

0025 3567 20 (Jan. 14, 2019) – Although the claimant was told that she was scheduled to attend a training, and she did not attend the training or notify the employer that she was not going, she is not disqualified under G.L. c. 151A, § 25(e)(2), because the review examiner found that she simply forgot. Her misconduct was not deliberate.

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Issue ID: 0025 3567 20

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.

The claimant was discharged from her position with the employer on March 22, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 15, 2018. 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 June 30, 2018.

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, 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 accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide evidence. Only the employer attended the remand hearing.¹ 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 conclusion that the claimant is not 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

¹ The Board initially remanded the matter in August of 2018. However, the employer defaulted at the remand hearing. After responding to the Board's Notice of Order to Show Cause for Failure to Prosecute, the Board remanded the case again to allow the employer a chance to participate. The hearing was then held on October 19, 2018. The case was returned to the Board on January 2, 2019.

claimant did not attend a scheduled training because she forgot about it and was busy taking care of her daughter.

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 as a per diem direct care personnel for the employer, an independent living center, from August 2015 until March 24, 2018.
2. As a per diem employee, the claimant is not provided with a regular work schedule. The claimant is allowed to pick up open shifts when available. The claimant was able to work at the employer's various locations.
3. The employer maintains an attendance policy. The exact wording of the employer's attendance policy is unknown.
4. The employer expects all employees to notify it, via the central phone line, if they are going to be absent from work and/or scheduled trainings.
5. The employer maintains a progressive disciplinary system, the steps of which include: verbal warning/supervision, 1st written warning, 2nd written warning and 3rd written warning with a suspension pending an employment hearing which may result in discharge depending on the employee's disciplinary history. The employer does not discharge all employees who have accumulated 3 written warnings.
6. On December 17, 2015, the claimant received a verbal warning for failing to follow the employer's call out procedures. The claimant was informed that in the event of an absence she must contact the employer through its central phone line.
7. On January 14, 2016, the claimant received a written warning for failing to attend a scheduled training on January 11, 2016. The claimant informed the employer that she did not remember having a training on that day.
8. On September 8, 2016, the claimant received a 2nd written warning for failing to report an accident while using the employer's vehicle. The warning stated any further occurrences would result in immediate suspension without pay pending hearing with the possibility of termination.
9. On July 21, 2017, the claimant received a 3rd written warning and was suspended without pay after allowing two of her required certifications to expire. The claimant was suspended until she renewed the certifications.

10. In or around early 2018, the employer planned to host a medication administration program training (the “training”). The employer worked with one of its employees, who was going to teach the training, to plan and schedule the dates and time of the training.
11. The employer has a limited number of spaces available during its trainings. The employer turns away employees from participating in its trainings once capacity is reached.
12. On February 15, 2018, the claimant asked the human resources (HR) coordinator for the dates of the training. A few days later, the HR coordinator advised the claimant that the training would be held on March 9th, 11th and 12th, from 10 a.m. – 4 p.m. Thereafter, the claimant confirmed she would be attending the training.
13. The employer expected that the claimant would not pick up any shifts which conflicted with the training.
14. The claimant failed to attend the training or notify the employer of her absence from the training on March 9, 2018.
15. On March 9, 2018, the claimant worked for the employer in its [Town A], MA location from 5 p.m. – 11 p.m.
16. The claimant failed to attend the training or notify the employer of her absence from the training on March 11th and 12th. The claimant did not work on March 11th or 12th.
17. The claimant did not attend the training on March 9th, 11th and 12th because she forgot about it and was busy with other obligations.
18. On March 19, 2018, the claimant received a written warning for failing to attend the training. The claimant was also suspended pending an employment hearing.
19. On March 22, 2018, the HR coordinator met with the claimant to discuss the March 19, 2018 written warning. The claimant told the HR coordinator she missed the training because she forgot and was busy with her daughter.
20. The employer discharged the claimant on March 22, 2018, for accumulation of disciplinary memos and missing the training without proper notice or explanation. In a termination letter sent to the claimant, the HR coordinator indicated in part, “Based on the accumulation of disciplinary memos and your explanation at your employment hearing, I have decided to terminate your work effective March 22, 2018.”

