

Claimant refused to take a reasonable suspicion drug test required by the employer's drug policy, and she did not establish that something outside of her control prevented her from taking the test. Held the claimant is ineligible for benefits due to deliberate misconduct in wilful disregard of the employer's interest 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 her position with the employer on December 13, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 25, 2020. 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 April 2, 2020. 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 remanded the case to the review examiner to give the claimant an opportunity to present evidence pertaining to her separation from employment. 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 knowingly violated a reasonable and uniformly enforced employer policy when she refused to take a drug test, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant did not provide a credible reason for her refusal to take the test.

Findings of Fact

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

1. On 06/12/19, the claimant began working full-time as a Residential Care Coordinator for this employer's assisted living facility.
2. On 12/06/19, the claimant arrived at work apparently under the influence of drugs. The claimant was stumbling, scratching at her face, trembling and speaking in the manner of a young child.
3. Several workers reported the claimant's behavior to the Business Office Director (who is the on-site Human Resources person), expressing concern for the claimant because of her strange behavior.
4. The Business Office Director, after witnessing the odd behavior herself, spoke with the claimant, asking her if she was feeling ok. The claimant refused to make eye contact (which was odd because the Business Office Director had a good and friendly relationship with the claimant), but the claimant said she was fine before quickly walking away.
5. The Business Office Director called the Executive Director for direction on how best to address the situation. The Executive Director told the Business Office Director to immediately take the claimant for a drug test and to offer to pay for an Uber ride home for the claimant so she would not be driving in her condition. The Executive Director told the Business Office Director that she should call the police if the claimant attempted to drive herself home in her own car while impaired.
6. The Business Office Director contacted the urgent care center, located across the street, and created a testing account so that she and the claimant would only need to travel a short distance on foot that day to accomplish the testing.
7. At approximately 3:00 p.m. on 12/06/19, the Business Office Director and the Memory Care Director met with the claimant. At this meeting, the Business Office Director expressed the view that the claimant appeared to be under the influence of a mind or mood-altering substance and a drug test was warranted. The claimant was told that the Executive Director was aware of the situation and had ordered that the claimant immediately go to the urgent care center across the street with the Business Office Director for a drug test.
8. When the claimant refused to take a drug test, the Business Office Director went over the employer's drug testing policy and told the claimant that refusing to take the test would be cause for discharge from employment.
9. The claimant became very upset and was crying and was repeatedly stating, "I am a good girl."
10. The claimant said she was willing to come back on another day for testing but did not want to be tested immediately. The Business Office Director explained

that the claimant was suspected of being under the influence of drugs now, so the testing needed to be done now at the urgent care facility located within walking distance from the work location.

11. The claimant was repeatedly told on 12/06/19 during the meeting with her Directors that she needed to have the drug test to preserve her job, but the claimant repeatedly refused to cooperate with the drug testing.
12. The claimant stated that she had recently taken Xanax without a prescription for this medication, and she was not aware that it would impact her the way it had that day.
13. The Business Office Director said that the claimant could tell the testing staff what drugs she had taken when she went with the Business Office Director to the urgent care center for the drug test. Again, the claimant refused to be tested.
14. The claimant next stated that she couldn't be tested because she needed to pick up her daughter after work. The Business Office Director explained that the claimant was scheduled to work until 5:00 p.m. and the test should only take twenty minutes, as the urgent care facility giving the test is located across the street from the work location.
15. The claimant continued to refuse the drug test directives despite being repeatedly told that refusal of the test would be cause for discharge from employment.
16. When the claimant attempted to change topics during the 12/06/19 meeting to personal issues in the claimant's life, the Business Office Director continued to bring the conversation back to testing as the way to preserve her employment. The claimant said she would not be tested.
17. The meeting had gone on for more than an hour when the claimant stated she felt she was being attacked and said she was leaving to drive herself home.
18. The Business Office Director explained to the claimant that the Executive Director had directed her to call the police if the claimant attempted to drive herself home in her impaired condition. The Business Office Director offered to pay for an Uber ride home for the claimant.
19. The claimant indicated that she did not want to leave her car at work, and it was agreed that the claimant would call two friends to come and take both the claimant and the claimant's car to the claimant's home.
20. When the claimant's friends ([Friend A] and [Friend B]) arrived to take the claimant and the claimant's car home, [Friend A] thanked the Business Office Director for preventing the claimant from driving in her condition.

