

There is no indication in the record that the claimant acted intentionally when he failed to meet the employer's performance standards, which required that he adequately and completely document sales information. It appears the claimant was simply ill-equipped for the job.

**Board of Review
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Issue ID: 0028 9387 45

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 January 12, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 27, 2019. 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 March 30, 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 give the claimant an opportunity to testify and present other evidence. 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 the consolidated findings do not establish that the claimant intentionally engaged in conduct contrary to the employer's expectations.

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 for the employer, a retail store, as a sales person, from September 18, 2018 until January 12, 2019. The claimant was paid \$15.00 per hour.
2. On December 29, 2018, the co-owner (Co-Owner A) met with the claimant and discussed the following issues: failing to adequately document sales information such as names, addresses, phone numbers, identity of products sold; exceeding his 30 minute lunch break; being absent from the sales floor; failing to help customers; vacuuming instead of answering the phones; and not being supportive to other employees.
3. On December 29, 2018, Co-Owner A told the claimant if he repeated this behavior he would be terminated. Co-Owner A documented the content of the meeting. The claimant was placed on probation for 30 days. (Exhibit 8)
4. The claimant was aware his job was in jeopardy.
5. It is the employer's expectation the claimant adequately document sales information such as names, addresses, phone numbers, credit card account numbers, and identity of products sold.
6. The employer's interest in having the claimant adequately document sales information such as names, addresses, phone numbers, credit card account numbers, and identity of products sold, is so the employer may have the information necessary to operate its business.
7. Purchase orders are to contain a customer's name, address, telephone number(s) and email address.
8. Credit card information must also be obtained. Credit card account numbers are not written on purchase orders.
9. The claimant's sales procedure consisted of writing on a separate piece of paper all of the customer's information and credit card account number which he then used to complete a purchase order.
10. The claimant would then submit the completed purchase order with the separate information sheet attached in the sales envelope to the office. The claimant kept a copy of the separate sheet with the information as a backup.
11. On January 8, 2019, the claimant took a telephone order from a customer (Customer A).
12. The claimant completed a purchase order. (Remand Exhibit 7)
13. The claimant wrote Customer A's name and credit card name on the purchase order.

14. The claimant did not write Customer A's address, telephone number or email address on the purchase order.
15. The claimant placed the purchase order in the sales envelope which went to the office.
16. The claimant did not attach a separate information sheet to the purchase order.
17. The claimant could not recall if he obtained Customer A's credit card account number.
18. On January 9, 2019, the claimant was contacted by bookkeeping because Customer A's credit card number was not submitted which was necessary to process the purchase order.
19. The claimant said to himself: "What a dope" when asked by the employer about the matter.
20. On January 12, 2019, the claimant was discharged for failing to adequately document Customer A's information.
21. The claimant was not terminated for any alcohol related matter.
22. The claimant is not an alcoholic.

Credibility Assessment

The claimant's testimony he wrote down Customer A's information on a separate piece of paper is not credible. The claimant testified he always writes down on a separate piece of paper all of a customer's information, including the credit card account number. The claimant also testified he took down Customer A's information on a separate sheet of paper, but could not recall if he obtained the credit card account number, which sheet of paper he mistakenly threw out, and which sheet of paper he stated he did not look at prior to throwing it out. It is unreasonable to believe the claimant obtained Customer A's complete information and credit card number and wrote it down on a separate sheet of paper and that he would throw out the sheet of paper without looking to see what he was throwing out. Had the claimant taken down all of Customer A's information, it is reasonable to conclude the claimant would not have written only Customer A's name and credit card company name on the purchase order but also included Customer A's address, telephone number and email address. Further, the claimant testified he did not recall whether he threw away the separate sheet of paper with Customer A's information before or after he completed the purchase order. Had the claimant thrown away the separate sheet of paper before he completed the purchase order, he would not have had Customer A's name or credit card company name to place on the purchase order. It is unreasonable to

believe the claimant wrote down Customer A's information on a separate sheet of paper.

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 believe that the review examiner's consolidated findings of fact support the conclusion that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest.

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

The review examiner found that the claimant was aware of the employer's expectation that he adequately document sales information, such as names, addresses and phone numbers. The review examiner also found that on January 8, 2019, the claimant took an order from a customer over the telephone and completed a purchase order form, which lacked some of the information necessary to process the customer's order. The claimant was unable to produce documentation of the customer's complete contact or credit card information. Additionally, the claimant could not recall whether he obtained the credit card information from the customer, and, when questioned by the employer about the incident, the claimant blamed his actions on being a "dope." In his credibility determination, the review examiner notes that he did not find the claimant credible when he testified that he had taken down the customer's complete contact information, but must have accidentally misplaced it.

In order to deny benefits, 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 at 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. at 97. Here, there is nothing in the consolidated findings or the totality of the record to indicate that the claimant intentionally failed to obtain the customer's complete contact and payment information. Rather, it appears that the claimant simply made a mistake and forgot to take down all of the customer's relevant information. At most, claimant was simply "ill equipped" for this aspect of his job, and his failure to meet the employer's performance standards was, therefore, unintentional. See Garfield, 377 Mass. at 97. Absent an

intentional disregard of the employer's interest, "there is no basis under § 25(e)(2) for denying benefits." Id.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending January 19, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – July 31, 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