21. The claimant filed a claim for unemployment benefits effective April 22, 2018.

Credibility Assessment:

In this case, there is no dispute over the fact that the claimant failed to attend a training. The claimant's failure to attend the training led to a final warning and subsequent employment hearing which ultimately resulted in the claimant's discharge. While both parties offered direct testimony regarding the circumstances which led to the claimant's discharge, due to attendance neither party was subject to cross examination. During the first session, the claimant testified that she was not aware of the dates of the training. The claimant indicated that sometime in October 2017 she registered for the training and at that time no dates were given. The claimant's explanation that she was allowed to register for a training for which dates were [sic] given is not credible. During the remand hearing, the HR coordinator testified that the claimant was aware of the dates of the training. The HR coordinator specifically testified that on February 15, 2018, the claimant asked for the dates of the training and thereafter, she personally provided the claimant with the dates. The claimant's testimony is further discredited by the supporting evidence in the record. The claimant testified that during her employment hearing, she also informed the HR coordinator she was not aware of the training date. The HR coordinator testified that the claimant did not allege she was unaware of the date but rather stated she forgot about the training and was busy with her daughter. The claimant has a history of forgetting about trainings as indicted [sic] in the January 14, 2016 written warning. In addition, in the termination letter sent to the claimant, the HR coordinator refers to the claimant's "explanation" given during the March 19th meeting and "outside commitments." It does not make sense for the HR coordinator to mention outside commitments unless something of that nature, such as the claimant's daughter, was discussed. Based on the above, I find the HR coordinator's testimony as to the claimant's knowledge of the dates of the training to be more credible than the claimant's testimony.

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 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. As discussed more fully below, we conclude that the employer has not shown that the claimant is subject to disqualification.

The parties agreed that the employer discharged the claimant after she failed to attend a training held in early March of 2018. 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

Under this statutory provision, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Following the first hearing, the review examiner concluded that the employer had not carried its burden. After reviewing the entire record, including the testimony from the remand hearing and the consolidated findings of fact, we agree with the review examiner's decision.

The employer discharged the claimant "for accumulation of disciplinary memos and missing the training without proper notice or explanation." Consolidated Finding of Fact # 20. Although the claimant had several prior warnings for various infractions, *see* Consolidated Findings of Fact ## 6–9, the final event which immediately preceded the claimant's discharge was her failure to attend a training scheduled for March 9, 11, and 12, 2018. But for the missed training, the claimant would have continued to work for the employer. Therefore, our focus in this matter is on the final incident which led to the discharge, namely, the missed training.

Although the employer's witness testified to an attendance policy, the policy was not provided to the review examiner. *See* Consolidated Finding of Fact # 3. Without the policy in the record, we conclude that the employer has failed to show that the claimant knowingly violated a reasonable and uniformly enforced policy or rule. The question then becomes whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As noted in the review examiner's credibility assessment, there was some dispute as to whether the claimant was informed about the dates of the training. At the first hearing, the claimant testified that she did not attend the training, because she had never been notified of the exact dates. During the remand hearing, the employer's witness testified that she had personally told the claimant the dates of the training. The review examiner believed the employer's testimony on this point. We see no reason to disturb the review examiner's findings on this issue. Thus, the employer's expectation was made clear to the claimant: she was to attend the training on March 9, 11, and 12. *See* Consolidated Finding of Fact # 12. Although informed of the dates of the training, the claimant did not attend it and did not notify the employer that she was going to be absent. Consolidated Findings of Fact ## 14 and 16.

The dispositive factor in this case is whether the claimant had the state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2). 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). The claimant testified that she was unaware of the dates of the training. Because she was not aware of the dates of the training, the review examiner concluded that the claimant could not have deliberately engaged in the alleged misconduct. However, the review examiner has now found, based on the employer's testimony, that the claimant informed the employer that she did not attend the training, because she forgot and was busy with her daughter. *See Consolidated Finding of Fact # 19.* Although the review examiner was not required to find that the claimant's alleged excuse was true,² she did, in fact, find that this was why the claimant did not attend the training. *See Consolidated Finding of Fact # 17.* Since the claimant forgot about the training, we cannot conclude that she intentionally, or deliberately, did not attend it. We further note that the claimant worked on March 9, 2018, a day when she was supposed to attend the training. It is unlikely that the claimant was willfully disregarding the employer's interests if she worked on March 9. The sequence of events supports the review examiner's view that the claimant probably forgot about the training in light of other things going on in her life. Given these facts, the employer has not shown that the claimant had the deliberate and wilful state of mind necessary for disqualification.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits is supported by substantial and credible evidence in the record, because, although the claimant did not attend a scheduled training or notify the employer that she was going to be absent, she did not possess a disqualifying state of mind for purposes 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 March 18, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – January 14, 2019



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.

² After all, the claimant's explanation at the first hearing was entirely different.

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