Although the claimant left work and dropped off an MCAD complaint the following day, the evidence supports a conclusion that the claimant was discharged, where he refused to drive a van, he said he would be back the next day, and the employer took him off its schedule. He is disqualified under the deliberate misconduct standard of G.L. c. 151A, § 25(e)(2), because he intentionally refused to drive a van and he had no reasonable basis to think that the van was unsafe.

Board of Review
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Issue ID: 0026 4386 07

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 affirm.

The claimant separated from his position with the employer on July 27, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 18, 2018.[1] The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 4, 2019.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's separation. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Following our review of the remand hearing record and the consolidated findings of fact, the Board remanded the matter once again, this time for the review examiner to make subsidiary findings of fact from the record. He then returned a new set of consolidated findings of fact to the Board. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from

[1] The DUA's determination disqualified the claimant under G.L. c. 151A, § 25(e)(2).

error of law, where the employer took the claimant off the schedule after the claimant refused to perform his duties by driving a specific van.

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 as a Van Driver for the employer, a transportation company, from October of 2016 to July 26, 2018. Since December of 2017, the claimant limited his hours to part-time.

2. The employer had a policy which prohibited absence without notification or permission. The policy warned that immediate termination could result for a first-time occurrence.

3. The claimant received the policy at the time of hire. The claimant knew that an absence of three days or more required a doctor's note and that absences should be reported.

4. The claimant understood the essential function of his position of Van Driver and that all routes assigned to him should be completed.

5. The van with which the claimant had issues was known as "Chair 2," "C 02," "C-2," or "WC-02."

6. On March 8, 2018, C-2 was serviced by replacing oil, oil filter, four tires, harness, wipers, headlamp, and turn signal relay. The vehicle also received an alignment and a full service inspection.

7. On May 10, 2018, C-2 received an oil change and filter, and full service inspection.

8. On May 12, 2018, the C-2 passed the state safety inspection, which included "steering and suspension."

9. On June 11, 2018, a client lodged a complaint about the claimant stating that he was hostile, rude, and obnoxious. The employer asked the claimant to provide a statement regarding his account of the incident. The claimant refused.

10. On June 30, 2018, C-2 was serviced by replacing the oil, oil filter, front brake pads, rear bake pads, and a rear pin kit. The vehicle also received a full service inspection. It was noted that the vehicle needed one tire and an alignment.

11. On July 6, 2018, the claimant reported [sic] completed a Vehicle Deficiency Form for C 02 stating, "This van when you hit a bump be all over the road. I

had a client say that they was going to call in too report this van. Also needs shock." [*sic*] The claimant's immediate supervisor (the Team Leader) added a note stating, "The van pulls to one side." The Fleet Manager noted an action plan stating, "Advised will need O.O.S. [out-of-service] for possible shock replacement."

12. On July 11, 2018, a different client lodged a complaint about the claimant stating that he delayed in retrieving a resident to take to his appointment having sat in the vehicle for twenty minutes.

13. On July 13, 2018, the employer asked the claimant to provide a statement regarding his account of the incident and about the previous incident. The claimant refused stating that he was not going to sign anything and that he was "starting to have a feeling about this company."

14. The claimant was next scheduled to work on July 19, 2018. The employer decided to again ask the claimant for the statements then.

15. On July 19, 2018, the claimant called out sick.

16. On July 20, 2018, the claimant called out sick stating that he will go to the emergency room.

17. The claimant was next scheduled to work on July 26, 2018 at 9:00 a.m.

18. The claimant drove "WC-02" between July 6, 2018 and July 26, 2018.

19. On July 26, 2018, the claimant arrived at work at 8:48 a.m. and did not bring a doctor's note, which he usually brought in the past. The Team Leader greeted the claimant and asked how he was feeling. The claimant stated that he was good. The Team Leader asked the claimant about the statements regarding the June and July incidents. The claimant refused stating that he was not going to sign anything and that he was starting to have feelings about this company. The Team Leader explained that it would be helpful for him to give an account. The claimant stated that it was all a lie and it was not his fault. The Team Leader again asked him to write the statements and the claimant refused. The Team Leader then assigned "WC-02" to the claimant. The claimant asked if the van was fixed. The Team Leader stated that it was not. Another employee entered the office, who was assigned to "WC-44". The claimant confronted the Team Leader about the assignment. The other employee stated that he will drive "WC-02." The Team Leader said, "No. He'll drive 44." The claimant then refused the assignment, said that he will punch out and try again tomorrow, and left the workplace. The other employee was ultimately assigned to the van "WC-02," which was operated by that employee for the entire day starting at 9:03 a.m. with no reported issues.