21. On 12/06/19, the claimant was told that she was suspended pending further action by the Executive Director.
22. The claimant was a well-liked worker at the employer's facility who had received no prior disciplinary warnings before the events of 12/06/19.
23. The claimant was aware, from her orientation at hire, and from the prolonged meeting with the Business Office Director and the Memory Care Director on 12/06/19, that refusing to take a drug test is cause for discharge from employment.
24. The claimant offered no credible reason for her refusal to cooperate with the drug test directive on 12/06/19.
25. On 12/13/19, the claimant was informed by the Executive Director that she was being discharged for repeatedly refusing to take a drug test on 12/06/19.
26. On 01/28/20, the claimant filed a claim for unemployment benefits effective 01/26/20.

Credibility Assessment:

The testimony of the Business Office Director regarding her first-hand witnessing of the claimant's strange behavior on 12/06/19, and her long-lasting but unsuccessful attempts to have the claimant cooperate with a drug test on 12/06/19 was credible. Prior to 12/06/19, the claimant had no disciplinary warnings whatsoever. The claimant's claim that she was targeted for discharge for unknown reasons and was never offered a drug test on 12/06/20 [sic], is rejected, because in view of the totality of the testimony and evidence offered at the hearing, it's not 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. After such review, the Board adopts the review examiner's consolidated findings of fact. In adopting the consolidated findings, we deem them to be supported by substantial and credible evidence. We further believe that the consolidated findings sustain the review examiner's original conclusion to deny 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, . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

On the record before us, we do not believe that the employer has met its burden to establish that the claimant knowingly violated a reasonable and uniformly enforced policy. This is because the employer has not satisfactorily established the existence of policy relative to mandatory drug testing and the uniform enforcement of any such policy. As set forth below, however, we do believe that the employer has established that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of § 25(e)(2).

In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. 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 "[T]ake 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) (citation omitted).

This case was remanded to the review examiner to afford the claimant an opportunity to present evidence pertaining to her separation from employment. During the remand hearing, the claimant testified that she was not offered a drug test on December 6, 2019. The claimant further argued that she believed the employer had targeted her for discharge, as the management staff had spoken badly about the claimant to other employees, who then relayed the gossip to the claimant. After reviewing the totality of the evidence in the record, the review examiner determined that the employer's assertions regarding the events leading to the claimant's discharge were credible, and the claimant's contentions were not credible. Since such an assessment on the parties' credibility is within the scope of the review examiner's role, and we find that the assessment here is reasonable in relation to the evidence presented, we will not disturb it on appeal.¹ See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

On the basis of his credibility determination, the review examiner found that the claimant appeared to be under the influence of drugs while in the workplace on December 6, 2019, as she was exhibiting odd behavior, such as stumbling and trembling. The review examiner further found that due to the claimant's strange behavior, the employer instructed the claimant to take a drug test that day, but the claimant refused, even after the employer reminded her that per the employer's drug policy, refusing to take a drug test would lead to the claimant's discharge from employment.

¹ However, in adopting the review examiner credibility assessment, we set aside the portion of said assessment which refers to a drug test offered on December 6, 2020. This appears to be a minor scrivener's error, as the consolidated findings of fact and the remainder of the credibility assessment establish that the test was offered on December 6, 2019.

Finally, the review examiner found that the claimant did not offer a credible reason for her refusal to take the drug test.

The employer established that it acted reasonably in asking the claimant to take a drug test on December 6th, as the claimant's behavior that day indicated that she may have been under the influence of drugs. The employer also established that it repeatedly explained to the claimant that per its drug policy, refusing to take a drug test would certainly result in the claimant's termination from employment. Despite the knowledge that a refusal to take the drug test was a violation of the employer's drug policy, the claimant declined the employer's request. She did not establish that anything outside of her control prevented her from taking the drug test. *See Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987)* (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control). Thus the record before us establishes that the claimant was aware of the employer's expectation that she take the drug test, the claimant refused, and she failed to establish the existence of any mitigating circumstances that excused her failure to comply with the employer's reasonable request.

We, therefore, conclude as a matter of law that the claimant engaged 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 affirmed. The claimant is denied benefits for the week ending December 14, 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 - June 9, 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 ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020². If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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

² See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (coronavirus) Pandemic, dated 5-26-20.