The claimant consumed alcohol before his shift because he erroneously believed that he was not scheduled to work that day. Where he reported to his workplace in order to speak to his supervisor about his inability to work his shift, and did not intend to actually perform any job duties, his discharge was not deliberate misconduct under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0022 9715 71

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 reverse.

The claimant was discharged from his position with the employer on September 11, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 5, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on February 9, 2018. 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 make subsidiary findings from the existing record. 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 decision, which concluded that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where the claimant reported to his job site while intoxicated, but was initially unaware that he was scheduled to work that day, and did not intend on performing work because of his intoxication.

Findings of Fact

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

1. The claimant worked full time as a warehouse selector for the employer, a food distributer, from August 2016 until September 11, 2017.

2. The claimant worked Sunday, Monday, and Wednesday through Friday, 6:30 p.m. until 3:30 a.m. The claimant did not work on Saturdays and Tuesdays.

3. As part of the claimant's job duties he was responsible for operating heavy machinery.

4. The employer maintains an "Alcohol and Drug Abuse Policy," the exact wording of the policy is unknown.

5. The employer expects that employees will not report to work under the influence of alcohol. The employer's expectation is a means to ensure employee safety.

6. If an employee is suspected of being under the influence of alcohol, the employer may request that the employee submit to a breathalyzer test.

7. The claimant was made aware of the employer's policies and expectations during orientation and safety training.

8. During his employment, the claimant received a final warning for attendance violations. The claimant believed that he would be discharged if he missed work after receiving the final warning.

9. As of September 3, 2017, the claimant had used all of his sick time.

10. The claimant was out of work on a scheduled vacation from September 3, 2017 until September 9, 2017. However, the claimant believed that his vacation included September 10, 2017 and he requested to take a personal day on September 11, 2017.

11. On September 9, 2017, the claimant consumed alcohol into the early hours of Sunday, September 10, 2017. At that time, the claimant was unaware that he was scheduled to work on September 10, 2017.

12. The claimant continued to consume alcohol while watching football with his family on September 10, 2017. At the time he consumed alcohol, the claimant was unaware that he was scheduled to work at 6:30 p.m. that evening.

13. Later on September 10, 2017, the claimant became aware that he was scheduled to work after checking his work schedule.

14. The claimant asked a friend to drive him to work on September 10, 2017. Usually, the claimant received a ride to and from work from a friend because he did not have a license.

15. The claimant reported to work to avoid another attendance violation because he knew he had no more available sick time. The claimant did not intend to perform any work on September 10, 2017 because he was under the influence of alcohol and knew that he could not perform his job duties.

16. On September 10, 2017, the claimant was 15 minutes late to work. When the claimant arrived, he went directly to the supervisor's office to report that he was "not feeling well." He expected to be sent home for the day. Had the employer not sent the claimant home, he was not willing to perform his duties because he understood it would be a violation of the employer's safety rules.

17. The supervisor smelled alcohol on the claimant and asked him if he had been drinking. The claimant denied drinking alcohol because he knew it was bad to report to work intoxicated.

18. The supervisor asked the claimant to submit to a breathalyzer test, the claimant agreed.

19. The breathalyzer test was administered at the employer's location. The employer's safety manager administered the breathalyzer test. The test showed the claimant had a 1.3 blood alcohol content (BAC).

20. The supervisor instructed the claimant to have someone come and pick him up from work.

21. On September 11, 2017, the warehouse manager discharged the claimant via telephone, for reporting to work under the influence of alcohol in violation of the employer's alcohol and drug abuse policy.

22. The claimant is not an alcoholic.

23. The claimant filed a claim for unemployment benefits on September 12, 2017, with an effective date of September 10, 2017.

CREDIBILITY ASSESSMENT

The claimant's testimony that he did not know he was scheduled to work on September 10, 2017 is accepted as credible. The claimant testified that he believed his requested vacation included September 10, 2017. Although it is unknown why the claimant was under this impression, the claimant's testimony on this issue was consistent. However, the claimant's testimony as to the amount of alcohol consumed on September 10, 2017 is not credible. The claimant testified that he drank alcohol until 2:00 am on September 10, 2017 and later in the day consumed only 1 or 2 beers. However, the claimant admitted to having a 1.3 BAC as indicated on a breathalyzer test administered after 6:30 pm. Given the claimant's BAC and

the span of time in which the claimant alleged he consumed alcohol, the claimant's testimony on this point is not 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant had the requisite state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2),

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 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 provision of the statute, the question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979). It is the employer's burden to establish that the claimant engaged in the alleged conduct, that such conduct violated either a written, uniformly enforced rule or a reasonable expectation so as to constitute misconduct, and that the claimant's actions were intentional. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996). As the employer failed to appear at the hearing or present a written rule or policy, it cannot be said that his discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The claimant was discharged for reporting to work under the influence of alcohol. The claimant freely acknowledged that, on September 10, 2017, he reported to the workplace while intoxicated. However, the analysis does not end there. In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). Specifically, 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." Garfield, 377 Mass. at 97.

In analyzing the claimant's state of mind in reporting to work under the influence of alcohol, his behavior can be broken down into two separate decisions. First, the claimant made the decision to consume alcohol on September 10, 2017, and then the claimant made the decision to report to work later that evening. The consolidated findings make clear that, at the time he consumed the alcohol, the claimant erroneously believed he was not scheduled to work that evening. As such, it cannot be concluded that the claimant's decision to become intoxicated before his shift was deliberate and in wilful disregard of the employer's interest. The consolidated findings also make clear that, in reporting to his place of employment that evening, the claimant did not actually intend to work his scheduled shift. Rather, the claimant apparently believed that it would be better to report to work than it would be to call out absent. Upon arriving at work, the claimant did not perform any job duties but instead reported immediately to his supervisor in order to explain that he was unable to work. In light of this, it cannot be concluded that the claimant's decision to report to work intoxicated was deliberate and in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant's discharge was not 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 within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 16, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

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.

JRK/rh