Claimant was discharged for failing a breathalyzer test. Where the findings provide that he had consumed alcohol more than 10 hours before his shift and there was no evidence of intoxicated behavior, Board concludes that there was not substantial and credible evidence to determine that the claimant violated the employer's policy not to report to work intoxicated or under the influence of alcohol.

Board of Review
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Issue ID: 0031 2558 84

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 7, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 27, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties via telephone, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 10, 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 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, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer by reporting to work under the influence of alcohol, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On October 31, 2019, the claimant filed his 2018-01 claim for unemployment benefits, effective October 28, 2018.

2. On November 11, 2018, the claimant began working as a Line Apprentice for the employer a Power Line contractor. This was a full-time job.

3. The employer and the union both had policies that disallowed being under the influence of alcohol at work.

4. The reason for the above policy was to maintain a safe work environment, as the employees drove 30,000 pound vehicles and [sic] working with high voltage electrical line. In addition the employer would be subject to penalty from the Department of Transportation if it did not have and enforce a drug and alcohol policy that sincerely sought to prevent employees from being under the influence of alcohol while at work.

5. The claimant was made aware of the drug and alcohol policy when he on boarded with employer. The policy, along with other safety polices, were reviewed frequently at weekly staff meetings.

6. The employer had discharged all employees who have tested positive on a drug or alcohol test.

7. The employer is required by DOT to do random drug testing of its safely sensitive employees. DOT will send a randomly chosen list of employees to the employer once a month and the employer is required to have them take a drug and alcohol test as soon as possible.

8. The clamant took and passed a drug and an alcohol test at hire. He also underwent and passed a number of random tests.

9. The evening of May 6, 2019, the claimant and his wife went to a friend's house for dinner, where the claimant drank wine and beer socially. They went home around 9:30 p.m. The claimant used alcohol based mouthwash when he brushed his teeth before going to bed when he got home. He did so again when he woke up at 4 a.m. to go to work.

10. On May 7, 2019, the claimant's name was chosen for the May random drug and alcohol test. The claimant was late to work that day due to heavy traffic. When he got to work he was told he needed to report for the random drug test.

11. The claimant reported as required for the random drug test, which was performed by Lifeloc technologies. The claimant took one breathalyzer test at 7:18 a.m. The result was .026. In order to pass the test the result must be less than .02. The claimant took a second test at 7:34. The result was .022.

12. The claimant was required to sign an Alcohol Testing form wherein he certified that he had submitted to the alcohol test and that the results were accurately recorded on the form. The notice also stated that the claimant understood that he must not drive, perform safety sensitive duties, or operate heavy equipment because his results were higher .02 or higher.

13. The claimant was sent home for the day and told to report to work the following day.

14. The Forman spoke to the Project Manager about the results of the test. The Project Manager discussed the results with the Regional Manager and it was agreed that the claimant had violated the policy regarding being fit for duty, as he was unable to pass the random drug test, and that the policy required that the employer discharge him.

15. When the claimant reported to work on May 7, 2019, he was informed that he was being discharged due to having reported to work unfit for duty on the 6th.

16. On June 27, 2019, DUA issued Notice of Approval 0031 2558 84-02, stating that the claimant was eligible to receive benefits as of May 7, 2019, and subsequent weeks.

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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's 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's discharge was attributable to a knowing violation of a reasonable and uniformly enforced rule or policy. Rather, as outlined below, we believe that a review of the record supports the conclusion that the claimant was not intoxicated at work and was not aware that his actions violated any of the employer's rules or policies.

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 bears the burdens of proof. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996). The employer may alternatively show that the claimant deliberately contravened the employer's expectations in wilful disregard of the employer's interest, or that he knowingly violated a reasonable and uniformly enforced formal rule or policy.

Here, the claimant was discharged by the employer for failing a random alcohol test, allegedly in violation of the employer's drug and alcohol policy. While both parties acknowledged that such a policy existed, and that the policy called for random alcohol testing, the employer failed to submit the policy in question. Without the written policy, it cannot be known whether the policy referred to "intoxication" and/or being "under the influence" of alcohol, and how these terms were defined. When questioned by the review examiner about the cutoff level for a positive test, the employer's witness stated that he did not know this information[1]. While the results form from the test itself includes a section titled "to be completed by employee if test result is 0.02 or higher," it is not known whether this cutoff is part of the policy or was otherwise communicated to the claimant. Without more details about the written policy, it cannot be determined precisely what the policy prohibited, and whether it was reasonable and uniformly enforced.

We must next determine whether the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employing unit's interest. The claimant did not dispute that he was aware the employer expected him to refrain from reporting to work under the influence of alcohol but maintained that he did not do so. The claimant testified that he had four or five drinks of beer and wine and stopped drinking around 9 p.m. the prior evening. The review examiner's findings appear to credit this testimony. The only evidence of that the claimant was intoxicated or under the influence was the breathalyzer results themselves, which showed that he had a blood alcohol concentration (BAC) of 0.026% and 0.022%. This breathalyzer test was conducted first thing in the morning, at 7:18 a.m., before the claimant's shift. We note that, for purposes of the criminal charge of driving under the influence in the Commonwealth of Massachusetts, the legal limit is defined as "a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater," or 0.08%. G.L. c. 90, § 24. The claimant's blood alcohol content was more than one-third *lower* than this. The employer did not suggest that the claimant showed any physical signs of intoxication.

A conclusion that the claimant committed misconduct by reporting to work under the influence of alcohol must be supported by "substantial evidence." *See* Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we cannot conclude that there is substantial evidence that the claimant reported to work while intoxicated or under the influence of alcohol, as these terms are commonly understood.

[1] We 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).

If the employer's expectation was that the claimant not have any alcohol in his system whatsoever, or that he refrain from consuming alcohol more than 10 hours prior to the start of his shift, there is no evidence in the record that such an expectation was ever communicated to the claimant. The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

We, therefore, conclude as a matter of law that the claimant's discharge was not 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 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 11, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION – October 30, 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.

JRK/rh