

Although the claimant's failure to complete landscaping work could have been attributable to poor performance, the review examiner specifically rejected this view of the evidence. Because the claimant was aware of what he needed to do, he was capable of doing it, but he failed to do it anyway, his conduct rose to deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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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 August 15, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 30, 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 overturned the agency's initial determination and denied benefits in a decision rendered on December 22, 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 allow the claimant an opportunity to testify, as well as to take testimony as to whether the claimant's separation was based on his poor performance, rather than on deliberate misconduct. 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 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 review examiner has found that the claimant was capable of properly performing his work on August 10, 2017, but he failed to do the work properly that day.

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 full-time for the employer, a landscaping company, from May of 2017, to August 15, 2017, as a Laborer.
2. The employer did not have an applicable policy.
3. The [claimant's] regular work schedule was Monday through Saturday from 8:00 a.m. to 5:00 p.m.
4. On June 29, 2017, the claimant was assigned to a job in East Longmeadow, which the claimant reported to be completed when he arrived at the workplace at the end of the day.
5. On July 13, 2017, the Owner went to the job site with a truck of mulch and saw that the job was not completed. The Owner and other employees spent their time completing the job left undone by the claimant and not using the mulch loaded in the truck as intended. The employer returned the next day to complete the mulching job.
6. The June 29/July 13, 2017, event was the first performance incident.
7. The Owner met with the claimant and informed him of his desire to discharge the claimant from employment. The claimant begged for a second chance and the Owner granted it. The Owner stated that he "cannot have it happen again," which the claimant understood.
8. For the next couple of weeks, the claimant performed his work very well, which prompted the Owner to give the claimant a \$0.50 raise and give more responsibility on July 26, 2017.
9. On July 31, 2017, the claimant was tasked with trimming three small trees. The Owner contended that a hand pruner and a medium sized orchard ladder were sufficient. The claimant contended that the equipment was inadequate, which caused the claimant to fail at performing the task to satisfaction. The employer has three orchard ladders of varying sizes, hand pruners, a pole pruner with ten-foot reach, electric trimmers and other equipment available to the claimant, which the claimant used on prior more complex jobs that he performed without any problems.
10. On August 1, 2017, the Owner assigned another employee to perform the task of pruning the trees, which the employer invoiced noting that the job was not done to satisfaction on the prior day and thus, the client was not being charged.

11. On August 7, 2017, the claimant was tasked with weeding, which the claimant failed to complete in a particular area near the client's building.
12. On August 8, 2017, the Owner tasked other employees to complete the job.
13. On August 10, 2017, the claimant was assigned as the Lead on a job site. Prior to the job, the Owner made it clear to everyone that the job was very important because the client was dissatisfied with the work being performed. The claimant was aware that he was to complete the scope of the job, which included constructing two swales. The Owner was on site until approximately 3:30 p.m. When the Owner left, the Owner believed that there was another solid hour or more of work to be done on a second swale; the first being done very well earlier that day.
14. At 4:19 p.m., the claimant returned to the place of business with another employee. The Owner was surprised and asked if the work was done. The claimant stated it was. The other employee smirked, which the Owner observed. The Owner then went to the job site and saw that the work was not complete.
15. The Owner texted the claimant with pictures showing fabric sticking out from the swale and stones on the lawn around the area and not cleaned up as it should have. The Owner stated, "... this is not what I call finished. Fabric sticking out all over. Stones all over the lawn. So you could get out an hour earlier." The claimant responded, "Ohh [sic]. I didn't [sic] know I was supposed to cut fabruc [sic] also don [sic]. Missed some rocks on lawn i [sic] see. So i [sic] failed? Sorry if i [sic] messed up."
16. On August 11, 2017, the claimant was scheduled to begin vacation.
17. On August 15, 2017, the claimant texted the Owner to ask about work the next day. The Owner informed him that he no longer had a job.
18. The claimant performed landscaping work for twenty-eight years primarily in self-employment and in 2016, for a high-end landscaping company for one to two months, which was under-the-table, and which ended in layoff.
19. The Owner considered the claimant very capable and could perform the work satisfactorily as he did in the second half of July of 2017. The claimant also considered himself to be capable.
20. The claimant was actually capable of properly doing landscaping work assigned to him.

