Although the claimant had a history of attendance issues, the final instance of tardiness was mitigated, because he was late due to traffic on his bus route. Because the tardiness was attributable to traffic, rather than to any deliberate act or wilful disregard of the employer's expectation that he arrive to work on time, he is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0026 6795 14

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 August 3, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 5, 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 December 8, 2018.

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, 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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence. 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 to deny benefits 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 claimant was late on his last day of work due to traffic on his bus route.

Findings of Fact

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

1. The claimant worked in the employer's Accounts Receivable department, from 2/24/16 to 8/3/18.

2. The claimant was scheduled to work Monday through Friday, from 8 a.m. to 4:30 p.m.

3. The claimant lives in [Town A], Massachusetts. The employer is located in [Town B], Massachusetts.

4. The claimant traveled to and from work via bus.

5. The claimant was absent from work on 6/6/18, as his furnace needed to be repaired, and he wished to remain at home while the furnace was repaired. He reported this absence to the Controller.

6. The claimant arrived late to work on 6/12/18, due to traffic on his bus route.

7. On 6/12/18, the Controller spoke with the claimant about his attendance, and reminded him that he was expected to appear at work on time, as scheduled.

8. The claimant arrived late to work on 6/14/18.

9. The claimant arrived late to work on 6/20/18, after going to a physician's appointment.

10. On 6/20/18, the Controller gave the claimant a written warning for continued instances of tardiness, following the above conversation on 6/12/18. The claimant signed the written warning.

11. The Controller told the claimant that if his attendance did not improve, this could lead to further disciplinary action, including termination from employment.

12. The claimant was absent from work on 7/2/18.

13. The claimant arrived late to work on 7/10/18.

14. The claimant arrived late to work on 7/23/18, following a physician's appointment, and left early on 7/25/18, due to personal business.

15. The claimant did not obtain prior permission to arrive late to work on 7/23/18, or to leave early from work on 7/25/18.

16. The claimant left his house at 6 a.m. on 8/3/18, to catch the bus to work. He planned to arrive at or before 8 a.m. that day.

17. The claimant sent the Controller a text message at 7:54 a.m., on 8/3/18, stating that he was going to be late.

18. The claimant arrived late to work on 8/3/18, due to traffic on his bus route.

19. On 8/3/18, the Controller met with the claimant and informed the claimant that he was terminated from employment for continued absences and instances of tardiness, following the 6/20/18 written warning.

20. The Controller gave the claimant a termination notice and asked the claimant to sign it. The claimant did not sign it.

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. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to disqualification.

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 relevant 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). After the initial hearing, at which only the employer attended, the review examiner concluded that the employer had carried its burden. Following our review of the entire record, including the consolidated findings of fact, we now conclude that the claimant is eligible to receive benefits.

The employer discharged the claimant on August 3, 2018, "for continued absences and instances of tardiness." Consolidated Finding of Fact # 19. Although the claimant had several attendance issues in June and July of 2018, the claimant was not discharged until he was late to work on August 3, 2018. Therefore, the focus of our analysis is on the claimant's August 3 tardiness.

There is no dispute that the claimant was late to work on August 3. This was in direct violation of the employer's expectations that the claimant arrive to work on time and that he work his scheduled shifts. The claimant had been warned about his attendance on June 12 and June 20, 2018. He had been reminded that his attendance was not satisfactory, and that further instances

of tardiness or lateness could lead to his termination. Consolidated Findings of Fact ## 7 and 11. Nevertheless, the claimant engaged in misconduct on August 3 by arriving late to work.

However, our analysis under G.L. c. 151A, § 25(e)(2), is not complete upon simply finding that misconduct occurred. To carry its burden, the employer must show that the claimant intended to, or deliberately, engaged in misconduct. *See* Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 810–813 (1996). This requires an analysis of the claimant's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). To evaluate the claimant's state of mind, especially whether the misconduct was done in wilful disregard of the employer's interest, 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).

We have no problem in concluding that the claimant was aware of the employer's expectations to arrive at work on time. After all, as we have noted above, he was given multiple warnings about his attendance. He signed the written warning given to him on June 20, 2018. Consolidated Finding of Fact # 10. The employer's expectations were certainly reasonable. They are in place to ensure that its business runs properly and so that its customers are serviced expeditiously.

The dispositive issue here is whether the claimant's tardiness on August 3 was mitigated. We conclude that it was. The claimant left his home at 6:00 a.m., with the intention of arriving to work on time, at or before 8:00 a.m. This gave him two hours to get from [Town A] to [Town B]. For the vast majority of his employment, this was a sufficient amount of time to commute to work on public buses. He was late to work due to traffic on the bus route, and he notified his supervisor that he was going to be late that day. The claimant's conduct in giving himself two hours to get to work and notifying the employer that he was going to be late generally suggests that he was not intending to be late, nor that he was intentionally disregarding the employer's interest in him arriving at work on time. The traffic on the bus route mitigated his misconduct.

We recognize that the claimant had a history of attendance issues and that he was warned about his attendance. However, we do not think that the record supports a conclusion that the claimant "intentionally adopted a routine that inevitably would result in tardiness." Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 628 (1984). The claimant had been late to work once before due to traffic on the bus route on June 12, 2018. His other absences or instances of tardiness were due to various personal issues. He was not on notice that the two hours was an insufficient amount of time to allot for his commute. His tardiness on August 3, the final incident just prior to his discharge, was due to a circumstance beyond his control, which he could not have reasonably foreseen.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the claimant's final instance of misconduct on August 3, 2018, was mitigated by the traffic on his bus route.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 29, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 28, 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