

Resolving conflicting testimony, the review examiner reasonably concluded that the employer discharged the claimant for work-related injuries that caused an absence and rendered him unable to perform his regular duties. Because the reason for the discharge was not misconduct, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0029 3207 84

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on August 13, 2018. He filed a claim for unemployment benefits with the DUA (his 2019-01 claim), which was initially approved, but in a determination issued on March 23, 2020, the DUA determined that the claimant was disqualified based upon his separation from the employer. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's determination and awarded benefits in a decision rendered on August 25, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not 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 employer's appeal, we remanded the case to the review examiner to afford the employer's primary witness an opportunity to present additional evidence about the reasons for the claimant's discharge. 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 original decision, which concluded that the employer failed to show that it discharged the claimant for any behavior that rose to the level of deliberate misconduct, is supported by substantial and credible evidence and is free from error of law.

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 as a forklift and machine operator for the employer's plastic manufacturing business from 1/22/18 until 8/13/18. The claimant worked from 6:00 a.m. until 6:00 p.m. on Monday through Saturday and was paid \$12.50 per hour.
2. The employer does not have a workplace policy that addresses employee absences without notice (no call-no show).
3. The employer requires employees to make a formal report of any accidents that occur in the workplace. The accident reporting protocol is necessary to ensure the employer's compliance with Occupational Health and Safety Administration (OSHA) standards.
4. On 2/9/18, the employer issued the claimant a Disciplinary and Counseling Action Notice (Notice) for failing to report damage to the opening of a trash compactor caused by a forklift he was operating. The claimant was retrained on forklift safety. The Notice contains a section that states the claimant must immediately report to management any and all damage, and that an incident report is to be filled out by the Production Manager. The claimant signed the Notice.
5. On 3/30/18, the employer issued the claimant a second Notice for speeding while operating a fork truck. The second Notice contains a section that reads: "This is (Claimant's) 3rd and final warning, if in the next 90 days, (Claimant) incurs another warning, it will be immediate termination. In addition, per OSHA regulations, (Claimant) must be immediately retrained on fork truck safety." The claimant signed the second Notice.
6. On 6/18/18, the employer issued the claimant a third Notice for failing to wear safety glasses on 6/4/18 and 6/18/18. The Notice reads in part: "This is (Claimant's) 4th warning, and per his last written warning that he received on March 30th, that if he is brought to us for any infractions of any kind during the 90 days following March 30th, then he will be terminated. The end of June would have been that target date. At this time the company is deciding the course of action and (Claimant) will be notified whether this will be a suspension or termination. The company reserves the right on this 4th warning to terminate after discussion with the Vice President if we see fit." The employer did not discharge the claimant after issuing the 4th warning because the employer was having difficulty getting employees to work and needed to keep the claimant on.
7. On an unknown date after the 6/18/18 incident, the claimant slipped while stepping on a step to access a machine. The claimant injured his shoulder and back. The claimant filed a claim and received workers' compensation benefits. The claimant subsequently returned to work on an unknown date. Sometime after resuming work, the claimant returned to his physician and complained that

he could not perform his work duties. The physician provided the claimant a note, indicating that the claimant was unable to perform the duties of his position. The claimant provided the medical note to the Plant Manager. The Plant Manager told the claimant that he needed people who are capable of working. The Plant Manager provided the claimant a brochure related to unemployment insurance.

Credibility Assessment:

The employer submitted a termination notice to the DUA that shows the claimant was discharged on 8/13/18 for failing to report damage and for two incidents of not wearing protective equipment. The employer also submitted an unsigned Disciplinary and Counseling Action Notice, dated 8/13/18, which indicates the claimant's physician's note indicated the claimant could return to work on 8/13/18, but the claimant failed to report for work or contact the employer that day. In his direct testimony, the employer witness contended that the claimant's absence on 8/13/18 was the "last straw", and that the claimant was discharged because he had four safety violations in one year. It is noteworthy that the employer did not discharge the claimant at the time of the fourth infraction. Likewise, the employer witness testified that had the claimant reported to work on 8/13/18, he would have been discharged that day because of the four safety violations. The undisputed testimony of the parties established that the employer discharged the claimant after an absence related to a workplace injury, which occurred sometime after the fourth safety violation occurred. The employer failed to provide any specific details related to the claimant's accident, the dates of the claimant's absence, or documentation sufficient to show that the claimant was medically cleared to return on 8/13/18. The weight of the evidence supports a conclusion that the claimant was discharged because of the workplace accident that caused his absence, and his inability to return to his regular duties.

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 also agree with the review examiner's legal conclusion that the claimant is eligible for benefits.

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

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

In this case, the parties disagreed about the reason for the claimant's discharge from employment. The employer maintained that it was due to the claimant's safety violations. The claimant asserted that he was let go because, due to work-related injuries, he could not perform his regular job duties. In her credibility assessment, the review examiner parses through the conflicting testimony and concludes that the employer discharged the claimant due to the workplace injuries that caused his absence and inability to perform his regular duties. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless her assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). We believe that her assessment and finding about the reason for the claimant's discharge are reasonable in relation to the evidence presented.

A threshold requirement for disqualifying the claimant under G.L. c. 151A, § 25(e)(2), is that the termination of employment be attributable to some misconduct. The discharge in this case was due to the claimant's physical inability to report for work to perform his regular duties. That is not misconduct and it is not grounds for denying benefits under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning January 13, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

DATE OF DECISION - December 8, 2020

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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 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.

AB/rh