

The claimant's failure to consistently meet the employer's high claims processing accuracy metrics was unintentional and due to making mistakes. His performance was not deliberate misconduct in wilful disregard of the employer's interest, and, therefore, he is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0025 9507 46

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny 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 June 14, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 11, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on November 7, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, he was 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 claimant's appeal, we remanded the case to the review examiner to obtain further evidence pertaining to the claimant's separation from employment. Both parties 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 decision, which concluded that the claimant deliberately failed to meet the employer's quality performance expectations, is supported by substantial and credible evidence and is free from error of law in light of consolidated findings after remand, which show that his failure to meet quality performance metrics were due to inadvertent errors.

Findings of Fact

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

1. The claimant worked full time as a claims processor for the instant employer, a health insurance company, from 05/02/16 until 06/14/18.
2. The employer maintains a Professional Conduct and Communications policy that states in part:

Each employee is responsible for product quality, service to [Employer] members, providers, participants, attentiveness to waste and costs, safety and security. Each employee is expected to act in an ethical and professional manner and follow the accepted business practices and legal requirements of our industry.

The following behaviors or acts, while not all-inclusive, reflect the types of behavior that are unacceptable and which, if permitted by management, could result in [Employer]'s failure. Therefore, such behaviors or acts may result in disciplinary action up to and including termination of employment.

- Insubordination, including but not limited to, failure or refusal to obey the orders or instructions of a supervisor or member of management, or the use of abusive or threatening language toward a supervisor or member of management; refusing to perform assigned work or intentionally restricting others in their efforts to perform work.
3. The purpose of the policy is to ensure that business needs are met and work gets completed within the required regulations.
 4. The claimant was given the policy at the time of hire.
 5. All employees are subject to the policy.
 6. Disciplinary action for being in violation of the policy is at the employer's discretion based on the nature and severity of the incident.
 7. The employer expects employees to perform work as requested by management and to discuss and review any issues they may have with being able to complete the work.
 8. The purpose of the expectation is to ensure that business needs are met and work gets completed within the required regulations.
 9. The claimant was given the policy at the time of hire.

10. The employer's Quality Audit process requires employees to meet monthly metric goals for processing accuracy, payment accuracy, and financial accuracy.
11. The percentages that employees are required to meet for the metrics are as follows:
 - Processing Accuracy – 97%
 - Payment Accuracy – 98%
 - Financial Accuracy – 99%
12. The Quality Audit process policy does not indicate the disciplinary steps that the employer takes when an employee fails to meet the any or all of the performance metrics.
13. The employer holds a quarterly "all staff training" for employees which indicates the disciplinary process when an employee fails to meet any or all of the performance metrics.
14. The disciplinary process is identified under the "Quality Audit Performance Management" section of the training and is as follows:
 - One fail – Immediate verbal counseling
 - Two fails – Manager/Supervisor communicates that should it occur again, individual will be put on a Performance Improvement Plan (PIP)
 - Three fails – PIP
 - Manager determines expectations and length of PIP
15. Under the employer's "Quality Audit" policy, prospective discipline does not vary if an employee fails to meet one, two or all three performance metrics.
16. On 10/17/17, the claimant was placed on a 90-day Performance Improvement Plan (PIP) for failing to meet the employer's expectation pertaining to attendance, quality of work and productivity.
17. The PIP indicated that the claimant was expected to show immediate and consistent improvement in the areas mentioned.
18. The employer also met with the claimant on a weekly basis throughout the PIP to go over any questions he may have had.
19. The employer offered the claimant additional training as well and the claimant accepted the training.
20. On 01/17/18, the claimant was issued a memorandum to inform him that he successfully completed the PIP and that he was expected to sustain his improved performance.

