

Although the employer alleged that the claimant smoked marijuana in a prohibited area of the workplace, the review examiner credited the claimant's denial over the testimony and evidence offered by the employer. Because the credibility assessment was reasonable, the findings cannot be disturbed on appeal, and the employer did not show that the claimant should be subject to disqualification under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0030 5716 87

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 April 8, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 29, 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 July 9, 2019.

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 his separation from employment. 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 review examiner has found, following the remand hearing, that the claimant did not smoke marijuana during his work shift on April 5, 2019.

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 as a Security Officer, for the employer, a Security Company, from August 8, 2016 until April 8, 2019, when he was discharged from his employment.
2. The claimant worked a full-time schedule for the employer.
3. The employer has a written rule that prohibits employees from smoking any kind of substance in prohibited areas at work. One prohibited area is anywhere in the client garage. Violations of the policy are dealt with on a case-by-case basis.
4. The claimant received a copy of the policy after hire.
5. During the claimant's tenure with the employer, the claimant complained that he had smelled marijuana smoke in the garage on numerous occasions. The employer stated it would be looked into.
6. In January 2017, the employer thought that the air around the claimant smelled like marijuana while he was working. The claimant was asked to take a drug test and he passed. The test came back negative for marijuana.
7. The claimant worked on April 5, 2019.
8. The claimant has an assigned parking space in the garage of parking space #34 on the first level.
9. The claimant had permission to leave work early on April 5, 2019.
10. At the end of his shift on April 5, 2019, the claimant got in his car and began to drive out of the garage. The general manager and operations manager, both employees of the client, approached the claimant and asked why he was leaving early. The claimant stated that he was going to be doing something with his daughter. The claimant was told to have a good weekend. The claimant then left.
11. The claimant did not smoke marijuana in the client's garage on April 5, 2019.
12. Neither the general manager nor the operations manager said anything to the claimant about smelling marijuana.
13. Later that day on April 5, 2019, the director of security for the client sent an e-mail to the claimant's employer, indicating that the claimant was no longer welcome to work at their site because the operations manager and general

manager saw the claimant smoking marijuana before he left the garage that day.

14. On April 5, 2019, the claimant's supervisor called the claimant and stated that someone had smelled marijuana in the garage that day and that he was going to be suspended for it and needed to contact district manager about it on Monday April 8, 2019.
15. The claimant stated he had not been smoking marijuana.
16. No one asked the claimant to take a drug test.
17. The claimant met with the employer on April 8, 2019 and was informed that he was being terminated for allegedly smoking marijuana in a prohibited area on April 5, 2019.
18. The claimant had been in charge of enforcing the smoking rule himself with other employees.
19. During the claimant's tenure with the employer, he never smoked marijuana or any other substance in a prohibited area.
20. The claimant filed for unemployment benefits and received an effective date of April 7, 2019.

Credibility Assessment:

The claimant and the employer presented conflicting testimony. The district manager testified that others told him that the claimant had been seen smoking marijuana in the garage on April 5, 2019. When asked where the people were in the garage when they first smelled the marijuana, the employer was unable to give an answer. When the employer was asked where the claimant usually parked in the garage, he was unable to provide an answer. When asked why the claimant was not asked to take a drug test, like he had been in the past, the employer also did not have an answer. The employer who testified at the hearings admitted that he was not in the garage on April 5, 2019, and did not himself see the claimant smoking marijuana.

The claimant credibly testified that he did not smoke marijuana in the client's garage on April 5, 2019 or any other day. The claimant testified that the operations manager and general manager stopped him while he was attempting to leave the garage in his vehicle. It does not follow that if the claimant was actively involved in smoking marijuana that he would have stopped his car and had a short conversation with client employees.

The employer witness who testified had no first-hand knowledge of what happened in the garage on April 5, 2019. As such, the only testimony given at the

hearings by the employer were statements of hearsay. The hearsay evidence of the employer was rebutted by the direct testimony of the claimant that he did not smoke marijuana in the client's garage on April 5, 2019. As the hearsay evidence of the employer is rebutted by the direct testimony of the claimant and is not found to be independently reliable [sic]. Given the record as a whole, the claimant's testimony is found to be more credible.

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).

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

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. In this case, the employer alleged that the claimant smoked (marijuana, specifically) in a prohibited area on April 5, 2019. Such conduct would in violation of the employer's expectation that employees not smoke in prohibited areas. Consolidated Finding of Fact # 3. Without the claimant present at the initial hearing, the review examiner took the employer's evidence and concluded that the claimant had smoked marijuana in a parking garage on the date alleged. Consequently, she decided that the claimant was ineligible for benefits.

During the remand hearing, the claimant denied smoking marijuana in the parking garage on April 5, 2019. The claimant testified, and the review examiner found, that the smell of marijuana

sometimes pervaded the garage. Consolidated Finding of Fact # 5. In addition, the claimant had been accused once before of smoking marijuana at work, and he was drug tested for it, but the test came back negative. Consolidated Finding of Fact # 6. However, in this instance, the claimant adamantly denied the alleged behavior. This critical factual dispute is the crux of the case. It was up to the review examiner to assess the parties' testimony and accompanying evidence and make findings about what happened on April 5, 2019. At this stage of the administrative process, "[t]he responsibility for determining the credibility and weight of that testimony rests with the hearing officer," not with the Board. Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31 (1980). We will not disturb the review examiner's credibility assessment, unless it is unreasonable in relation to the evidence presented. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). As noted above, we have accepted the review examiner's credibility assessment. There was nothing unreasonable about the review examiner accepting the direct testimony of the claimant over the testimony of the employer's witness, who was not present at the time the alleged smoking took place.

Based on the fact that the review examiner has found that the claimant did not smoke marijuana in a prohibited location on April 5, 2019, we cannot conclude that the employer has shown by that the claimant engaged in the misconduct alleged by the employer. The employer has not carried its burden under G.L. c. 151A, § 25(e)(2).¹

We, therefore, conclude as a matter of law that the review examiner's decision denying benefits is not supported by substantial and credible evidence or free from error of law, because the employer has not shown that the claimant smoked marijuana in a prohibited area, and, thus, has not carried its burden to show that the claimant should be disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2).

¹ In her original decision, after hearing evidence from the employer, the review examiner found that the claimant admitted to smoking on April 5, 2019. This finding has been removed from the consolidated findings of fact. Presumably, the review examiner did this based on her determination that the claimant was more credible than the employer's witness.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 7, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – September 25, 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