e-mail address at 12:39 p.m. The subject of the e-mail was "Please call ASAP," and the e-mail said the following:

    You did not show up for our meeting yesterday and have not returned my calls. Your shifts for the weekend are going to be covered by someone else if I do not hear from you by 1PM.

30. On June 30, 2017, the claimant spoke with the program manager. The claimant indicated a desire to fax medical documents to the program manager. The program manger gave the claimant the employer's fax number.

31. The claimant did not fax any documentation to the employer. The claimant believed that his personal medical information was private. He did not believe that a law prevented him from sharing his medical information to the employer. The claimant chose not to provide the employer with medical documentation.

32. On July 11, 2017, the program manager sent the claimant a letter, informing him that he was discharged. The letter stated the following:

    This letter is to confirm that as we spoke about on the phone today, you are being terminated from employment at [the employer] due to failure to show up for your assigned shifts on June 24th and 25th. You also did not call the on call supervisor to let her know that you were unable to work your shifts. You also failed to provide documentation from your doctor that you had confirmed you could provide stating you were in the hospital the weekend of your failure to show up for work.

33. The employer discharged the claimant for (1) failing to show up for work on June 24 and 25, 2017, and (2) for failing to properly notify the employer that he was going to be out on those days.

34. The claimant filed a claim for unemployment benefits on July 22, 2017. The claim is effective July 16, 2017.

35. On October 4, 2017, the Department of Unemployment Assistance (DUA) sent the claimant a Notice of Disqualification, informing him that he was not entitled to receive benefits beginning June 18, 2017.

36. The claimant appealed the October 4 notice on October 6, 2017.

CREDIBILITY ASSESSMENT:

Findings of fact were made regarding the claimant's ambulance trip to the hospital on June 24, 2017. Generally, findings of fact were made on topics which were supported by documentary evidence or consistent testimony. Otherwise, the claimant's testimony continued to be not straightforward, reasonable, logical, or generally credible. The lack of credibility extended to the reason for him being at the hospital, his ability to work, and his desire to not submit medical documentation of his hospital stay.

As to why he was in the hospital, the claimant confirmed in his testimony that it was due to hiccups. He also testified that it was due to severe hypertension. As to whether the claimant suffers from hypertension, the claimant presented no medical documentation. However, he did testify about the hypertension at both the initial and remand hearings. He gave some specific testimony as to prior history with hypertension. Therefore, it is found that the claimant has a generalized history of hypertension.

However, no medical documentation was presented to show that the hypertension was so bad that he needed to be out of work on June 24 and June 25, 2017. The claimant testified that he has dealt with the hypertension for years and that he takes no medication for it at all. No evidence was presented to show that he left the hospital on June 24 with instructions not to work or to take some time off from work. The claimant also suggested that he had bad anxiety. No documentation was presented to support this assertion. The only condition which the documentation shows the claimant possibly had is hiccups. The ambulance documentation does not even state that the claimant reported that he had bad or severe hypertension. He testified that he had no hiccups when he left the hospital. He testified that he left the hospital at about 7:30 a.m. on June 24. This left him with most of the day to relax before his 4:00 p.m. shift for the employer. Given the lack of medical documentation as to what his medical problem or issue was on June 24 (if he actually had any) and the fact that he has chronic hypertension which he deals with regularly, the claimant did not present sufficient evidence to show that he could not work on June 24. Moreover, the claimant testified that, even though he was released from the hospital with no instructions and no prescriptions, he still knew on June 24 that he was going to be unable to work on June 25, 2017. This is not credible. It is not credible that the claimant knew on June 24 that his hypertension was going to be so bad on June 25 that he was not going to be able to work. On the whole, the claimant did not show that something beyond his control prevented him from working on June 24 and June 25, 2017.

Thus, even if the claimant called the employer on June 24 and notified the employer on June 24 that he would not be in on June 24 and June 25, there is no reason for him to have been out on those days. There was no reason for him to have violated the employer's expectation that he report to work as scheduled, if he was able to do so.

The claimant's testimony (reasons) about not producing the medical documentation was also not credible. At the first hearing, the claimant suggested that it was against the law for him to show the employer his medical records. Consequently, he could not present the records at the hearing. At the remand hearing, the claimant modified this argument slightly. He testified that it was not against the law for him to get his records and provide them to the employer, but it was against the law for the employer (on its own, presumably) to access his records. The claimant failed to give a persuasive explanation for why he could not give authorization to the hospital to release his records to him and why he could not then provide (possibly redacted) records to the employer and/or to the review examiner during the confidential hearing. The explanation of HIPAA law he provided to the review examiner (contained within Review Exhibit #14A) does not state that he cannot provide this information. Rather, the claimant's testimony during the remand hearing indicated that he preferred not to provide the medical information, because it is private and he did not want the employer to see it. In other words, he chose to not provide the documentation.

> The testimony offered by the program manager during the November 13, 2017 hearing is still considered to be more credible, consistent, and logical. Her testimony regarding telling the claimant about the employer's attendance expectations, about having a conversation with him regarding the June 28 meeting, about sending him the June 29 email, and about the claimant's desire to fax documentation to the employer on June 30 is all accepted as reasonable, logical, and more plausible than what the claimant testified to. The claimant even suggested during the remand hearing that the June 29, 2017 email was fabricated/fake. This contention is rejected.
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> Therefore, many findings of fact based on the program manager's testimony have remained in the consolidated findings of fact. As noted above, where the claimant provided documentation or reasonable testimony about certain matters, findings were made accordingly. However, his overall testimony was not deemed forthright and credible by the review examiner.

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. However, we conclude that the consolidated findings support a denial of benefits to the claimant.

Since the claimant was discharged from his employment, we analyze his eligibility for benefits 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 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 the claimant was aware of the employer's expectation that he report to work as scheduled or notify the employer if he was going to be absent. The review examiner also found that the claimant did not report to work for his scheduled shifts on June 24, 2017, and June 25, 2017. The employer discharged the claimant for failing to report to work these two days and failing to properly notify the employer of his absences.

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. In order to evaluate the claimant's

state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

The employer contended that the claimant did not properly call out because he did not speak directly to a supervisor about his absences. Rather, the claimant spoke to an employee at the front desk. The review examiner found that the claimant called out to the front desk on June 24, 2017, and he told the program manager that day that he would not report to work on June 25th. Since the review examiner found that the claimant routinely called out by calling the front desk instead of a supervisor, and the employer had never reprimanded him for using this method, we cannot conclude that the claimant intended to disregard the employer's call-in protocol when he called out to the front desk on June 24th. Similarly, since the review examiner found that the claimant reported his June 25th absence to his supervisor on June 24th, we cannot conclude that the claimant engaged in any deliberate misconduct regarding his manner of communication. It appears that the claimant reported his absences in ways that he believed were acceptable to the employer.

The review examiner also found that no medical issue prevented the claimant from working on June 24th and June 25th. Since the claimant did not give any other reason for his failure to work on those days, the claimant has failed to present mitigating circumstances to excuse his failure to comply with the employer's expectation that he report to work as scheduled. 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 within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending June 24, 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 - April 3, 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.

SVL/rh