20. The claimant filed a complaint at the MCAD after leaving the workplace.

21. At 3:23 p.m., the claimant texted the Team Leader, "I hope that you punched me out since there was no van available for me. I'll try again tomorrow."

22. On July 27, 2018, shortly before 8:14 a.m., the claimant called dispatch wanting to know what time he is on the schedule for, at which time the Team Leader got on the phone and told the claimant that he was not on the schedule.

23. At 8:14 a.m., the Team Leader informed members of management via email, to include the Vice President of Operations, about the text from the claimant on the previous day and about the claimant's call to dispatch just then and what transpired.

24. Prior to 9:00 a.m., the claimant left an MCAD complaint on the windshield of one of the vehicles and soon after contacted the Vice President of Operations that it was there.

25. At 9:01 a.m., the Vice President of Operations stated in a reply email, "I have just spoken to [the claimant] this morning. I have followed up with [human resources] of the situation. Effective immediately NO ONE is to communicate with [the claimant] expect [*sic*] [human resources]. If you have any questions please contact [human resources]." The Vice President of Operations sent the email due to the receipt of the MCAD complaint.

26. The employer interpreted that claimant's actions on July 26 and 27, 2018 to be quitting his employment.

[Credibility Assessment:]

The claimant testified that he believed "WC-02" needed shocks and ball joints, that the vehicle pulled to the right, and that it needed wheel bearings. Aside from his July 6, 2018 report on the deficiency form, which suggests a suspension and alignment issues only, the reason for the claimant's additional beliefs are unknown and are not credible due to the claimant not being a mechanic, who would otherwise need to lift the vehicle and physically manipulate the wheel assembly and/or disassemble the wheel assembly to determine what is needed. The fact that the vehicle was operated by another employee on July 26, 2018 for the entire day and that the vehicle passed a state safety inspection a few months earlier suggests that the vehicle was safe to operate and thus, the claimant's belief that it was not safe was unreasonable.

The claimant also testified that he checked his schedule online around 6:00 a.m. on July 27, 2018, and prior to going to the workplace to leave an MCAD complaint on the windshield of a vehicle, and saw that he was not on the schedule. This testimony is inconsistent with the contemporaneous emails in evidence. If the claimant checked his schedule at 6:00 a.m. and saw that he was

not on the schedule, it does not make sense that he would then call dispatch around 8:00 a.m. to ask if he was on the schedule. Furthermore, the claimant testified that he dropped the MCAD complaint off at 10:00 a.m. and then spoke with the Vice President of Operations, but, again, this is inconsistent given the email timestamped at 9:01 a.m., which is from the Vice President of Operations and in response to a discussion with the claimant earlier that morning and to the MCAD complaint.

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 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, except for the second date noted in Consolidated Finding of Fact # 18. It appears that the second date should be July 13, 2018, not July 26, 2018.[2] We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we agree that the claimant is subject to disqualification. However, we reject the review examiner's conclusion that the claimant quit his job.

As an initial matter, we must decide how to characterize the claimant's separation. The DUA initially concluded that the claimant was discharged and applied G.L. c. 151A, § 25(e)(2). The review examiner concluded that the claimant quit and applied G.L. c. 151A, § 25(e)(1). According to Part III of his decision, the review examiner applied G.L. c. 151A, § 25(e)(1), because: (1) the claimant unreasonably refused to write a statement regarding complaints lodged against him; (2) the claimant refused his assignment to drive a van due to alleged issues he was having with the van; and (3) the claimant left the workplace and the following day left a Massachusetts Commission Against Discrimination complaint on the windshield on one of the employer's vehicles. We disagree that these actions, taken together, show that the claimant voluntarily quit his position.

