

The claimant's attendance infractions are mitigated by his alcoholism, since at the time of the infractions, he was making a sincere effort to overcome his illness, but was unable to control it. He is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0032 1083 15

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 September 6, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 22, 2019. The employer appealed the determination to the DUA hearings department. Following an initial hearing on the merits attended by both parties, and a continued hearing attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on December 19, 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 give the claimant an opportunity to present 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 engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant's attendance infractions were the result of his alcoholism.

Findings of Fact

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

1. In April of 2019, the claimant's brother died due to medical issues related to the brother's struggles with alcoholism. The claimant was very depressed due to the loss of his brother.
2. The claimant never had issues with his personal use of alcohol prior to the death of his brother.
3. After his brother's death, the claimant started drinking to excess and became an alcoholic.
4. On 06/10/19, the claimant began new full-time employment as a non-union Casino Porter at this employer's casino.
5. At the time of hire, the claimant [attended] an orientation training where he [was] provided with the employer's policies and procedures.
6. The employer uses a point system to track absences. For a no call no show, 7 points are given and at 14 points, an investigation will be done with a discharge occurring if there are more than 14 accumulated points and no defense to bring the points down to less than 14.
7. The employer did not enforce its attendance policies strictly during the time the claimant worked for this employer, because the employer was focused on opening this new casino on 06/23/19, and getting the business up and running before dealing with attendance issues.
8. If the claimant is absent from a scheduled shift, he may call out or his wife may call out for him.
9. The claimant is expected to contact the employer to explain an absence. The claimant was told by his supervisor that the employer would contact the claimant to learn why he was absent if his absences accumulated 14 points, but this was not done in the claimant's case.
10. The claimant was a no call no show in June 2019 and in early July 2019 due to his alcoholism issues. At the time, employer management was focused only on opening the new casino, so the claimant was not questioned about these absences.
11. In early July 2019, the claimant told his supervisor that he was being treated professionally for alcoholism.
12. The claimant attended AA meetings, hospital recovery programs and ongoing counseling sessions to address his alcoholism.
13. The last shift the claimant worked was on 08/14/19.

14. The claimant was hospitalized due to issues related to his alcoholism on 08/15/19. The claimant's supervisors were informed of the claimant's hospitalization due to issues related to his alcoholism.
15. After 08/14/19, the claimant was not healthy enough to work until 08/25/19. The claimant and his wife made calls to the claimant's supervisor explaining his ongoing medical issues for the period from 08/15/19 until his attempt to return to work on 08/25/19.
16. On 08/25/19, the claimant arrived to work but he was called in to meet with management and Human Resources. The claimant was told that the employer was investigating his ongoing attendance issues.
17. It is unknown why the employer chose 08/25/19 as the date to warn the claimant about attendance concerns as opposed to any other prior date. As the casino was in operation for a while, management began to be less lax and started to enforce its attendance policies.
18. During the 08/25/19 meeting, it was discussed that due to his short term of employment, the claimant was not eligible for FMLA leave to address his alcoholism and the employer business needs would not permit a personal leave being granted. On 08/25/19, the claimant was told he was being suspended while the employer further investigated his attendance issues.
19. On 09/06/19, the claimant met with his supervisors and he was told that he was being discharged for two instances of no call no show on 06/29/19 and 07/01/19 that occurred before the claimant had notified the employer of his serious issues with alcoholism. The claimant was given no discipline at the time because the employer was still lax in its enforcement of attendance policies due to the focus on opening the employer's new casino.
20. The claimant was never issued any prior disciplinary warning before his 08/25/19 suspension and 09/06/19 discharge.
21. All of the claimant's attendance issues were due to his alcoholism and no other reason.
22. During the 09/06/19 discharge meeting, the claimant was told by his supervisors that after his alcoholism is under control through treatment, the claimant would be eligible to apply to again work for this employer, but in a different department.
23. On 09/08/19, the claimant filed to reopen an existing unemployment claim filed new on 11/28/18, effective 11/25/18.
24. The claimant, as directed, has applied for new employment with this employer's casino, and he is awaiting a response to his application.

25. At the remand hearing, the claimant provided additional medical documentation supporting his claims that he has been in treatment for his alcoholism.

Credibility Assessment:

The claimant's testimony and evidence dealing with his efforts to treat his alcoholism during his term of employment with this employer was accepted as credible, as it is supported by the evidence.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. In light of the consolidated findings, and as discussed more fully below, we believe that the claimant is entitled to unemployment benefits.

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, . . .

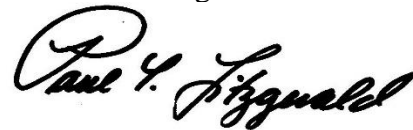
The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Director of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Director of Division of Employment Security, 393 Mass. 271, 275 (1984). 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, 377 Mass. at 97. In Shepherd v. Director of Division of Employment Security, the Supreme Judicial Court considered whether alcoholism mitigated the willfulness of the misconduct for which the claimant was discharged. 399 Mass. 737, 740 (1987) (remanded to obtain evidence of the claimant's state of mind). We note that Shepherd does not stand for the proposition that alcoholism is an absolute defense to disqualification under G.L. c. 151A, § 25(e)(2). Under Shepherd, if the employer can prove that the claimant either had control of his alcoholism, or that he deliberately and willfully refused to accept help in controlling it at the time of the misconduct, then the employer may meet its burden of proof as to the claimant's state of mind under G.L. c. 151A, § 25(e)(2). Id. at 740.

The employer has not met its burden in this matter. After obtaining the claimant's testimony and other evidence at the remand hearing, the review examiner found that the claimant is an alcoholic, and his alcoholism directly caused attendance violations. Specifically, the claimant failed to report to work or call the employer to report his absences. The consolidated findings of fact reflect that, at the time that the claimant failed to comply with the employer's policy requiring employees to report to work as scheduled or call out, the claimant was making good faith efforts to control his alcoholism by attending AA meetings, hospital directed recovery programs, and counseling sessions. Since the claimant continued to miss work due to alcohol consumption, despite his sincere efforts to control it, we can reasonably conclude that the claimant was not in control of his alcoholism at the time of the misconduct. Further, there are no findings of fact establishing that the claimant deliberately or willfully refused help in trying to control the disease when he failed to report to work. Under these circumstances, we conclude that the claimant's alcoholism mitigated the willfulness of his misconduct within the meaning of Shepherd, and he is, therefore, entitled to unemployment benefits.

We conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer'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 ending September 7, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 30, 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
(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