

The claimant did not provide any mitigating circumstances to excuse his refusal to comply with the employer's expectation that he meet with the employer in person as part of the employer's investigation into a code of conduct violation.

**Board of Review
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Issue ID: 0025 8548 92

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 separated from the employer on June 16, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 29, 2018, pursuant to G.L. c. 151A, § 25(e)(1). 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 under G.L. c. 151A, § 25(e)(2), in a decision rendered on August 16, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged from his employment, and he did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate 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 initially remanded the case to the review examiner to give the employer an opportunity to testify and provide other evidence. Only the employer participated in that hearing. Subsequently, we remanded the case a second time to get clarification on the communications between the claimant and his manager. Both parties participated in the second remand hearing, but only the employer participated in the continued remand hearing, which is when the Board's remand questions were asked. Thereafter, the review examiner issued his 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 was discharged from his employment for non-disqualifying reasons, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings establish that the claimant failed to meet with the employer after he was warned that such failure could lead to his termination from employment.

Findings of Fact

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

1. The claimant worked for the employer, a telecommunications company, from March of 2010 to June 16, 2018, as an In-Home Service Representative.
2. On June 4, 2018, the claimant's immediate Manager (the Integration Services Manager)(hereinafter "Manager") informed the claimant that he was being suspended. The Manager informed the claimant that it was to investigate a code of business conduct violation. The Manager did not provide further explanation to the claimant.
3. The employer in fact began an investigation into fraud/theft, but kept the specific information from the claimant in order to preserve the integrity of the investigation.
4. The claimant set up multiple accounts and lines within the accounts, with each line getting the newest iPhone, but no usage occurred on any of the lines within the accounts, which alerted the employer. The employer estimated that \$40,000.00 worth of equipment was associated with the accounts and, thus, was missing.
5. The claimant made inquiries or attempted to make inquiries about his status. When communication between the claimant and Manager did occur, the Manager always referred the matter as being up to upper management or "leadership" and said he was "still waiting."
6. On June 7, 2018, the claimant was informed of a meeting to take place on June 11, 2018 at the main office in [Town A], which was for the purposes of conducting an investigation. The claimant was informed that the meeting could lead to dismissal, but was not informed about the specific nature of the meeting. The claimant stated that he could not meet in [Town A]. The Manager offered to meet at any of the employer's retail locations. The claimant stated that he did not feel comfortable meeting in person and that he would meet by telephone.
7. The Manager informed the claimant that if he did not meet, his failure to do so could result in his dismissal.
8. On June 11, 2018, the claimant, who was in possession of a company car (and other equipment valued at approximately \$10,000.00), dropped the company car off at a retail store and let his Manager know he could pick it up. The claimant did not attend any meeting.
9. The claimant texted the Manager at 1:11 p.m. inquiring about his status.

10. At 4:33 p.m., the claimant's Manager replied stating that he was "still waiting for leadership." The Manager said nothing about returning to work after June 11, 2018 or that any change in his status occurred.
11. On June 15, 2018, the claimant's immediate Manager sent a letter certified mail to the claimant stating that he was suspended on June 4, 2018 pending an investigation into a Code of Business Conduct violation, that on June 7, 2018 the Manager contacted the claimant by phone directing the claimant to report to the office on June 11, 2018 to be interviewed, and that because the claimant failed to go to the office on June 11, 2018 and report to work on June 12 and 13, 2018, the employer considered the claimant's behavior to be a voluntary resignation effective June 16, 2018.
12. The employer considered the claimant's failure to meet on June 11, 2018 as the precipitating factor for termination, but that it waited a couple of extra days (June 12 and 13, 2018) to see if there was going to be any effort on the claimant's part to reach out to the employer to arrange to meet and be interviewed. Had the claimant agreed to meet on June 11, 2018, the claimant might have been allowed to work after June 11, 2018, which was contingent upon the outcome of the interview.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant's termination from employment was not due to deliberate misconduct in wilful disregard of the employer's interest.

The agency originally adjudicated this case as a quit and denied benefits to the claimant pursuant to G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent

Subsequently, the review examiner reversed the original determination to deny benefits and awarded benefits to the claimant pursuant to 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

After hearing only the claimant's testimony during the initial hearing, the review examiner concluded that the claimant was discharged from his employment for failing to report to work on June 11, 2018, and thereafter, as indicated in part in a June 15, 2018, termination letter that the employer sent the claimant. The review examiner further concluded that, because the employer never notified the claimant that he was expected at work, and the claimant believed he was still suspended, he did not intentionally miss work beginning on June 11th, and, thus, his separation was qualifying. After we remanded the case on two occasions, first to give the employer an opportunity to testify and thereafter to obtain clarification on the parties' communications regarding the claimant's employment status, the review examiner modified his original findings.

After remand, the review examiner found that the claimant was informed that he was suspended on June 4, 2018, and the supervisor explained that it was so that the employer could investigate a code of business conduct violation. The review examiner also found that, on June 7th, the claimant's manager informed him that he was expected to meet with the employer on June 11, 2018, as part of the employer's investigation into the code of conduct violation. When the claimant refused to meet at the employer's [Town A] office, the manager offered to meet at any one of the employer's retail locations, but the claimant again refused to meet, stating that he was only willing to speak to the employer by telephone. At that time, the manager informed the claimant that failure to meet with the employer could result in his dismissal. Subsequently, the claimant dropped off the employer's company vehicle and other equipment on June 11th, and he sent a text to his manager on the same day inquiring about his employment status. The manager replied a few hours later that he was waiting on the employer's leadership to make a decision. The review examiner found that, since the claimant did not show up to the meeting on June 11th and made no attempt to meet with the employer thereafter, the employer decided to terminate him effective June 16, 2018. The employer considered the claimant to have abandoned his position.

Upon review of the findings and record before us, we agree with the review examiner's conclusion that the claimant was discharged from his employment, rather than quitting. Although the claimant refused to meet with the employer in person on June 11, 2018, or thereafter, he remained in contact with the employer regarding his employment status and was willing to discuss the investigation with the employer via telephone. This is not a case where the claimant abandoned all communication with the employer and simply disappeared. Rather, the claimant was refusing to cooperate with the employer's investigation in the manner in which the employer prescribed. In essence, he was discharged for refusing to comply with the employer's expectations regarding how its investigation would be conducted. Thus, G.L. c. 151A, § 25(e)(1), is not applicable in this case.

In order to deny benefits under G.L. c. 151A, § 25(e)(2), it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Thus,

“the critical issue in determining whether disqualification is warranted is the claimant’s state of mind in performing the acts that cause his discharge.” *Id.* 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.” *Id.*

Here, the consolidated findings establish that the claimant was aware he was expected to cooperate with the employer’s investigation by meeting with the employer in person. Furthermore, it’s not unreasonable for the employer to want to meet with the claimant in person while conducting its investigation, in case it wanted to review documentation with the claimant, such as the employer’s policies and the claimant’s transaction history. Finally, since the claimant failed to provide an explanation as to why he was uncomfortable meeting with the employer in person, he has not established any mitigating circumstances to excuse his failure to comply with the employer’s expectation. Absent such mitigating circumstances, the claimant is disqualified under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant’s discharge is attributable to deliberate misconduct in wilful disregard of the employer’s interest.

The review examiner’s decision is reversed. The claimant is denied benefits for the week ending June 16, 2018, 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 - April 29, 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.

SVL/rh