The consolidated finding of fact show that the claimant refused to drive a van on July 26, 2018, the claimant indicated that he would be back the following day (suggesting that he was not quitting), the claimant checked on July 27, 2018, to see what his schedule was, and the claimant was told that he was no longer on the schedule. These findings, viewed in conjunction with the entire record, indicates that the employer initiated the separation by taking the claimant off the schedule, and, thus, that the claimant was discharged from his job. This is so, even where the employer may have considered the claimant to have quit. *See* Consolidated Finding of Fact # 27. How the employer viewed the situation does not determine what section of law should be applied. Therefore, we conclude that G.L. c. 151A, § 25(e)(2), applies to the claimant's separation, as the DUA initially adjudicated.

[2] The claimant was at work on July 13, 2018. *See* Consolidated Finding of Fact # 13. The review examiner found that the claimant was next scheduled to work on July 19. However, he was out sick on July 19 and July 20. He was next scheduled to work on July 26, 2018, the date of the final incident. Thus, it does not appear that the claimant worked at all for the employer from July 14, 2018, through July 25, 2018.

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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. *See* Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Although the employer here considered the claimant to have quit his job, we are not precluded from assessing whether there is substantial and credible evidence in the record to support a conclusion that the claimant should be disqualified under the above-cited section of law. In so doing, we think that there is sufficient evidence to do so under the deliberate misconduct provision.

From the outset of this case, there has been no serious dispute that the claimant refused to drive wheelchair van WC-02 on July 26, 2018. Consolidated Finding of Fact # 19. We consider this to have been an act of misconduct, contrary to the employer's expectations that the claimant complete all routes assigned to him. Consolidated Finding of Fact # 4. In addition, the consolidated findings of fact support a conclusion that the misconduct was deliberate. The claimant did not mistakenly fail to drive WC-02 on July 26. He told the Team Leader that he was not going to drive the van, he was going to punch out, and he would be back the next day. He intentionally refused to do the work.

The question of the claimant's eligibility for benefits turns in large part on whether the claimant engaged in the misconduct in wilful disregard of the employer's interest. This analysis must take into account the claimant's state of mind at the time of the misconduct. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). To evaluate the claimant's state of mind, we consider "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). As alluded to above, the claimant was aware that he was supposed to drive routes assigned to him in the employer's vans. Generally, this expectation is reasonable, as the employer's business depends upon the drivers fulfilling their transportation work.

In this case, the claimant argued that he should not have been expected to drive a van which was not safe to drive. Indeed, if the WC-02 van was objectively unsafe to drive, or if the claimant reasonably believed that it was unsafe to drive, we could not conclude that the employer's expectation that he use it on July 26, 2018, was reasonable. In his credibility assessment, the review examiner noted that the claimant's belief that the WC-02 van was unsafe to drive was unreasonable. He rejected the claimant's explanations and reasons for not driving the van on July 26, 2018. Such credibility 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). The review examiner noted that the van had passed a state inspection roughly two and a half months prior to July 26, 2018. Although the Fleet Manager noted a "possible shock replacement" on the Vehicle Deficiency Form the claimant filled out, the van was apparently used by employees throughout this period of time. The van was presumably being driven on the days the claimant called out of work in July of 2018. After the claimant refused to drive WC-02 on July 26, 2018, a co-worker drove it with no problems. Taken together, it appears that there were few actual issues, if any, with the WC-02 van. We therefore decline to disturb the review examiner's credibility assessment on this point.

By not finding that the claimant actually believed there to be issues with the van the review examiner is, in essence, determining that the claimant did not actually believe things were wrong with the vehicle. Perhaps the claimant was refusing to drive the van for other reasons. The claimant certainly seems to have some underlying uneasiness, whether real or imagined, about the workplace. It's not clear what that was based on. He mentioned that he was having "feelings" about the company. *See* Consolidated Finding of Fact # 13. He continuously refused to write reports about complaints made about him. It may be that he brought up issues with the van just to be difficult or to deflect the employer's attention from his own issues. Frankly, it is not for us to determine. We are satisfied concluding that the employer reasonably expected the claimant to drive van WC-02, a van which only he reported issues with, and his refusal to drive the van was not mitigated by any actually held belief that it was unsafe to drive.

We, therefore, conclude as a matter of law that: (1) the review examiner's decision to apply G.L. c. 151A, § 25(e)(1), was not supported by the record or free from error of law, because the substantial and credible evidence in the record shows that the employer discharged the claimant; and (2) the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2), because there is substantial and credible evidence in the record to show that the employer ended the employment relationship with the claimant after he refused, without mitigating reasons, to drive a van on July 26, 2018.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning July 22, 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 24, 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.

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