

Although an employer offered that the claimant was discharged for attendance issues in the winter of 2018, the review examiner found credible the claimant's assertions that he was separated due to a lack of work. Therefore, the claimant is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0029 0951 00

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 separated from his position with the employer on or about December 21, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 9, 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 February 1, 2020.

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 regarding the circumstances of his separation from work. Only the claimant 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 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 review examiner has found, following the remand hearing, that the claimant separated from his job due to a lack of work in the winter of 2018-2019.

Findings of Fact

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

1. From June 1, 2018, until December 17, 2018, the claimant worked as a full-time (35 to 40 hours per week) laborer for the employer, a landscaping company.
2. The claimant reported directly to the employer's owner (the owner).
3. The claimant was aware, as a matter of common sense, that the employer expected him to report to work for his scheduled shifts.
4. At the time he was hired, the claimant, who suffers from polycythemia vera, a blood illness, told the owner that he needed to take off from work multiple Thursdays in order to get phlebotomy treatment (the treatment) at [Hospital A].
5. Throughout his employment, the claimant received the treatment on a weekly or bi-weekly basis.
6. The claimant was scheduled to report to work for his shifts at 7 a.m.
7. The employer did not provide the claimant with any paid time off. Any days which the claimant had to take off for illness or medical appointments were unpaid.
8. On July 30, 2018, the claimant did not report to work as he was sick. The claimant informed the owner that he would be out sick for the day.
9. On October 4, 2018, the claimant did not report to work as he was receiving the treatment. The claimant informed the owner in advance that he would be out for the day.
10. On October 24, 2018, the claimant did not report to work as he was sick. The claimant informed the owner that he would be out sick for the day.
11. On November 15, 2018, the claimant did not report to work as he was receiving the treatment. The claimant informed the owner in advance that he would be out for the day.
12. On November 22, 2018, the claimant, who lived in [City A], spent Thanksgiving at a relative's home in [City B]. That night, a neighboring home experienced a fire resulting in the claimant's vehicle being blocked by the firefighters. The claimant had to spend the night in [City B].
13. On November 23, 2018, the claimant's vehicle was still blocked by firefighters battling the fire.

14. On November 23, 2018, the claimant, who was scheduled to report to work at 7 a.m., called the owner and told him that he would not be able to report to work as a result of his vehicle being blocked by firefighters.
15. At no time throughout his employment was the claimant warned nor was he issued any type of discipline—written or verbal—regarding his attendance.
16. After Thanksgiving, 2018, the claimant, who has worked in the landscaping business for approximately 20 years, and who was used to the industry experiencing a slowdown before the holidays, began calling the owner on a daily basis asking if there was work available for the day.
17. Sometime around early December, 2018, after the claimant asked some co-workers what would happen at work during the winter season (since he was used to the landscaping industry slowing down during that time), the owner told him that the employer would have work available for him during the winter.
18. On December 18, 2018, the claimant's 12-year old son experienced an illness and was unable to go to school. The claimant, a single parent with no one else available to care for his son, determined he needed to stay home and care for him.
19. On December 18, 2018, at 5:36 a.m., the claimant sent a text to the owner, which read, "Am not going to be able to come to work today I was up all night with my son he is sick. Sorry."
20. On December 18, 2018, the claimant did not report to work as a result of his son's illness.
21. It is unknown if the claimant sought medical attention for his son as a result of the illness he experienced on December 18, 2018.
22. On December 19, 2018, in the morning prior to his shift, the claimant called the owner in order to determine whether there was work available for the day. The claimant did not hear back from the owner. As a result of not hearing from him, the claimant did not believe that there was any work available and did not report to work.
23. On December 20, 2018, the claimant had an appointment for the treatment. At 5:56 a.m., the claimant sent a text to the owner, which read, "Am sorry am not going to make today."
24. The claimant did not report to work on December 20, 2018, as he was receiving the treatment.

