

The claimant's final instance of absenteeism occurred when she was unexpectedly pulled over by the police and told of her suspended driver's license. Because the claimant thought that she had paid her parking tickets, and because the review examiner attributed the traffic stop to an error or oversight, the claimant did not have the knowing or deliberate state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0031 5002 89

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 her position with the employer on July 1, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 27, 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 October 1, 2019.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding her separation from employment. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 to deny 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 employer discharged the claimant for excessive absenteeism after she was absent a final time on June 28, 2019.

Findings of Fact

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

1. The claimant worked full-time as a site supervisor for the employer, an outpatient site for recovery services, from November 20, 2018 through July 1, 2019.
2. The employer had a written policy regarding "misuse" of time off. The policy stated that employees who took additional time off beyond what they had accrued would be considered to have a "negative balance" in their paid time off and would be subject to disciplinary action up to and including termination.
3. The employer had an expectation that employees will be at work as scheduled and on time and only take approved time off.
4. The claimant was aware of the policy and expectation from receiving a handbook at hire, because she was a manager, and because she had been counseled and warned about attendance issues during her employment.
5. As the site supervisor, the claimant was responsible for the site and the staff there. The employer expressed to the claimant how important it was for her to be reliably at work.
6. The claimant began her employment with a 90-day probationary period. During the probationary period, the claimant accrued time, but was not allowed to take any time off. The claimant took 5 full unapproved days off during that time and left early twice.
7. The claimant is a single parent of two small children. Her 4 year old has medical issues and has frequent doctor appointments which caused the claimant to be absent from work. The claimant also had some childcare issues.
8. On February 19, 2019, the employer extended the probationary period for an additional 3 months/90 days (to May 20, 2019) and expressed to the claimant that she needed to improve her attendance in order to keep her job.
9. The claimant found a new babysitter and was able to improve her attendance. During most of the additional probation, the claimant did not have any unapproved absences.
10. On May 22, 2019, two days after the probation extension was completed, the claimant again began having absences, was late or left early.
11. Between May 20 and June 28, 2019, the claimant was out for 7 full days, and had a number of occasions where she came in late or left early.

12. The claimant's absences were as a result of her own illnesses. The claimant provided medical documentation to the employer for her absences.
13. On June 28, 2019, the claimant was pulled over by a police officer at or about 8:20 a.m. She was told she was being pulled over because her license was suspended due to unpaid parking tickets.
14. The claimant was confused because she had paid her parking tickets. The officer who stopped her told her she could not drive and her car would have to be towed. He also told her to go to the RMV to straighten out her license.
15. The claimant called her supervisor and explained the situation. The supervisor told the claimant to "do what you need to do." The claimant then spent the remainder of the day handling her license issues and having her license renewed.
16. On July 1, 2019, the claimant arrived on time for work and worked throughout the morning. At or about 1:00 p.m. the claimant was called into a meeting with her supervisor and the director of human resources. She was told that it wasn't working out and they were letting her go because she was absent too often.
17. On July 1, 2019, the claimant was terminated for excessive absences in violation of the employer's time off policies.
18. The claimant filed a claim for unemployment insurance benefits with the Department of Unemployment Assistance (DUA) with an effective date of June 30, 2019.
19. On July 27, 2019, DUA issued a Notice of Approval to the claimant. The employer appealed that determination.

Credibility Assessment:

Only the employer, by its director of human resources, attended the initial hearing. Both the claimant and the employer attended the remand hearing. The credible testimony of both the claimant and the employer witness during both hearings was largely free of disagreement or conflict with regard to the basic facts of the claimant's employment and separation. At the remand hearing, the claimant provided additional information about the reasons for her absences and more details about the final incident. The claimant testified that she had explained to her supervisor why she wasn't coming to work on June 28, 2019 – due not only to being stopped and having her car towed, but also because she needed to make arrangements to get her car back and handle the issues with her license. The claimant also testified that she had paid her parking tickets and the cancellation of her license was either due to a late fee she had not paid, or an error on the part of

the RMV, and not due to her having failed to pay her parking tickets. Given all of the above, I find the claimant's testimony on these points credible.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the claimant is not subject to disqualification from the receipt of unemployment benefits.

