

The claimant is disqualified under G.L. c. 151A, § 25(e)(3), not § 25(e)(2), because she was discharged due to a criminal conviction.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0031 3579 36

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 on different grounds.

The claimant was discharged from her position with the employer on June 20, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 22, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 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 remanded the case to the review examiner to provide notice to the parties of G.L. c. 151A, § 25(e)(3). 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 was disqualified from the receipt of benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the record shows that she was discharged due to a criminal conviction.

Findings of Fact

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

1. The claimant worked full-time for the instant employer as a Health Insurance Claims Representative from 3/18/2019 until her separation on 6/20/2019.

2. At the time of hire, the claimant was informed that she needed to pass a criminal background check as a condition of employment.
3. The claimant was informed in writing that due to a delay in background checks in the [A] County, she could begin employment on 3/18/2019, pending the outcome of the background check. The claimant signed this document acknowledging her receipt.
4. The claimant made Human Resources aware of pending embezzlement charges which were felony charges.
5. On 5/22/2019, the claimant plead [sic] guilty to larceny over \$250, forgery of a check and uttering a false check. The claimant was ordered to pay restriction [sic] in the amount of \$54,927.00.
6. On 6/18/2019, the employer received the criminal background check indicating that the claimant was convicted of larceny over \$250, forgery of a check and uttering a false check.
7. The employer could not have the claimant work with a felony conviction since the employer works with private information of clients.
8. On 6/20/2019, the claimant was informed that she was terminated for failing her background check due to her felony conviction.

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. However, as discussed more fully below, while we agree that the claimant's separation from employment is disqualifying, we reject the review examiner's legal conclusion that her disqualification is under G.L. c. 151A, § 25(e)(2).

Because the claimant was terminated from her employment, the review examiner analyzed her separation under 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

However, since the review examiner found that the employer terminated the claimant because she was convicted of a felony, this case is governed by G.L. c. 151A, § 25(e)(3), 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 . . . (3) because of conviction of a felony or misdemeanor.

Because the parties did not receive notice of G.L. c. 151A, § 25(e)(3) at any point during the unemployment proceedings below, we remanded this case to the review examiner. Notice of this section of law was provided to the parties on November 15, 2019. This action was necessary in order to preserve each party's right to a fair, independent, and impartial decision.

As stated above, we agree with the review examiner's determination that the claimant's separation from employment was disqualifying, but we find that she is disqualified pursuant to G.L. c. 151A, § 25(e)(3) and not G.L. c. 151A, § 25(e)(2), as her separation resulted from her felony conviction in May 2019. We note that in her appeal to the Board of Review, the claimant objected to the denial of benefits, arguing that she did not break any of the employer's rules. While we agree that her termination from employment did not result from any type of misconduct related to the employer, in order to deny benefits under G.L. c. 151A, § 25(e)(3), it is not necessary that the offense leading to the conviction be related to the claimant's employment. Glasser v. Dir. of Division of Employment Security, 393 Mass. 574, 576 (1984); *See also* DUA Service Representative Handbook, § 1352.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, § 25(e)(3), the claimant is disqualified from the receipt of benefits because her separation from employment was the result of a felony conviction.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending June 22, 2019, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 26, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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