

The claimant did not have the necessary state of mind to engage in deliberate misconduct, as he informed the supervisor that he was leaving early and the supervisor did not give any indication that this would be unacceptable to the employer.

**Board of Review
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Issue ID: 0026 9644 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 August 13, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 3, 2018. 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 April 27, 2019. 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, 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 additional evidence pertaining to the events leading to the claimant's separation from employment. Both parties attended the remand hearing. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant informed the supervisor that he was leaving for the day.

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 for the instant employer as a full-time Sales Associate from 12/4/2017 until his separation on 8/13/2018.
2. The employer has an attendance policy which states that [sic] to refrain from repeated absenteeism and if going to be absent, that you must speak with your manager.
3. Violations [sic] of this policy is grounds for disciplinary action up to and including termination of employment.
4. The claimant signed an acknowledgement form indicating that he received the company handbook and that it was his responsibility to read the rules and polices set forth by the employer.
5. On Saturday, 8/11/2018, a customer came to the employer's dealership for a specific vehicle they wanted.
6. The Front Sales Manager, who was previously the Finance Director, instructed the claimant to show the customer the vehicle, however, the claimant told the Front Sales Manager that he was instead going to show them a vehicle he would make money from.
7. The Front Sales Manager informed the claimant to show the customer the vehicle they wanted.
8. The claimant refused to listen to the directive of the Front Sales Manager telling him, no, and the Front Sales Manager told the claimant that he needed to do what [he was] told.
9. The claimant did not listen to the directive from this supervisor, who had supervisory authority over the claimant, and instead sold the customers a different vehicle, which wasn't the vehicle they had requested.
10. The claimant is not aware of any employer policy or expectation for him to suggest a different vehicle to a customer who came in with a certain vehicle in mind.
11. The customer did not voice any concerns over the claimant's conduct in helping him find a vehicle to purchase.
12. The claimant is unaware if the Front Sales Manager had the authority to instruct him over what vehicles could and could not be shown to customers.
13. The claimant was never informed why the Front Sales Manager instructed him to refrain from showing the customer vehicles other than the ones the customer came in to see.

14. After the sale, the claimant believed that the Front Sales Manager was talking about him because co-workers would stop speaking when the claimant approached them.
15. The Front Sales Manager approached the claimant and informed him to do what he was told the next time.
16. The claimant told the Finance Director that he was not going to listen to him in the future and would do what makes the most money from [sic] himself.¹
17. The claimant was dissatisfied with the verbal directive and felt overwhelmed.
18. The Front Sales Manager got in the claimant's face and told him to do what he was told.
19. The claimant walked out to his vehicle for 10-15 minutes for his break and returned to the workplace.
20. Upon returning to the workplace, [the claimant] heard the Front Sales Manager telling other employees that the claimant though [sic] he was the best and thought he could do whatever he wanted.
21. Due to overhearing this conversation with employees, the claimant felt that [the] rest of the day would have been hell and decided to go home to avoid any further confrontation.
22. The claimant told the Front Sales Manager that he was leaving and walked off his shift.
23. The claimant called out for his shift on 8/12/2018 due to his daughter being ill and needing to provide her with care.
24. Upon calling out for his shift, the General Sales Manager informed the claimant that he thought that he had quit.
25. The claimant responded that [he] did not quit his employment.
26. On 8/13/2018, the claimant reported to work and shortly after reporting, the General Sales Manager asked to speak with the claimant.
27. The General Sales Manager told the claimant that his actions on 8/11/2019 where [sic] unacceptable.

¹ The review examiner's use of the title, Finance Director, is a typo, as the person he is referring to is the Front Sales Manager, as evidenced by the remaining findings.

28. The General Sales Manager told the claimant that he had heard rumors that the claimant was unhappy and wanted to leave.
29. The claimant explained that he did not want to leave and that he was unhappy with the employer not advertising enough, having less customer[s] and changing the pay plans.
30. The General Sales Manager informed the claimant that the employer no longer had room for him on the sales team and that he was no longer employed.
31. The General Sales Manager decided to terminate the claimant for the attendance issue of walking off the job without notifying the employer on 8/11/2019.

Remand Credibility Assessment:

The claimant's testimony is accepted as credible in all contested area[s], since the claimant was forthright in giving firsthand testimony and his detailed and consistent version of the events made more logical sense. The testimony of the multiple employer witnesses [was] less detailed and speculative at times when questioned, thus causing the claimant's testimony to be considered more credible in all contested area[s].

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding of Fact # 10 in its entirety.² We also note that the review examiner mistakenly refers to "multiple employer witnesses" in his credibility determination, when the employer was represented by the same witness during both hearings. Finally, we reject the portions of Consolidated Findings of Fact ## 27 and 31 which use the year 2019 in dates, as the other findings establish that all of the relevant events took place in 2018. In adopting the remaining findings, we deem 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. However, as discussed more fully below, we reject the review

² This finding states that, "The claimant is not aware of any employer policy or expectation for him to suggest a different vehicle to a customer who came in with a certain vehicle in mind." We reject this finding, as the claimant did not make this statement at the remand hearing. The Board instructed the review examiner to ask the claimant whether it was against an employer rule, policy or expectation for the claimant to suggest a different vehicle to a customer who came in with a certain vehicle in mind, and the claimant responded that he was not aware of any rule, policy or expectation to that effect. We note that the employer's witness, the human resources director, testified that no such rule, policy or expectation existed.

We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

examiner's original legal conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests. We believe that the review examiner's consolidated findings of fact support the conclusion that the claimant did not have the necessary state of mind to engage in deliberate misconduct.

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. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

In all discharge cases, for the employer to carry its burden, it must first show that the claimant did something which was prohibited by the employer. The employer must present substantial and credible evidence to show that a policy or rule was violated, or that there was some type of misconduct engaged in by the claimant. Here, the review examiner found that the claimant was discharged for walking off the job without notifying the employer on August 11, 2018. The review examiner also found that the claimant had received a copy of the employer's attendance policy, which provided that employees should notify their manager if they are going to be absent.

The findings show that, on August 11, 2019, the claimant was involved in a verbal altercation with his supervisor, who instructed the claimant to only show a certain vehicle to a customer. The claimant refused to obey this directive, as the claimant was not aware of any policy or expectation stating that the supervisor could dictate how the claimant showed vehicles to customers, and the customer did not voice any concerns over the claimant's conduct. The review examiner found that the claimant, who already felt overwhelmed by the supervisor's instructions, had to deal with the supervisor getting "in the claimant's face" and disparaging him in front of other employees that day, decided to go home early.

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). In order to evaluate the claimant's state of mind, we must "[T]ake into account 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). Here, the claimant explained that he decided to go home early to avoid any further confrontations with his supervisor, who was ridiculing him in front of others and, without explanation, giving the claimant directives that were completely contrary to what the claimant was used to as part of his job as a sales associate. Prior to leaving, the claimant made sure to tell the supervisor that he was not finishing his shift for the day, presumably because he was aware of the employer's expectation regarding employee absences. In light of the finding

that the claimant informed the employer he was leaving, and the absence of any evidence that the employer informed the claimant this was unacceptable at that time, we cannot conclude that the claimant was aware that his actions were contrary to the employer's expectations regarding attendance. Thus, the claimant did not have the necessary state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest when he left work early on August 11th.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 18, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – September 18, 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.

SVL/rh