

The review examiner did not find credible the claimant's assertion that he was a no-call, no-show due to having to take his mother to the hospital. Since he did not establish mitigating circumstances for his failure to comply with the employer's expectation that he report to work as scheduled or call out, he is disqualified due to deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0030 6385 79

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 affirm.

The claimant was discharged from his position with the employer on April 16, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 14, 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 June 29, 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 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, 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 did not establish a reason for being a no call, no show on April 12, 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 full-time assembler for the employer from October 15, 2009 through April 16, 2019, when the employer discharged the claimant.
2. The employer's Production Manager was the claimant's immediate supervisor.
3. The employer expects employees to report to work as scheduled.
4. The employer issued multiple warnings to the claimant for attendance issues throughout his employment.
5. On April 12, 2019, the claimant was scheduled to report to work at 6:30 a.m.
6. On April 12, 2019, the claimant was a no call/no show at work.
7. On April 12, 2019, at 7:57 a.m., the employer's Floor Manager sent a text a [sic] message to the claimant regarding his absence.
8. On April 12, 2019, at about 9:22 a.m., the claimant replied that he had a family emergency. The employer instructed the claimant to remain out of work until further notice.
9. On April 12, 2019, the claimant was a no call/no show for unknown reasons.
10. On April 16, 2019, the employer had the claimant report to its location for a meeting during which the [claimant] was discharged.
11. The employer discharged the claimant for absenteeism.

Credibility Assessment:

On April 12, 2019, the claimant was scheduled to report to work at 6:30 a.m. but was a no call/no show at work.

The claimant offered that his mother, a diabetic, via phone call notified him that she was not feeling well, so he reported to his mother's home to take her to the hospital at about 8:00 a.m. However, the claimant was scheduled to report to work at 6:30 a.m., an hour and a half prior to the stated time that he took his mom to the hospital. The claimant offered that he did not notify the employer of his absence because he did not have his phone. However, there is no evidence that he made any attempts, upon receiving the phone call of his mother's illness, to contact the employer about his absence on April 12, 2019.

In addition, the claimant was given an opportunity to submit documentation that may indicate that his mom did report to a hospital on April 12, 2019. The claimant did not submit any such documentation.

Given the totality of the evidence presented, it is concluded that the claimant's testimony is not plausible or credible.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

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

In her original decision, the review examiner notes that the employer did not present a written policy addressing the reason for which the claimant was discharged, his absences from work. Since the employer did not subsequently present an attendance policy at the remand hearing, it did not establish that the claimant's discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer pursuant to G.L. c. 151A, § 25(e)(2). However, pursuant to the statute, the claimant will be denied benefits if the employer can show that he engaged in deliberate misconduct in wilful disregard of the employer's interest.

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant not only committed the act, but did so with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Director of Div. of Employment Security, 377 Mass. 94, 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. When evaluating the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

After remand, the review examiner found that the claimant had received multiple warnings due to poor attendance throughout his employment, which indicates that the claimant was put on

notice of the employer's expectation that he report to work as scheduled or call out. We further note that the claimant testified during the remand hearing that he was aware of the employer's expectation that he report to work as scheduled, and the totality of his testimony indicates that he was also aware he had to call out if he could not report to work.¹ Despite his knowledge of the employer's expectation, the claimant failed to report to work or notify the employer of his absence on April 12, 2019, and, as a result, the employer discharged him on April 16, 2019. After hearing the claimant's testimony that he did not report to work or call out on April 12, 2019, because he had to take his mother to the hospital and was overwhelmed by the situation, the review examiner concluded that the claimant's explanation for his actions was neither plausible nor credible. The review examiner arrived at this conclusion in part because of the claimant's repeated failure to present medical documentation to substantiate his testimony. Since it is within the scope of the review examiner's role to assess the parties' credibility, and we do not find her adverse credibility determination against the claimant to be unreasonable in relation to the evidence presented, her assessment will not be disturbed. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Since the claimant has not established any mitigating circumstances to excuse his failure to comply with the employer's expectation that he report to work or call out, he is disqualified from the receipt of benefits.

We, therefore, conclude as a matter of law that the claimant's discharge is attributable to 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 affirmed. The claimant is denied benefits for the week ending April 20, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 24, 2019



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 OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

¹We 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).

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