

After a District Court-ordered remand for additional evidence, the employer did not participate in the remand hearing. The consolidated findings, based upon claimant testimony which the review examiner found to be credible, fail to show that he was discharged for misconduct. Consequently, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0030 6402 53

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. Benefits were denied on the ground that he was discharged from the employer for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on May 10, 2019. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on December 7, 2019. The claimant sought review by the Board, which affirmed the hearing decision denying benefits, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On November 10, 2020, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to afford both parties an opportunity to present further evidence. Only the claimant participated in the court-ordered remand hearing. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest by failing to attend mandatory weekly meetings, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. On 09/07/18 the claimant began full-time employment with this employer's preowned automobile sales company as the Finance Manager/Business Manager.
2. The employer President was the claimant's supervisor and she was [sic] person who was involved in coaching and training the claimant for his work at the employer's company.
3. The claimant made good faith errors when performing his job and he looked to the President to teach him to perform his job tasks to the standard the President wanted.
4. The claimant always did his job to the best of his ability.
5. The employer President frequently told the claimant "when the Coach stops coaching that is when you need to worry". The employer President never stopped coaching the claimant so the claimant, until his last day, never believed he had a reason to worry about his job.
6. The claimant never received any written or verbal disciplinary warnings from this employer.
7. The claimant noted that he had been tardy for some meetings during his employment in 2018, but the meetings were not held consistently and when they were held, the start time was very fluid and not a set time. The claimant was never warned for being tardy to a meeting or for anything else.
8. In February 2019, after a long period of no meetings, the President mentioned that she wanted to start holding the Monday morning meetings again, but no date was given to resume the meetings and no meetings were held in March 2019.
9. On Monday, 03/15/19, the claimant arrived before 9:00 a.m. and there was no monthly meeting scheduled or held that morning.
10. At approximately Noon on 03/15/19, the President arrived at the office.
11. On 03/15/19, shortly after her arrival, the President came to the claimant's office to speak with him. The President began the conversation "I'm going to be taking over the F and I office", referring to the claimant's position in the finance and insurance office.
12. The claimant understood that he was being laid-off due to business sales being slow and the President's desire to save money by doing the claimant's job herself. During this discharge meeting, the President did note that the claimant was not the strongest or best closer, referring to the claimant's sales abilities.

13. At the time of the 03/15/19 discharge, there was no mention of the claimant allegedly failing to attend any meetings or any allegation of intentional misconduct.
14. The claimant was surprised by the sudden discharge on 03/15/19 because he had not received any prior warnings and the President had never stopped coaching the claimant up to the date of his termination. The claimant felt “blindsided” by the sudden discharge.
15. On 04/16/19, the claimant filed a claim for unemployment benefits effective 04/14/19. The claimant reopened his claim on 06/09/19.

Credibility Assessment:

The claimant’s consistent testimony that he never engaged in any acts of deliberate misconduct and received no prior disciplinary warnings, was accepted as credible. The claimant’s testimony that there was no meeting scheduled or held by the employer on 03/15/19 was accepted by this Review Examiner because it was credible. Only the claimant and his attorney attended the remand hearing to offer testimony.

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. After such review, the Board adopts the review examiner’s consolidated findings of fact except to note that the claimant’s discharge date, which appears in Consolidated Findings ## 9–11, and 13–14, as well as in the credibility assessment as March 15, 2019, is incorrect, as the undisputed evidence in the record shows an April 15, 2019 discharge date.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Based upon these consolidated findings, we now reject the review examiner’s original legal conclusion that the claimant is ineligible for benefits, as outlined below.

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

¹ Both parties reported in the DUA fact-finding questionnaires filled out in April, 2019, that the discharge date was April 15, 2019. *See* Exhibits 3 and 4. Moreover, the findings of fact in the review examiner’s original decision referred to the April 15, 2019, discharge date. *See* Remand Exhibit 1.

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).

Throughout the original and remand hearings, there was much discussion about the reason for the claimant's discharge. The original hearing extended over three days, and when the claimant failed to participate in the last session, the review examiner relied upon the employer's testimony, which he found to be credible. Consequently, the review examiner's original decision found that that the claimant was fired for failing to attend mandatory weekly meetings, even though he had been warned about his failure to do so. The consolidated findings which we have received following the District Court remand order look very different. They indicate that the claimant was discharged because business was slow. *See Consolidated Findings ## 11 and 12.* These new findings are based upon the claimant's testimony, which the review examiner determined to be credible, after the remand hearing that the employer did not attend.

“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). It would have been helpful if the review examiner had explained why he ultimately found the claimant's testimony to be more credible than the employer's. However, given the long history of this case, including numerous continuances and the failure of both parties to participate in every hearing, we decline to remand this case again. The new findings about the reason for the claimant's discharge are reasonable in relation to the evidence presented by the claimant at the hearings. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) (“[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence.”).

In order to disqualify the claimant for either deliberate misconduct or a knowing policy violation under G.L. c. 151A, § 25(e)(2), the employer must show that it fired the claimant for some form of misconduct. As stated, the consolidated findings reflect that the claimant was discharged due to a slowdown in business. There is no suggestion that the slowdown was attributable to any claimant misconduct. Thus, there is no basis to conclude that the claimant either knowingly violated a reasonable and uniformly enforced policy or engaged in deliberate misconduct in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to show that the claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 14, 2019, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 18, 2021



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

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.

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

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