

The claimant forgot he did not have any more time to use for unexcused absences from work and, therefore, at the time of the final unexcused absence, he did not have the necessary state of mind to engage in a knowing violation of the employer's absenteeism policy or deliberate misconduct within the meaning of G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0031 1109 42

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 May 1, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 8, 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 17, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 his 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 knowingly violated a reasonable and uniformly enforced rule or policy of the employer, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that at the time of the final incident on April 30, 2019, the claimant had forgotten he had already used his allotted eight hours of unexcused time off from work in a single month.

Findings of Fact

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

1. The employer is a manufacturer. The claimant worked as a full-time machine operator for the employer. The claimant worked for the employer from 12/21/77 to 4/29/19.
2. The claimant worked 7:00 a.m. to 3:30 p.m. shifts.
3. The claimant was in a labor union when he worked for the employer.
4. The employer has a collective bargaining agreement with the labor union (the agreement).
5. The agreement features a policy titled "Excessive Absenteeism." The section reads, in part:

Unexcused hours are any hours an employee misses from his normal schedule, for any reason, that he is not compensated for. Each employee is able to earn 9-3/4 sick days each year. They also have their allotted vacation days, five of which can be used at the employee's discretion as emergency or personal days without prior notice to the company but a call in for the day...

Excessive absenteeism is considered to be forty (40) unexcused hours in less than a twelve (12) month period of time beginning with the first unexcused hour. Excessive would also be more than eight (8) hours in one month.

Warnings for excessive absenteeism are as follows. If an employee nears the limit of unexcused time they will be reminded by management of the company policy. If they exceed the limit they will be issued an Oral Warning as a first step. The warning will remain until six (6) months from the incident of unexcused time has passed. If they have no other incidents of unexcused time the warning will be removed. If however they have another incident of unexcused time after receiving the Oral Warning but before it has been cleared they will be given a Written Warning. This level of warning will remain until six (6) months from the date of unexcused time has passed. If the employee has more unexcused hours before this level the Written Warning is removed he will be given a suspension of two days. Again this level of warning will remain until six (6) months from the incident of unexcused time has passed. If the employee has more unexcused hours before this level of discipline is removed he will be terminated. An employee with multiple warnings will only have one level removed as each six-month date is passed.

6. The employer allows workers to use accrued sick time for drunkenness.

7. The employer has twenty production workers. The employer implemented the Excessive Absenteeism policy to limit absenteeism to ensure continued production.
8. Prior to 12/07/18, the claimant missed work on various occasions. The employer followed the progressive steps outlined in the Excessive Absenteeism policy.
9. The claimant missed work on 12/07/18. The employer suspended the claimant for two days.
10. The employer created a document titled "Notice of 2 Day Suspension." The document is dated 12/10/18. The document reads, in part, "[The claimant] was absent without excuse on Dec 7th 2018 for eight hours. This is in excessive of the forty (40) hours of unexcused time allow [sic] during a twelve-month period." The document reads, in part, "If within the next six months [the claimant] does not receive another warning, this notice will be removed and lowered down one level. If however within the next six months [the claimant] receives any warning subsequent to this, he will be terminated." The employer gave the document to the claimant.
11. The claimant presented for work on 4/02/19. He left work at 7:30 a.m. due to illness. The claimant accrued 7.5 hours of unexcused absence due to this early departure from work.
12. The claimant did not miss any work on 4/01/19 or in the period 4/03/19 through 4/29/19.
13. Sometime in the period 4/05/19 to 4/29/19, the employer told the claimant that he had 31.5 hours of unexcused absence on his record.
14. The claimant did not work a scheduled shift on 4/30/19. The claimant did not work his shift because he was drunk from alcohol consumption.
15. On 4/30/19, the claimant contacted a supervisor prior to his 7:00 a.m. work start time and reported his absence. He told the supervisor that he thought he had 31.5 hours of unexcused absence on his record. He asked the supervisor if he had eight hours before he hit forty hours of unexcused absence. The supervisor told the claimant that he had the eight hours.
16. On 4/30/19, the claimant had forgotten that he had accrued 7.5 hours of unexcused absence on 4/02/19.
17. The employer discharged the claimant because he did not work his scheduled shift on 4/30/19. The employer determined that the claimant accrued more than eight hours of unexcused absence in April 2019 and that this violated the Excessive Absenteeism policy.

18. The claimant grieved his discharge via his union. On 6/18/19, the union informed the employer that it had withdrawn its grievance.
19. The claimant is an alcoholic. In the final six months of the claimant's employment, the claimant did not take any steps to combat his alcoholism.
20. The employer issued a paystub to the claimant for the pay period ending 4/24/19. The stub shows that the claimant had four hours of sick pay available.
21. The employer issued a paystub to the claimant for the pay period ending 5/01/19. The stub shows that the employer paid the claimant four hours of sick time.

Credibility Assessment:

In the hearing, the claimant testified that he had forgotten that he had accrued 7.5 hours of unexcused absence on 4/02/19. The claimant's testimony is accepted as credible because the record does not feature any information to suggest otherwise. In the hearing, the employer's owner testified that the claimant reported that he had forgotten about this prior absence when he came into work on 5/01/19. This report that the claimant made to the employer contemporaneous to his absence on 4/30/19 lends credibility to the claimant's assertion in the hearing.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant knowingly violated the employer's excessive absenteeism policy.

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

This section of law disqualifies a claimant from benefits if his or her separation was attributable to either a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest. Under G.L. c. 151A, § 25(e)(2), 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). After the first hearing, in which only the employer participated, the review examiner concluded that the employer met its burden. Following our review of the record from both the initial and remand hearings, as well as the consolidated findings of fact and the documentary evidence, we now conclude that the employer has failed to satisfy its burden.

At the outset, the employer must first show that the claimant engaged in the behavior which ultimately led to his discharge. Here, the employer's policy defines excessive absenteeism, in part, as using more than eight hours of unexcused time off from work in a single month. The claimant testified that he was aware of this policy. On April 2, 2019, the claimant left work early and used seven and a half hours of unexcused time off from work. Subsequently, on April 30, 2019, the claimant called out because he was drunk and unable to work. This was considered an unexcused absence of eight hours. The unexcused absence on April 30th put the claimant over the eight-hour limit for unexcused time off from work in a single month.

The dispositive issue in this case is not whether the claimant engaged in the prohibited conduct, which he clearly did, but whether he had the state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2). Under the knowing violation portion of the statute, the claimant's actions are considered knowing if, at the time of the misconduct, the claimant was ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still, supra at 813. In this case, the review examiner found that the claimant had forgotten he had an unexcused absence of seven and a half hours on April 2nd. Since the claimant mistakenly believed at the time he got drunk and missed work on April 30th, that he had eight hours available to use without penalty for calling out of work, we cannot conclude that he knowingly violated the employer's excessive absenteeism policy on that day.

For similar reasons, we conclude that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest. Under the deliberate misconduct standard, in order to evaluate 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." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). As noted above, the claimant was aware, via the excessive absenteeism policy, that the employer expected its employees to use no more than eight hours of unexcused time off from work in a single month. The claimant's failure to comply with that expectation arose out of forgetfulness, a level of forgetfulness that the employer could justifiably decide not to tolerate, but which nonetheless is inconsistent with a conclusion that the claimant acted deliberately at the time he went over the allotted eight hours of unexcused time off from work. Thus, the claimant did not have the necessary state of mind to engage in deliberate misconduct on April 30th.

We, therefore, conclude as a matter of law that the claimant did not engage in a knowing policy violation or act deliberately in wilful disregard of the employer's expectations 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 ending May 4, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 15, 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.

SVL/rh