21. The claimant's audit scores for April of 2018 were as follows:
- Processing Accuracy – 90%
 - Payment Accuracy – 92%
 - Financial Accuracy – 96%
22. The claimant did not meet any of the targets for the month of April.
23. The claimant performed his job to the best of his ability but made some “keying errors” and other “errors” which caused him fail the audit.
24. On 05/09/18, the claimant was given a written warning for failing to follow the Quality Audit policy because didn't meet the metrics during the month of April.
25. The warning indicated that the employer expected “immediate and sustained improvement to my satisfaction and that you are meeting and maintaining the established department Metrics. Failure to satisfactorily correct the problems outlined in this Written Warning or any occurrence in the applicable future of any types such as additional quality, performance, productivity and/or attendance concerns may result in further disciplinary action, up to and including termination.”
26. The claimant signed and acknowledged the warning.
27. The claimant's audit scores for May of 2018 were as follows:
- Processing Accuracy – 92%
 - Payment Accuracy – 98%
 - Financial Accuracy – 100%
28. The claimant met 2 out of the 3 targets for the month of May. The only target he didn't meet was the processing accuracy.
29. The claimant felt that the job was stressful but he did not have any issues affecting his personal life that would've affected his ability to perform his job.
30. On or about 06/05/18, the employer became aware that the claimant didn't meet the [metrics] for his May audit.
31. The claimant went through the 1st level audit dispute for the May audit and the employer removed 2 “errors” from the list.
32. The other “errors” caused the claimant to not meet the metrics for processing accuracy.

33. The employer emailed the claimant the audit results and told the claimant to “make any necessary updates and/or complete the Audit dispute for any errors as applicable. In the event you did encounter an error that you are disputing, please advise if you will be attending the 2nd level audit review meeting,”
34. The claimant did not request to attend a 2nd level audit review meeting because he believed he had the tools to perform his job but made “errors” or “mistakes” at times when processing claims.
35. On 06/14/18, the claimant was discharged for failing to meet the quality audit metrics.
36. The employer contended that there were no other reasons for discharge.

Credibility Assessment:

At the initial hearing and remand hearing the employer testified that the claimant failed to meet the monthly audit metrics. At the remand hearing, the employer consistently testified that the claimant’s “errors” caused him to fail the audits. Nonetheless, the employer testified that they believe the claimant “intentionally” failed to perform his job because he had the tools necessary to perform his job and there were no new processes in place. The Review Examiner asked the employer to submit any documentation that the claimant was given at the time of discharge during the hearing and the employer did not have any documentation to submit.

At the remand hearing, the claimant credibly testified that he performed his job to the best of his ability at all times. The claimant testified that he disagreed with the employer’s testimony that he “intentionally failed to perform his job” and he also testified that the reason he failed the audits were because of “mistakes” or “errors” on his part.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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. Based upon these new consolidated findings, we reject the review examiner’s legal conclusion that the claimant is ineligible for benefits.

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).

In this case, the employer discharged the claimant due to his failure to meet the employer's high quality performance metrics. *See Consolidated Findings ## 11 and 35.* The employer asserted that his failure to follow instructions for processing claims violated the portion of its Professional Conduct and Communications policy set forth under Consolidated Finding # 2. In her original decision, the review examiner concluded that because the employer's policy grants the employer discretion as to the level of disciplinary action taken with each violation, it failed to prove that the policy is uniformly enforced, and, therefore, the employer did not show that the claimant's conduct was a knowing violation of a *uniformly* enforced policy under G.L. c. 151A, § 25(e)(2). We agree.

Alternatively, a claimant will be disqualified under G.L. c. 151A, § 25(e)(2), if the employer can demonstrate that he engaged in deliberate misconduct in wilful disregard of the employer's interest. With this in mind, we remanded the case to afford the claimant an opportunity to present evidence and find out more about why he did not meet the metrics.

It is undisputed that the claimant did not consistently meet the employer's high quality audit metrics. This was despite training the claimant how to process claims correctly, being placed on a Performance Improvement Plan, weekly coaching, and a written warning. *See Consolidated Findings ## 16–19, 21–22, 24–25, 27, 28, and 30.* The question before us is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979).

During the hearing, the employer argued that because the claimant had been trained, had been doing this work for a long time, the protocols had not changed, and at certain times he was able to meet the quality performance metrics, his failure to meet them consistently was intentional. The claimant maintained that it was not intentional, that he simply made mistakes. The review examiner believed the claimant. *See Consolidated Findings ## 23, 32, and 33.* Such assessments are within the scope of the fact finder's role and unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). In light of the testimony and evidence in the record, we believe her credibility assessment is reasonable.

“When a worker is ill equipped for his job . . . , any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no

basis under § 25(e)(2) for denying benefits.” *Id.* at 97. Since the review examiner found that the claimant performed his job to the best of his ability and simply could not consistently reach the high accuracy standards expected by the employer, we conclude that his failure to process these claims accurately as instructed was not done deliberately and in wilful disregard of the employer’s interest.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant either knowingly violated a uniformly enforced policy or engaged in 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 original decision is reversed. The claimant is entitled to receive benefits for the week beginning June 10, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 24, 2019



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.

AB/rh