

Corroborated employer testimony showed that it discharged the claimant for possessing a bottle of whiskey at work and not due to a work slowdown. Held the claimant was ineligible for benefits under G.L. c. 151A, § 25(e)(2), due to a knowing violation of a uniformly enforced policy.

**Board of Review
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Issue ID: 0024 6168 36

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 September 23, 2016. He re-opened an existing claim for unemployment benefits with the DUA. Subsequently, the DUA issued a determination on March 27, 2018, to deny benefits as a result of this separation from employment. 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 May 4, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 obtain further evidence pertaining to the reason for the claimant's discharge. Only the employer 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 original decision, which concluded that the claimant was entitled to benefits because he was laid off, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand reveal that the claimant was not laid off, but fired for possession of alcohol at work.

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 as a Warehouse Specialist for the employer, a solar panels company, from 01/27/16, until 09/23/16. The claimant's rate of pay was \$15.00 per hour.
2. The employer has a written Drug and Alcohol Abuse Policy that prohibits: "Possession or use of alcohol, or being under the influence of alcohol while on the job."
3. The claimant electronically signed off on receipt of the policy upon hire.
4. The purpose of the Drug and Alcohol Abuse Policy is to ensure a safe working environment.
5. The Drug and Alcohol Abuse Policy states: "Violation of these rules and standards of conduct will result in disciplinary action, up to and including termination, and may result in such matter being brought to the attention of appropriate law enforcement authorities."
6. On or about 09/21/16, a bottle of whiskey was discovered in an area of the warehouse where the employer stored deadstock.
7. Only the claimant and the Warehouse Lead had access to the area where the bottle of whiskey was found.
8. The employer questioned both employees separately and they both denied knowledge of the bottle of whiskey.
9. Subsequent to being questioned, the claimant emailed the Regional Manager and admitted to bringing the bottle of whiskey to the place of employment.
10. The Regional Manager met with the claimant again and the claimant acknowledged he brought the bottle of whiskey to the place of employment.
11. The Regional Manager discussed the matter with the Human Resources Representative; they determined the incident warranted discharge because the claimant's actions were a "safety risk" for the business.
12. On 09/23/16, the Regional Manager discharged the claimant for possessing alcohol at work.
13. On 10/02/16, the claimant reopened his unemployment claim.

[Credibility Assessment:]

The claimant did not attend the June 25, 2018, remand hearing. At the initial hearing which the employer did not attend, the claimant testified that he was laid off work due to a business slowdown. The Regional Manager provided clear and direct testimony at the remand hearing that the claimant was discharged for violating the employer's Drug and Alcohol Abuse Policy for admittedly bringing a bottle of whiskey to work and that he was notified when discharged of this reason. The documentary evidence submitted by the employer corroborated the Regional Manager's testimony. In the present case, the employer's testimony is found more reliable and the claimant's testimony is found 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, based upon the new findings after remand, we reject the legal conclusion in the review examiner's original decision that the claimant was entitled to unemployment benefits, as outlined below.

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

“[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).

Without the employer's participation at the original hearing, the review examiner relied upon the claimant's testimony that he lost his job with the employer due to a slowdown in business.¹ In other words, she concluded that he was laid off. Based upon these facts, her original decision to award benefits under G.L. c. 151A, § 25(e)(2), was appropriate.

¹ See Finding of Fact # 2 in the review examiner's original decision. Remand Exhibit # 1.

However, upon hearing testimony from the employer's manager at the remand hearing, the review examiner has now rejected the claimant's version of events. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless her assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). As noted in her credibility assessment, documentary evidence corroborates the employer's testimony. The findings based upon this assessment are, therefore, reasonable in relation to the evidence presented.

Consolidated Finding # 12 states that the employer fired the claimant for possessing alcohol at work. The employer has established that it has a policy which prohibits possession of alcohol on the job. *See* Consolidated Finding # 2. The policy is self-evidently a reasonable safety precaution for an employer that operates a warehouse. *See* Consolidated Finding # 4. During the remand hearing, the employer also offered unchallenged testimony that any employee caught with alcohol would be out.² Thus, the policy appears to have been uniformly enforced. Finally, the claimant admitted to being the one who brought the bottle of whiskey into work. *See* Consolidated Finding # 9.

The employer has also shown that the claimant was aware of the policy, as he acknowledged receiving a copy of it at hire. *See* Consolidated Finding # 3. However, 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." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996). In other words, the violation must not have been accidental. Exhibit # 9 is an email from the claimant. In his own words, he explains that he took the whiskey bottle from his wife's car when she dropped off lunch and placed it in the warehouse. In our view, this demonstrates conscious behavior, not an accident. Since the claimant had recently signed off on the policy when hired earlier in the year, it is not likely that he forgot about the work rule. Because he failed to appear at the remand hearing to provide any further explanation for bringing the whiskey onto the employer's premises, the only reasonable inference is that he did so knowingly in violation of the employer's alcohol policy.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant knowingly violated a reasonable and uniformly enforced employment policy within the meaning of G.L. c. 151A, § 25(e)(2).

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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 reversed. The claimant is denied benefits for the week beginning September 18, 2016, 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 – August 24, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

AB/rh