

Employer had an obligation to ask about a criminal record on its job application for a pharmacy delivery position. The claimant deliberately lied on his application just so he could get a job. When the employer found out, it fired him. The claimant was disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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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.

The claimant was discharged from his position with the employer on September 20, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 7, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered January 16, 2021. 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 matter back to the hearings department to obtain detailed information about the claimant's job title and duties. Both parties attended the remand hearing. 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 is disqualified from benefits under G.L. c. 151A, § 25(e)(2), for falsifying his job application, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant was paid by an employment agency to provide care for his mother from July 2016 until she died on November 1, 2019.

2. (a).¹ He also worked as a Pharmacy Driver for the instant employer, a grocery store, from September 14, 2019, through September 20, 2019.
2. (b). The instant employer maintained a policy in its handbook prohibiting employees from falsifying documents.
3. The purpose of the policy was to ensure employees were honest.
4. The policy is in the employee handbook which is typically given to employees during orientation.
5. The claimant did not receive a copy of the handbook.
6. The policy states that violations can lead to disciplinary action up to and including termination.
7. The employer has terminated all employees who falsified their employment application.
8. The claimant knew from his own common sense that he should not be dishonest with his employer.
9. When the claimant applied for the position with the employer, he completed an electronic application. The application asked the claimant whether he had ever been convicted or pled guilty or no contest to any crime or offense other than a minor traffic violation.
10. The claimant checked the “No” box even though he was convicted of intimidating a witness and pled guilty to a drug charge in 2013.
11. The claimant checked the “No” box because he really wanted a job and he didn’t think lying would be a big deal.
12. The employer sent the application to their third-party vendor for review. The third-party vendor provided the employer with information about the claimant’s criminal record.
13. On 09/20/19, when the employer received the results, the employer terminated the claimant for falsifying his employment application.
14. There is no federal or state law preventing the employer from hiring the claimant or retaining him as an employee based upon his criminal record.

¹ We have labelled these findings (a) and (b) to distinguish the two consolidated findings that were assigned the same number.

15. If the claimant had answered the question regarding his criminal past honestly, the employer would have reviewed his history with the Human Resource Department to determine whether he would continue to remain as an employee. Since he falsified his application, the employer terminated him per their written policy.
16. On 02/18/20, the claimant was arrested for disturbing the peace and resisting arrest. From August 18, 2020, through November 4, 2020, the claimant was incarcerated because he violated his probation from his February arrest.

Credibility Assessment:

This Review Examiner found the claimant's testimony not to be credible because his answers to questions in both hearings were vague and evasive. The claimant testified that he was paid by a company to care for his mother until she died, but when asked during both hearings when his mother actually passed away, he could not answer. In the second hearing, he replied that he received a letter from the employment company indicating his last day of work was November 1, 2019, so he assumed that was her date of death. Although the claimant received wages to care for his mother, it is unreasonable to believe the claimant was actually working for his mother every day and could not recall when she died. Similarly, it is also unreasonable to believe the claimant did not knowingly and intentionally falsify his employment application with the instant employer. During his testimony, the claimant seemingly blamed the employer for hiring him and neglected to take responsibility for the fact that he was dishonest on his application.

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, with the exception of Consolidated Finding # 14, and deems them to be supported by substantial and credible evidence. As discussed more fully below, both Massachusetts state law and federal law dictate that an employer's ability to ask a job applicant about his criminal record history depends on the specific job position sought. Here, given the nature of the claimant's position as a pharmacy driver, we conclude that he was properly disqualified for benefits for falsifying his job application.

Since the claimant was discharged from his job, 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

Under this section of the law, the employer has the burden to show that the claimant is not entitled to benefits. *See Still v. Comm'r of Department of Employment and Training*, 423 Mass. 805, 809 (1996) (citations omitted).

During the hearing, the claimant testified that when he applied for the position, he completed an electronic application. It asked if he had ever been convicted or pled guilty or no contest to any crime or offense other than a minor traffic violation. The claimant checked the "No" box even though he was convicted of intimidating a witness and had pled guilty to a drug charge in 2013. The claimant testified that he checked the "No" box because he really wanted a job, and he didn't think lying would be a big deal. *See Consolidated Findings ## 9–11.*

Even though the claimant readily admitted under oath that he had provided false information on his employment application, Massachusetts law prevents employers from inquiring about certain criminal convictions on an initial employment application. G.L. c. 151B, § 4(9½), states, in pertinent part:

It shall be an unlawful practice . . . (9½). For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

Because the employer had a pharmacy on sight that was subject to federal drug control registration requirements², we remanded the matter back to the hearings department in order to determine if the job position the claimant was applying for fell under subsections (i) or (ii) of G.L. c. 151B, § 4(9½), which would allow the employer to ask about his criminal record history on the initial job application.

Consolidated Finding # 2(a), as well as the testimony of the employer, shows that the claimant was hired to be a pharmacy driver for the purpose of transporting prescription drugs to the employer's customers.³ We can reasonably infer that the employer's pharmacy prescribed narcotics, and that the claimant would have been assigned to deliver them. Because the job duties involve the

² *See* 21 U.S.C. § 822(a)(2).

³ This portion of the employer's testimony, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

transportation of controlled substances, federal law dictates security measures for the employer. Specifically, 21 C.F.R. § 1301.76(a) provides in pertinent part:

The registrant shall not employ, as an agent or employee who has access to controlled substances, any person who has been convicted of a felony offense relating to controlled substances

Since the claimant's job required him to have direct access to controlled substances, the employer was required to inquire about the claimant's criminal history on his initial job application.

By the claimant's own testimony, he admitted to falsifying his job application with the employer. However, in order to determine whether this action can be seen as constituting deliberate misconduct in wilful disregard of the employer's interest, we must also consider his state of mind at the time of the behavior. *See Grise v. Dir. 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 v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979).

Here, the review examiner found that the employer had a policy that prohibited employees from falsifying documents. The review examiner further found that the claimant knew from his own common sense that he should not be dishonest with his employer. It was reasonable for the employer to ask about the claimant's criminal history, because of its legal obligation to avoid hiring anyone convicted of a felony relating to controlled substances. The claimant's need for a job does not constitute a circumstance which mitigates his misconduct of lying on the job application.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged for 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 affirmed. The claimant is denied benefits for the week beginning November 3, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 22, 2021



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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.

CAS/rh