

The claimant did not report to work after the employer denied his request for time off, and no mitigation was presented to excuse the claimant's absence.

**Board of Review
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Issue ID: 0022 6238 67

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 July 31, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 30, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 28, 2017. 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, or knowingly violate 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 give the employer an opportunity to testify and present other evidence. Both parties 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 that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer is supported by substantial and credible evidence and is free from error of law, where, after remand, she found that the claimant took time off from work without authorization.

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 manufacturer of iron products, as a full-time painter from August, 2013, until July 31, 2017. He last physically worked on July 27, 2017.
2. The employer did not have a written policy regarding attendance or requesting time off from work.
3. The employer expected employees to appear for work as scheduled unless approved for time off.
4. Prior to July 27, 2017, the claimant had taken time off to address legal and medical issues. His requests for days off from work were made verbally and approved verbally by the business owner.
5. The employer closes for 2 weeks each summer and was shut down from July 2, 2017 until July 17, 2017. The owner was out of state during that time and neither he nor the foreman received any communication from the claimant during the break.
6. On July 26, 2017, the claimant verbally requested to take off Saturday, July 28, 2017 to attend a family function.
7. The owner responded that they were booked for that day, and he needed the claimant to come to work. He informed the claimant that he would try to release him for a half day if their job was completed timely.
8. The claimant did not appear for work on the morning of July 28, 2017.
9. Some time prior to 9:30 a.m., the foreman texted the claimant stating that he (the claimant) was told by the owner to appear for work that morning. The foreman stated that he would be required to complete the day's job with another employee and that the project would be behind schedule. He indicated that he did not believe the claimant would have a job the following week due to his failure to appear for the first half of the day as instructed.
10. The claimant did not appear for work after receiving the text.
11. The following workday, July 31, 2017, the claimant appeared for work in street clothes approximately an hour after his regularly scheduled start time.
12. On July 31, 2017, the claimant was discharged for failing to appear for work on July 28, 2017, as instructed by his employer.

NOTE [Credibility Assessment]:

The November 20, 2017 order of the Board of Review requested the parties to submit:

1) Documentary evidence, such as texts and emails, pertaining to communications between the claimant and the employer about the claimant's request to take time off on July 28, 2017.

2) Documentary evidence, such as payroll records, texts and emails, showing what time off the claimant has taken while employed with the employer.

The sole piece of documentary evidence submitted at the December 29, 2017 hearing has been marked and entered as Remand Exhibit 6. This exhibit documents the July 28, 2017 text communication between the claimant and his foreman. The parties were in agreement that the claimant made no written request to take time off on July 28, 2017, and that no written response to any verbal request was provided. The parties were in agreement that, prior to July 28, 2017, the claimant took time off from work on multiple occasions and that these requests were both made and approved verbally.

The parties provided conflicting testimony regarding whether the claimant made a request to take time off on July 28, 2017 more than 2 days in advance, and whether his request for the day off was approved.

On October 24, 2017, the claimant testified that he had taken no time off from work prior to July 2017. On December 29, 2017, the claimant concurred with the employer's testimony that he had taken time off on multiple occasions to attend to personal matters. The claimant testified that, on or around July 14, 2017, he made a verbal request of the business owner to take off July 28, 2017 and that his request was made in the presence of the foreman. At the remand hearing, however, he acknowledged that the business was closed between July 2, 2017 and July 17, 2017. The claimant acknowledged receiving the text sent to him the morning of July 28, 2017, but testified that he did not know the individual sending the text was considered the foreman or that he would be discharged for failing to appear for work after receiving the communication. If this statement was accurate, it is unclear why the claimant would fail to appear timely and prepared to work the following business day.

Considering multiple inconsistencies in the claimant's testimony, the employer's testimony was more credible.

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, 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 interests, as the review

examiner's consolidated findings of fact support the contrary conclusion regarding the claimant's separation from employment.

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 the employer expected employees to report to work as scheduled, unless they had been approved for time off, and the claimant had complied with this expectation on numerous occasions. The review examiner also found that the claimant requested to have July 28, 2017, off for a family function, but this request was denied by the owner due to business needs. Despite the owner's refusal to give him the day off, the claimant failed to report to work on July 28th. The review examiner premised these findings largely on an adverse credibility determination against the claimant. As we cannot say that this determination was unreasonable in relation to the evidence presented, we will not disturb it. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7 (1996).

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 disregard of the employer's interests when he did not report to work on July 28th, as he has not established any mitigating circumstances to excuse his failure to comply with the employer's expectation that he report to work. See Id. 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 August 5, 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 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.

SVL/rh