[Credibility Assessment:]

The claimant was not credible regarding the final incident, specifically suggesting that he did not know he was supposed to trim the fabric protruding from the swale despite not leaving any fabric protruding from the first swale completed earlier that day. The claimant also suggested that the stones on the lawn were not left there when he left the job site, but this was not reflected in the text messages that same evening. In those messages, the claimant did not argue that he picked up the stones from the lawn as he is contending today, which would be the reasonable reaction on the day of. The claimant only responded, “Missed some rocks on lawn i [sic] see.” The claimant also suggested that he did not have the proper tools to satisfactorily perform the work on an earlier job pruning three small trees. The employer credibly countered stating that he maintains a variety of equipment, which the claimant previously used with success on more difficult pruning jobs.

The claimant’s dishonesty reflects misconduct and not a performance-based issue.

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 credibility assessment and deems them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the review examiner’s initial decision to disqualify the claimant from receiving unemployment benefits is supported by the record.

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 first hearing, at which only the employer offered evidence, the review examiner concluded that the employer had carried its burden. After reviewing the testimony from both the original and the remand hearings, the documentary evidence, and the consolidated findings of fact, we conclude the same.

The focus in this case is on the final incident, which occurred on August 10, 2017. On that day, the employer had a job consisting of constructing two swales for a customer. The owner, the claimant, and at least one other employee completed the first swale together. The claimant was aware that both swales needed to be completed. Consolidated Finding of Fact # 13. When the owner left the job site at about 3:30 p.m., he figured that an hour of work remained. Nevertheless, at 4:19 p.m., the claimant and his co-worker returned to the employer’s place of business. Considering the travel time to the employer’s offices, it was clear that the claimant and

co-worker did not do an additional hour of work at the job site. The owner then went to the job site to view the second swale. He noticed fabric sticking out and stones strewn across a grassy area, both of which indicated that the job had not been completed and that the claimant and co-worker had not cleaned up as they were supposed to have done. In texts with the owner, the claimant expressed some ignorance as to what he was supposed to do and was apologetic. *See Consolidated Finding of Fact # 15.*

The main question presented by the facts of this case is whether the claimant's incomplete and poor work after the owner left the job site on August 10 was due to his incompetence or due to deliberate misconduct. If the claimant tried his best, but his performance still fell below the employer's expectations, then he would not be subject to disqualification. *See Trustees of Deerfield Academy v. Dir. of Division of Employment Security*, 382 Mass. 26 (1980) (termination for unsatisfactory work performance not disqualifying). However, if the claimant has the capability to do the work, knew what he needed to do, and still did not do it, the separation could be attributable to an intentional failure to accomplish the work assigned to him, which would be potentially disqualifying. The Board specifically directed the review examiner to examine and make findings about this issue.

The review examiner has now clarified his view of the events. He found that both the owner and the claimant considered the claimant capable of performing the tasks assigned to him on August 10, 2017. This is supported by the testimony of the parties at the remand hearing. The review examiner specifically did not find the claimant's testimony credible that he did not know what he was supposed to do after the owner left the job site. He pointed to specific evidence in the record to find the claimant not credible. We see no reason to disturb the credibility assessment, including the portion which states that the "claimant's dishonesty reflects misconduct and not a performance-based issue."

Thus, we are left with findings that the claimant was made aware of how important the August 10 job was, the claimant was aware of what he needed to do to complete the job, the claimant asserted that the job was completed when he returned to the employer's place of business faster than anticipated, and the job itself was not complete. The claimant's failure to complete the work, despite knowing what needed to be done, constitutes an act of misconduct. Because the findings indicate that the claimant was capable of doing the work, he had experience in landscaping, and he had witnessed the first swale being completed earlier in the day, we can only infer from these findings that the claimant and his co-worker intentionally did not complete the work.¹ No mitigating circumstances are noted in the findings and, if they were argued by the claimant, the review examiner expressly rejected any assertion that something prevented the claimant from properly doing the work. In short, then, the misconduct was deliberate and done in wilful disregard of the employer's stated interest that the job be done well to please a client who had already been dissatisfied with some of the employer's previous work.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the review examiner's consolidated findings of fact support the original

¹ The review examiner did not state why the claimant would have wanted to not do the work. However, the claimant was set to go on vacation on August 11, 2017. The owner suggested in his testimony that this had something to do with it.

conclusion that the claimant knew what he needed to do on August 10, 2017, he was capable of doing the work, he did not do the work, and nothing prevented him from doing it.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning August 13, 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 27, 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