

The claimant failed a pre-employment drug screening for a DOT position and was discharged. Because there was no evidence the claimant used drugs while working for the employer, there was no policy violation or deliberate misconduct. He may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0033 8959 46

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant separated from his position with the employer on November 19, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 28, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 7, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employing unit's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional evidence relating to the claimant's duties and the results of his pre-employment drug screening. Only the employer 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, which concluded that the claimant did not commit deliberate misconduct in wilful disregard of the employer's interest even though he failed a pre-employment drug test, 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 employer offered the claimant a full-time truck driver position, which was contingent upon the claimant's successful completion of a background check and physical exam, including a drug screening test. The claimant was aware that his position would be subject to Department of Transportation (DOT) rules.
2. The claimant's position was covered by U.S. Department of Transportation (DOT) regulations requiring a pre-employment drug test.
3. On 11/6/19, the claimant submitted a urine specimen for the pre-employment drug test. The drug test was conducted in accordance with the regulations established by the DOT. [sic] determined that the claimant's specimen contained 6-Acetylmorphine. The claimant was notified of the result; the employer was subsequently notified of the result.
4. The claimant began work for the employer's business on 11/11/19, prior to the employer receiving a written notice of the claimant's drug test result. The laboratory notified the employer by telephone that the claimant was "all set", prior to issuing the written test results.
5. The laboratory provided the employer written test results that show an "Initial Test Level" and a MS Confirmation Test Level." The written results indicate that the claimant's specimen tested positive for 6-Acetylmorphine at both the initial and confirmation test levels.
6. After receiving the results of the claimant's drug test, the employer notified the claimant that his employment was terminated because he failed the drug screening test. The claimant did not express any protest or surprise when informed that he failed the drug screening test.
7. The claimant filed an initial claim for unemployment insurance benefits, effective 2/23/20.
8. On 3/2/20, the employer completed a DUA fact finding questionnaire, indicating that the claimant was discharged because he failed a pre-employment drug test. The employer did not provide the DUA with documentation related to the drug test or the results. The employer informed the DUA that the drug test is required for safety purposes and to ensure compliance with DOT rules.
9. On 3/28/20, the DUA issued the claimant a Notice of Disqualification, finding him ineligible for benefits under Section 25(e)(2) of the law.
10. On 4/20/20, the claimant appealed the Notice of Disqualification.

Credibility Assessment:

During the initial hearing, the claimant testified that he was told by the employer that he failed the required drug test because his urine specimen lacked protein. The

claimant's testimony was contradicted by the employer's testimony, and by the evidence which shows the results of his drug screening test. It is also noteworthy that the claimant did not divulge during the hearing that he was contacted directly by the laboratory and informed of the results. The evidence submitted by the employer shows that the results do not contain any reference to protein levels but do show that the claimant tested positive for 6-Acetylmorphine. In view of the above, the claimant's testimony was not credible, and the employer's testimony was accepted in disputed areas.

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. 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. Upon review of the entire record, we conclude that the review examiner's decision is based on substantial evidence and is free from any error of law affecting substantive rights.

Because the claimant was discharged from employment, we analyze his eligibility for benefits 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

"[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).

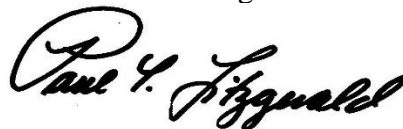
The position the employer offered to the claimant is subject to U.S. Department of Transportation (DOT) rules, which require a candidate pass a pre-employment drug screening before being hired. Consolidated Findings ## 1 and 2; *see* DOT regulations at 49 C.F.R. § 382.301. As the claimant failed his pre-employment drug test, the employer's decision to sever the employment relationship was reasonable. Consolidated Findings ## 5 and 6. However, the Massachusetts Supreme Judicial Court has held that a positive drug test result on a pre-employment screening is not, by itself, evidence of deliberate misconduct or a knowing violation of an employer's policies while at work. Thomas O'Connor & Co., Inc. v. Comm'r of Employment and Training (No. 2), 422 Mass. 1007 (1996) (rescript opinion); *see also* Board of Review Decision 0002 4594 82 (Jan. 28, 2014) (pre-

employment positive drug screen for a DOT-regulated position, by itself, does not constitute deliberate misconduct in wilful disregard of employer's interest under G.L. c. 151A, § 25(e)(2)).¹

Because the only evidence of drug use in this case is the claimant's pre-employment drug screening, the record does not show a violation of an employer policy or expectation while at work. Thus, in accordance with both Massachusetts Supreme Judicial Court precedent governing pre-employment drug testing and Board of Review precedent, the claimant's positive drug test result is not disqualifying.

We, therefore, conclude as a matter of law that the claimant did not engage in a knowing violation of his employer's policy or 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 entitled to receive benefits for the week beginning November 17, 2019 and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

DATE OF DECISION - December 11, 2020

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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

¹ Board of Review Decision 0002 4594 82 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

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.

LSW/rh