Claimant's decision to test in batches and report aggregate data rather than testing one at a time and reporting individual results was, at most, an exercise of poor judgment. He is not disqualified under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0030 9399 16

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 15, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 10, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on October 26, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 by unilaterally changing the testing procedure for one of the employer's products, and documenting results that were not accurate as a result of this change, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as a plating lab supervisor for the instant employer, a defense product testing company, from 04/12/18 until 04/15/19.

2. The employer maintains an Associate Conduct policy that states in part:

   [Employer] has certain rules and regulations regarding associate behavior that are necessary for an efficient business operation and for the safety of our associates. Conduct that interferes with operations, violates our rules or policies, is a safety issue, or is offensive will not be accepted and may result in disciplinary action. Corrective disciplinary action may be in the form of verbal or written warnings, suspension without pay, or termination, depending on the circumstances of each case.

   Examples of inappropriate behavior include but are not limited to:

   - Falsification of time or production records
   - Dishonesty or immoral conduct or indecency

3. The employer maintains this policy to ensure that they are honest with their customers regarding test results for their product so that they are providing the customer with the best possible product.

4. The claimant completed an orientation at the time of hire in which the employer's policies were reviewed.

5. All employees are subject to the policy.

6. Disciplinary action for being in violation of the policy is at the discretion of the employer based on the nature and severity of the incident.

7. The employer expects employees to provide truthful and accurate information on employer records.

8. The purpose of the expectation is to ensure the employer is honest with their customers so that they are providing the customer with the best possible product.

9. The employer is responsible for testing products for their customers and providing the customer with the test results.

10. The customer dictates which specifications they want the testing to be done according to.

11. If an employee is going to change the testing procedures, they would need to discuss that with a manager because all the products are defense products and the customer would also have to approve the change.

12. In January of 2019, the claimant raised a concern regarding the employer's ionic testing process and that some employees were not performing the tests properly.

13. The employer decided that the claimant would take over all responsibilities for testing and he would continue to do the testing as outlined in the "Ionic Cleanliness" certification that it provided to their customers.

14. The Ionic Cleanliness certification indicates that samples should be tested one part at a time.

15. The form that is completed has a space for the individual test results for each part which is later provided to the customer.

16. The claimant made a suggestion or recommendation to the Quality Assurance Manager (QAM) that multiple parts could be tested at the same time.

17. The QAM never told the claimant to begin testing multiple parts at the same time.

18. Once the claimant took over the testing process, he began testing multiple parts at the same time and documenting the average result for all 10 parts.

19. On 04/12/19, the Human Resources Manager (HRM) was notified that there was a concern regarding the claimant's testing process by the Director of Operations (DOO).

20. The concern was that the claimant was not testing the parts in accordance with the test procedures for the forms that are provided to the customers.

21. The claimant told the employer that he made the decision to aggregate the samples to use less solvent per piece as allowed and encouraged by the spec in order to gain higher resolution of the results.

22. On 04/15/19, the HRM and the DOO met with the claimant to find out why he decided to aggregate the samples and where the numbers came from and the claimant told them that he made them up so that they came to the correct number that we want to put on the form.

23. The claimant was told that he was being placed on paid leave while the employer conducted an investigation.

24. The employer looked into how far back and [sic] see how many batch results and test results that were done with the aggregate method instead of the individual method. The employer had to retest and resample all parts using the individual method.

25. The employer found that this had been going on since approximately the end of January.

26. The employer decided that this was falsification of records and dishonesty and it would result in the claimant's termination.

27. On 04/26/19, the HR coordinator contacted the claimant by telephone and asked him to come in on 04/29/19 at 1 p.m. to talk about the investigation. The claimant agreed to meet with the employer.

28. On 04/29/19, the claimant failed to show up for the meeting and the employer tried to reach him by phone but was unsuccessful.

29. The claimant did not attend the meeting because he had already heard from other employees that he was going to be fired.

30. On 04/29/19, the employer mailed the claimant the termination letter that they planned on presenting to him in the meeting.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows.

We decline to adopt the portion of Finding of Fact # 22, which provides that, when the employer asked the claimant about the data he used on the certifications, "the claimant told them he made them up so that they came to the correct number that we want to put on the form." This portion of the Finding has no basis in the record, as neither party ever asserted that the claimant told the employer he "made them up." In the employer's fact-finding, it stated that the clamant "made the decision to test the samples together rather than one at a time and that HE 'got creative' with the numbers on the certifications on order for the numbers to add up." Exhibit 2. At the hearing, the employer testified that, when asked, the claimant explained he aggregated the results and "got creative" with the numbers. In his testimony, the claimant denied ever using the terms "got creative." Even accepting the employer's testimony, there is no evidence in the record suggesting that the claimant told the employer he "made up" the numbers. We therefore decline to adopt that portion of Finding of Fact # 22.[1]

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant acted deliberately in wilful disregard of the employer's interest by reporting the aggregated testing data.

