Employer's directive to provide proof that the claimant had requested a new Green Card for continued employment, where the employer had a copy of his old one, was unreasonable. The request was prohibited by the USCIS, because lawful permanent residents have permanent work authorization in the United States, even after their Green Cards expire. Claimant may not be denied benefits under G.L. c. 151A, § 25(e)(2), for failing to comply with an unreasonable expectation.

Board of Review
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Issue ID: 0024 3279 66

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant was discharged from his position with the employer on January 3, 2018. He filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA), which was denied in a determination issued on February 6, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, a review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 30, 2018.

The employer appealed the hearing decision to this Board. Following a review of the record and pursuant to our authority under G.L. c. 151A, § 41, we remanded the case for further evidence regarding the claimant's failure to produce his Permanent Resident Card (Green Card). Only the employer attended the remand hearing, and the review examiner issued new consolidated findings of fact. Based upon these new findings, the Board rendered a decision on July 30, 2018, to disqualify the claimant from receiving benefits pursuant to G.L. c. 151A, § 25(e)(1). However, on August 7, 2019, we issued an order to revoke our final decision for reasons discussed below. We now affirm the review examiner's original decision to award benefits.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was eligible for benefits under G.L. c. 151A, § 25(e)(2), was supported by substantial and credible evidence and is free from error of law, where the employer discharged the claimant due to his failure to comply with an unreasonable, and possibly unlawful, directive to reverify an expired Green Card.

Findings of Fact

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

1. On December 14, 2002, the U.S. Department of Justice Immigration and Naturalization Service granted the claimant Legal Permanent Residency in the United States and issued him a "Permanent Resident Card" (Green Card) with an expiration date of December 24, 2012.

2. On an unknown date, prior to the December 24, 2012 expiration date, the claimant renewed and was issued a new Green Card that expired around December 2020.

3. The claimant previously worked for the employer, a retail store, during an unknown period of time.

4. The employer rehired the claimant in January 2017 and [he] worked as a claims associate for the employer until January 3, 2018, when he was discharged.

5. At the time the claimant was rehired, he was not required to provide his Green Card because the employer had it in their record from his previous employment period.

6. On an unknown date in 2017, the claimant lost his Green Card. He did not request a replacement Green Card at the time because he did not intend to leave the country and did not believe he needed it for another reason at the time.

7. On an unknown date in November 2017, the PC received notification from the employer's human resources department that the claimant's Green Card was not valid. The PC told the claimant to produce his Green Card to show the expiration date and the claimant told him he lost it.

8. On an unknown date, the PC told the claimant to apply for a replacement Green Card, provide the employer with the receipt that he had applied for his replacement Green Card and he would indicate in the employer's system that a replacement Green Card had been applied for.

9. Shortly after the claimant spoke with the PC, he contacted the United States Customs and Immigration Services (USCIS) and requested a new Green Card. USCIS scheduled the claimant an appointment to its Boston office in February 2018.

10. On unknown dates in December 2017, the PC asked the claimant if he had his Green Card. Each time, the claimant told the PC he did not have his Green Card.

11. The claimant did not provide the employer with the appointment notice from the USCIS for an unknown reason.

12. On January 2, 2018, the claimant arrived to work, was called into the PC's office and was told if he failed to provide his Green Card by January 3, 2018, he would be terminated.

13. On January 3, 2018, the PC terminated the claimant for failing to provide a valid Green Card.

14. In March 2018, the claimant's Green Card that expired on December 24, 2012, was extended until March, 2019.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Findings ## 2 and 14 provide conflicting expiration dates for the claimant's renewed Green Card. However, this date is not material to our decision.[1] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we now agree with the review examiner's legal conclusion that the claimant is eligible for benefits, but we do so on different grounds.

