Directive to submit to a Fitness for Duty examination based solely upon using an over-the-counter hemp based cream to relieve chronic knee pain was unreasonable, where the product did not contain THC, claimant's job performance was unaffected, and her behavior was normal. Claimant's discharge for refusing to take the exam was not disqualifying under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0023 4482 89

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 affirm on different grounds.

The claimant was discharged from her position with the employer on October 30, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 1, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 3, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not knowingly violate a reasonable and uniformly enforced employer policy or engage in deliberate and wilful misconduct when she refused to submit to a Fitness for Duty Examination, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer, a hospital, as an RN/Case Manager from 1999 until October 30, 2017 under the business' current management.

2. The employer maintained written policies regarding drug/alcohol testing and refusal to cooperate with fitness for duty exams.

3. The policies stated that an employee's refusal to cooperate with a requested Fitness for Duty Examination, to consent to a blood, breath or urine test, or to appear for a test when requested may result in corrective action up to and including termination. If a "reasonable suspicion" urine or blood test showed the presence of alcohol or illicit drugs, the employee would be placed in an approved rehabilitation program through the employer's EAP and granted a medical leave of absence if necessary.

4. The policies also indicated that diversion, theft, or dispensing or [sic] drugs or any medical equipment or supply without proper authorization; as well as unauthorized possession, buying or selling drugs, alcohol or other controlled substances during work time or on employer property, resulted in immediate termination.

5. The policies served to ensure a safe and healthy environment for patients and staff and to ensure staff members maintained the clarity of mind necessary to provide proper patient care. The claimant signed for receipt of the policies on November 15, 1999.

6. On October 16, 2017, the claimant informed her manager that she had been using a topical hemp product on her knee to help relieve chronic pain.

7. The claimant purchased the product over the counter at a physical therapy supply retailer and had used it for several weeks prior to October 16, 2017. The claimant did not believe that her use of the cream would be unacceptable because it was purchased over the counter, was recommended by her rheumatologist, did not contain THC, and did not impact her mental status in any way.

8. The product was manufactured using CBD, a derivative of the cannabis plant that is often used for its pain relieving properties. The compound causes no psychoactive effects.

9. The manager expressed that she had concerns regarding the claimant's use of what she understood to be a cannabinoid product while at work. In return, the claimant texted her pictures of the container's packaging (Ex. 18) which stated "THC Free".

10. On October 18, 2017, the manager requested that the claimant accompany her to employee health and the claimant agreed.

11. The manager was concerned that the claimant may be under the influence of a marijuana-like substance and wished for her to undergo a Fitness for Duty Examination.

12. Upon arrival at employee health, the claimant learned that she was expected to complete a Fitness for Duty Exam.

13. She was confident that she would pass a drug/alcohol screen but questioned the reason she was required to submit to the test. The claimant did not believe there was a valid reason for requiring a Fitness for Duty exam and she requested consultation with her union representative.

14. The manager notified the claimant that if she refused the exam, it would [be] treated as if she had returned a positive drug/alcohol screen.

15. Upon her arrival, the union representative reviewed the policies that were provided to the claimant regarding substance abuse and fitness for duty examinations.

16. She pointed out that, per the claimant's union contract, no nurse may be disciplined except for just cause. The union rep expressed that she did not see good cause for disciplinary action or discharge, and she instructed the claimant not to proceed with the drug/alcohol screen until she consulted with the union board. The group of union reps agreed there was no good cause for the claimant to submit to the Fitness for Duty Exam, and the claimant was again instructed not to proceed.

17. The claimant was placed on administrative leave from October 18, 2017 until October 30, 2017 while the employer considered appropriate next steps.

18. Effective October 30, 2017, the claimant was discharged for failing to submit to a Fitness for Duty Examination on October 18, 2017.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, while we believe that the review examiner's findings of fact support the conclusion that the claimant is eligible for benefits, we conclude so on different grounds than those relied on by the review examiner in her decision.

Because the claimant was terminated from her employment, her 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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered exceptions or defenses to an eligible employee's right to benefits, and the burden of production and persuasion rests with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). To be a knowing violation at the time of the act, the employee must have been ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Id. at 813. 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). Deliberate misconduct alone is not enough. Such misconduct must also be in "wilful disregard" of the employer's interest. "Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted).

In her decision, the review examiner concluded that the claimant lacked the requisite state of mind, because, at the time the claimant refused to take the Fitness for Duty Examination (hereinafter, "fitness examination"), she had no reason to believe this refusal would lead to disciplinary action. However, the review examiner's conclusion in this regard is based upon a legal error. As grounds for her conclusion, the review examiner first cites the fact the employer ultimately did not treat the claimant as if she had returned a positive drug screen, as the claimant's manager had initially indicated. That the employer would later decline to do so could not have been known to the claimant at the time she refused to take the fitness examination. Consequently, this fact cannot serve as part of the basis for a conclusion as to the claimant's state of mind at the time of the refusal.

The second basis cited by the review examiner for her state of mind conclusion is the union's assurance to the claimant that the employer lacked good cause to administer the fitness examination. The union may have believed the employer would have no good cause to discipline the claimant for refusing the fitness examination. However, given the employer's clear directive that refusal would result in discipline, the claimant had to have understood that this was a possibility, even if the union would have supported her in grieving any discipline imposed. *See* Finding of Fact # 14. Instead, we believe the dispositive issue in this case is whether the employer's directive was reasonable.

Pursuant to the employer's policies, the claimant had to submit to the fitness examination if the employer reasonably suspected the claimant was not fit to perform her job duties. The findings and record before us, however, do not establish that the employer possessed the reasonable suspicion required to compel the claimant's submission to the fitness examination. The review

examiner found that, on October 16, 2017, the claimant advised the employer she was using an over-the-counter hemp based cream to relieve her chronic knee pain. The review examiner also found that the product, which was manufactured using a cannabis plant derivative, had no psychoactive effects and that the claimant was using the product at the recommendation of her rheumatologist. When the claimant's manager expressed concern about the claimant's use of the product, the claimant texted the manager a picture of the product packaging stating the product was "THC free.[1] Two days later, the claimant was told she needed to complete a fitness examination. The relevant employer policy provides that before a manager may require an employee to submit to a fitness examination, the manager needs to complete a "Fitness for Duty Visual Observation Checklist". (Exhibit 11, page 2.) Such a checklist was prepared relative to the claimant. Two of the employer's managers signed this checklist, (*see* Exhibit 16) and the claimant was deemed to be "normal" for each of the relevant behavioral characteristics observed by the two managers.[2]

Thus, at time the claimant was required to submit to the fitness examination the employer knew the following: 1) the claimant had been using a topical hemp based cream, which did not contain THC; 2) she had performed her job duties without incident; and, 3) she was exhibiting normal behavior. Under these circumstances, we do not believe the employer could have reasonably suspected there were any illicit drugs in the claimant's system. Its directive that the claimant submit to a fitness examination was, therefore, unreasonable.

We, therefore, conclude as a matter of law that the claimant's refusal to follow an unreasonable directive issued by the employer does not constitute either a knowing violation of a reasonable policy or deliberate and wilful misconduct within the meaning of G.L. c. 151A § 25(e)(2).

[1] THC is Tetrahydrocannabinol, the principal psychoactive constituent of cannabis.

[2] While Exhibit 16, the Fitness for Duty Assessment Manager Visual Observation Checklist, is not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending November 4, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 2018

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

PTF/rh