[1] While this dispute regarding the claimant's statements remains unresolved, it is not dispositive to the issue at hand. The remaining findings of fact provide information sufficient for us to reach a decision.

Because the claimant was discharged, his qualification for benefits is appropriately analyzed under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part:

> [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).

The employer maintains a policy prohibiting inappropriate behavior such as "[f]alsification of time or production records" and "[d]ishonesty or immoral conduct or indecency." Finding of Fact # 2. Under this policy, the employer maintains complete discretion over what discipline to assign an employee based on the nature and severity of the violation. Finding of Fact # 6. The claimant was provided with and reviewed these policies during orientation at the time of hire. Finding of Fact # 4. While this suggests that the claimant was aware of the aforementioned policy, we cannot determine whether the policy is uniformly enforced, as the employer has complete discretion in determining the appropriate disciplinary action for any infraction and has failed to show that all other employees accused of reporting inaccurate testing data had been similarly terminated. Therefore, the Board cannot conclude that the claimant knowingly violated a uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

The next inquiry is whether the claimant's actions constituted deliberate misconduct in wilful disregard of the employer's interest. The central issue to this analysis is the claimant's state of mind at the time of the alleged misconduct. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.) Here, the employer's expectation was that employees would provide truthful and accurate information on employer records, in this case the Ionic Cleanliness certification. Finding of Fact # 7. Therefore, the dispositive question in this case is whether the claimant knew his decision to report the aggregated test results was contrary to the employer's expectation.

The Review Examiner found that the Ionic Cleanliness certification indicates that samples should be tested one part at a time. Finding of Fact # 14. Upon review of the document, entered into evidence as Exhibit # 8, we note that, while the certification does have spaces to record the results of each individual part tested, nothing in the language on the form itself instructs

employees to test each part individually.[2] The document requires only that the parts be tested in accordance with the identified specification, the substance of which is not contained in either the testimony or documentary evidence of record.[3] *See* Exhibit 8. In light of this ambiguity in the certification itself, we give less weight to Finding of Fact # 14. However, even assuming *arguendo* that the certification form indicated that parts should be tested individually, as discussed below, the record does not clearly show that the claimant knew his decision to report aggregated data was contrary to the employer's expectation that employees would provide truthful and accurate information on employer records. *See* Finding of Fact # 7.

After the claimant raised concerns regarding the employer's testing process, the employer gave the claimant complete responsibility for conducting testing in compliance with the relevant specifications. Findings of Fact ## 12 and 13. Subsequent to being granted this authority, the claimant informed the Quality Assurance Manager that multiple parts could be tested at the same time. Finding of Fact # 16. The Quality Assurance Manager never instructed the claimant to begin testing multiple parts at the same time. Finding of Fact # 17. Nor did the Quality Assurance manager instruct the claimant not to begin testing the parts in batches.[4] This is not inconsistent with Finding of Fact # 17, which finds only that the Quality Assurance manager did not give the claimant permission to implement his proposed changes. When the employer inquired into the claimant's reason for testing the parts in batches, he explained that he "made the decision to aggregate the samples to use less solvent per piece as allowed and encourage by the spec in order to gain higher resolution of the results." Finding of Fact # 21. The claimant's response is consistent with his unchallenged testimony at the hearing that he believed testing the parts in batches provided more accurate results than testing the parts individually. *See* Finding of Fact # 21. Under these circumstances, we do not believe that the employer has shown that the claimant believed his decision to report the aggregated testing data was contrary to the employer's expectation that employees would provide truthful and accurate information on employer records.

As the customer specifies what tests must be done to a specific part, the claimant should have followed up on his conversation with the Quality Assurance manager to ensure the employer got customer approval for any testing-related changes. *See* Findings of Fact ## 10, 11 and 16. Upon reflection, that may have been the best practice. However, "[w]hen a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). At most, the circumstances in this case demonstrate that the claimant had a good-faith lapse in judgment. As such, they do not warrant denying benefits.

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[2]Exhibit 8 is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

[3] Exhibit 11 is labeled IPC-TM-650 Method 2.3.25D, however the Ionic Cleanliness certification, identified as Exhibit 8, instructs employees to follow IPC-TM-650 Method 2.3.25B. The Board notes that testing method labeled Method 2.3.25D is the only testing method included in the record, even though it is not the testing method required by the Ionic Cleanliness report.

[4] This portion of the claimant's testimony is also part of the unchallenged evidence before the review examiner.

Therefore, we conclude as a matter of law that the employer has failed to show that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of April 28, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 15, 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 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.

LW/rh