The first question is whether to analyze the claimant's separation from employment under G.L. c. 151A, § 25(e)(1), as voluntary, or under G.L. c. 151A, § 25(e)(2), as involuntary. In our original decision, we concluded that the claimant should be disqualified under subsection 25(e)(1), because he voluntarily brought his own unemployment on himself when he failed to present the employer with evidence that he had applied for a replacement Green Card. In that decision, we did not consider whether the employer's request to produce that evidence was reasonable in the first place.

It is apparent that the directive was the employer's endeavor to fulfill its immigration law obligations. The U.S. Citizenship and Immigration Service (USCIS) administers the federal immigration law under the U.S. Department of Homeland Security. In this role, the USCIS provides employers with instructions for ensuring that they employ individuals who are lawfully authorized to work in the United States. In most instances, employers must reverify a worker's employment authorization if the worker's employment authorization document expires.[2] However, these same instructions expressly provide that employers are *not* to reverify Permanent Resident Cards after they expire.[3] The practice may also constitute an unfair immigration related employment practice. *See* 8 U.S.C. §1324b.

[1] We also note that the review examiner refers to the "PC" in Consolidated Findings ## 7-10, 12, and 13 without identifying who it is. Nonetheless, we can reasonably infer from these findings that this was an individual who worked for the employer with authority to discharge the claimant. *See* Consolidated Finding # 13.

[2] USCIS *Handbook for Employers: Guidance for Completing Form I-9 (Employment Verification Form) (M-274)*, available at https://www.uscis.gov/i-9-central/51-reverifying-employment-authorization-current-employees (Last updated 7/17/2017).

[3] Id.

In the present case, the review examiner found that the claimant had been granted Legal Permanent Residency in 2002 and was issued a Permanent Resident Card, more frequently referred to in the findings as a Green Card. Consolidated Finding # 1. At some point before 2017, he had previously worked for the employer's retail store. *See* Consolidated Finding # 3. According to Consolidated Finding # 5, the claimant was not required to produce his Green Card when rehired, because the employer had a record of it from his previous employment. We can reasonably infer from this finding that, at the time of the initial hire, the claimant presented his non-expired Green Card to the employer. Since the employer had already been provided with documentation showing that the claimant was a Lawful Permanent Resident, it should not have asked him to produce it again in November, 2017. The request is prohibited by the federal government's Form I-9 and E-Verify rules. [4]

In her original decision, the review examiner concluded that the claimant was involuntarily discharged and that he was not disqualified under G.L. c. 151A, § 25(e)(2). We now agree. This provision states, 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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

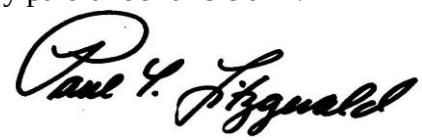
In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state 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." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted). Here, the employer made its expectation clear when the claimant was told that, if he failed to provide his Green Card by January 3, 2018, he would be terminated. Consolidated Finding # 12. But, as explained above, this expectation was not reasonable because it was prohibited by the USCIS and may have been unlawful. For this reason, the claimant may not be denied unemployment benefits for failing to comply.

We, therefore, conclude as a matter of law that the claimant's separation from employment was an involuntary discharge. We further conclude that the discharge was not due to behavior that

[4] As noted above, it may also have violated the Immigration and Naturalization Act's anti-discrimination provision, 8 U.S.C. § 1324b. *See* U.S. v. Isabella Geriatric Center, 31 NY.J.V.R.A. 9:10, 2014 WL 5463541 (N.Y. Sup. Aug. 5, 2014) (alleged practice of requiring lawful permanent resident employees to present a new Permanent Resident Card when their prior card expired "is prohibited by Form I-9 and E-Verify rules, as lawful permanent residents have permanent work authorization in the United States, even after their Permanent Resident Cards expire.").

constituted 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 entitled to receive benefits for the week beginning December 32, 2017, and for subsequent weeks if otherwise eligible. The claimant is not responsible for returning any benefits already paid under this claim.



BOSTON, MASSACHUSETTS
DATE OF DECISION - August 20, 2019

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.

AB/rh