25. On December 21, 2018, the claimant met with the owner in order to pick up his check. At the time they met, the owner asked the claimant if he wanted to plow snow for the employer during the winter season. The claimant responded that he would be willing to plow.
26. At no time on December 21, 2018, or at any other time, did the owner tell the claimant that he was discharging him from his employment.
27. The claimant never heard from the owner again after December 21, 2018.
28. On December 26, 2018, the claimant called the owner to ask if there was any work available. The claimant was unable to reach the owner and did not receive a callback.
29. On December 30, 2018, the claimant again called the owner to ask if there was any work available. Again, the claimant was unable to reach the owner and did not receive a callback.
30. Sometime during the first week of January, 2019, once it snowed, the claimant again called the owner to ask if there was any work available. The claimant was again unable to reach the owner and did not receive a callback.
31. As a result of the claimant not hearing from the owner for several weeks, the claimant believed that the employer had no work available for him. As a result, the claimant decided to file for unemployment benefits.
32. The claimant was discharged from his employment due to a lack of work.
33. On January 6, 2019, the claimant filed a claim for unemployment benefits with an effective date of January 6, 2019. At the time he filed for benefits, the claimant indicated he had been discharged from his employment due to a lack of work.

CREDIBILITY ASSESSMENT

During the initial hearing, the owner testified that the claimant was discharged as a result of attendance infractions. The owner, however, did not testify to the claimant having ever been issued any attendance 4 warnings. During the remand hearing, the claimant provided a reason for each of his absences throughout his employment, and further testified that, at no time, was he issued any warnings (verbal or written) or other sort of discipline regarding his attendance. Furthermore, although the owner testified that he discharged the claimant on December 21, 2018, the owner wrote (in his initial fact-finding questionnaire to the Department), that the claimant was absent from work between December 26, 2018, and December 30, 2018. As such, and also where the claimant's testimony was consistent with his initial submissions to the Department and his documents supporting his appeal to the Board, it is concluded that the claimant was never

told by the owner that he was discharged from his employment. Therefore, where the claimant provided clear and specific testimony (and consistent with his earlier written documents) that he attempted to contact the owner and the owner never returned his calls, where the owner did not participate in the remand hearing and provided no rebuttal testimony, and despite the owner's assertions during the initial hearing that the employer had work available for him, it is concluded that the claimant was discharged from his employment due to a lack of work.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to disqualification, under G.L. c. 151A, § 25(e)(2).

During the initial hearing conducted on January 31, 2020, the employer's owner testified that he discharged the claimant from his job on December 21, 2018, for attendance problems. Consequently, the review examiner applied 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

Under this section of law, the burden is on the employer 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). Based on the information presented at the January 31, 2020 hearing, the review examiner concluded that the employer had carried its burden.

During the remand hearing, the claimant testified that he was not told that he was being discharged on December 21, 2018. Rather, the claimant testified that he was asked if he would be available for winter plowing work, and the claimant agreed to do work. However, the employer never offered any plowing work to the claimant. Thus, the claimant argued that he was separated due to a lack of work in December of 2018, and he filed his claim soon after, in early 2019.

The review examiner considered the testimony of both parties and rendered a credibility assessment finding the claimant to be more credible. We believe that the review examiner's view of the evidence is a reasonable one, and he gave supported reasons for believing the claimant's testimony. Therefore, as we have noted above, we have accepted the review

examiner's consolidated findings of fact and will not disturb them. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

In accordance with his view of the evidence, the review examiner found that the claimant was not discharged for attendance issues on December 21, 2018, that the claimant contacted the employer for more work in December of 2018, but was not offered any, and that the claimant's separation was due to a lack of work. *See Consolidated Findings of Fact ## 25–32.* Such a separation is not attributable to deliberate misconduct in wilful disregard of the employer's interest, and, therefore, the claimant is eligible to receive unemployment benefits.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits under G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the review examiner's consolidated findings of fact show that the claimant's separation was due to a lack of work.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 16, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 10, 2020



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
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until May 4, 2020¹. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

¹ See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-1-20.

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