Because the claimant was terminated from her employment, her 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 the law, the employer has the burden to show that the claimant is not eligible to receive benefits. *See Still v. Comm'r of Department of Employment and Training*, 423 Mass. 805, 809 (1996). After the initial hearing, which only the employer attended, the review examiner concluded that the employer had carried its burden. Following our review of the record, exhibits, and testimony from both the initial and remand hearings, we conclude that the employer has not shown that the claimant should be disqualified.

The review examiner found that the claimant was discharged for "excessive absences in violation of the employer's time off policies." Consolidated Finding of Fact # 17. The consolidated findings of fact show that the claimant had a history of absences and attendance issues. During her initial probationary period, the claimant had several unapproved days off, and this resulted in the employer extending her probationary period. After the extended probationary period ended, the claimant was again absent on multiple days and did not work her full shift on other days. Consolidated Finding of Fact # 11. Although the claimant had numerous instances of attendance issues, a final absence occurred on June 28, 2019. After that day, the employer decided to discharge the claimant. Therefore, our focus in this case is on the June 28, 2019, absence, as it was the direct precursor to the discharge. *See Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 626–627 (1984).

For the employer to carry its burden under G.L. c. 151A, § 25(e)(2), it must first show that the claimant engaged in misconduct or a violation of an employer rule or policy. In other words, she

must have done something prohibited by the employer. As noted, the employer alleged that the claimant was absent on June 28, 2019. The absence had not been pre-approved. Because it is not clear from the review examiner's findings of fact that the claimant had "misused" her time, or that she did not have sufficient paid time off to cover the June 28, 2019, absence, we cannot conclude that the claimant violated the policy noted in Consolidated Finding of Fact # 2. However, we conclude that the claimant did violate the employer's expectation that she report to "work as scheduled and on time and only take approved time off." Consolidated Finding of Fact # 3. The claimant did not report to work on June 28, 2019, after she was pulled over by the police. This was a violation of the employer's expectations.

Our analysis does not end there, however. In discharge cases, the claimant's state of mind at the time of the alleged behavior is of paramount importance. Thus, even if the employer had shown a violation of its written policy, the employer would still have to show that the claimant's policy violation was done knowingly. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996). Under the deliberate misconduct standard, the claimant must have intentionally violated a reasonable expectation of the employer and done so in wilful disregard of the employer's legitimate business interest. See Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The review examiner's consolidated findings of fact show that the claimant did not intend to miss work on June 28, 2019. She was unexpectedly pulled over by the police, and she was informed that her license had been suspended. It was then important for her to deal with her outstanding issues with the Registry of Motor Vehicles (RMV). See Consolidated Findings of Fact ## 13–15. Although the claimant's suspended license could be attributable to the claimant's own actions, perhaps in failing to pay her parking tickets, the review examiner suggests in her consolidated findings of fact that the claimant was surprised by what happened. She noted that the claimant was "confused because she had paid her parking tickets." Consolidated Finding of Fact # 14. We infer from this finding that the claimant was not aware that she still had outstanding parking tickets, or that her license had been suspended. The review examiner found the claimant's testimony to be credible, and the review examiner noted in her credibility assessment that the suspended license was most likely attributable to an error by the RMV or an oversight by the claimant. These circumstances do not indicate that the claimant had a disqualifying knowing or intentional state of mind, which would subject her to disqualification.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny the claimant benefits pursuant to G.L. c. 151A, § 25(e)(2), was not supported by substantial and credible evidence or free from error of law, because, even though the claimant was absent from work on June 28, 2019, she did not have the necessary state of mind to disqualify her from receiving unemployment benefits.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 30, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 27, 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.

SF/rh