

The employer did not establish that the claimant intentionally disregarded the employer's safety standards when he threw a metal rod in the employer's facility, as the findings show that the claimant acted emotionally and without thinking after being provoked by his manager's repeated failure to follow the social distancing necessitated by the pandemic.

**Board of Review
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Issue ID: 0036 2379 88

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 March 24, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 14, 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 on September 28, 2020. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

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 when he threw a metal rod into some boxes, is supported by substantial and credible evidence and is free from error of law, where the review examiner found that the claimant acted out of frustration, after the manager repeatedly failed to adhere to social distancing guidelines when approaching the claimant during the COVID-19 pandemic.

Findings of Fact

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

1. The claimant worked full-time as a mechanic for the previous employer, a capacitor manufacturer, January 21, 2019, until March 31, 2019, when the employer

purchased the previous employer. The claimant remained employed full-time as a mechanic for the employer from April 1, 2019, until March 24, 2020.

2. The claimant's immediate supervisor was the maintenance manager ("the MM").
3. The employer maintained an expectation that employees work in a safe manner in the facility. The employer maintained this expectation to ensure employees felt safe; to ensure a safe work environment; and to ensure focused employees. The claimant knew of the employer's safety in the workplace expectation based on his work experience.
4. On March 23, 2020, the plant manager ("the PM") gave directives to the plant employees, including the claimant and the MM, of how the plant was going to adhere to COVID-19 social distancing rules. The PM informed employees they were required to social distance and remain at least six feet from each other.
5. The PM told the employees that anyone who did not adhere to [the] six feet social distancing rule would be suspended for one week.
6. After the PM completed the meeting, he tasked the claimant with marking the plant with markers, six feet apart.
7. The claimant had a six-foot metal rod he used to mark the distance between markers.
8. While the claimant was marking the floors, the MM walked up to him, within six feet. The claimant walked back, attempting to keep six feet away from the MM.
9. The MM approached the claimant and attempted to come within six feet of him approximately four times. The claimant told him to back off each time.
10. The claimant did not notify the PM that the MM attempted to come within six feet of him.
11. The claimant became frustrated that the MM was coming within six feet of him, and he threw the metal rod into boxes of product.
12. The claimant threw the rod to show his displeasure with the MM attempting to come within six feet of him.
13. After the claimant threw the rod, the MM told the claimant to go home for the rest of the day.
14. The claimant damaged the product in the boxes.
15. After the MM sent the claimant home, he notified the human resources administrator ("the HRA") of the incident.

16. On March 23, 2020, the MM and the HRA viewed the plant's security camera and saw the claimant throw the six-foot metal rod into the boxes of product.
17. The HRA saw on the security video that there were two employees approximately 20 feet from where the claimant threw the metal rod, walking in the direct[ion] of the claimant.
18. On March 24, 2020, the MM met with the claimant when he arrived for work and discharged him for not working in a safe manner in the facility when he threw the six-foot metal rod into the boxes of product on March 23, 2020.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when he threw the metal rod, as the findings of fact establish that the claimant did not intentionally disregard the employer's safety standards.

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, 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

In her original decision, the review examiner concluded that the claimant was not discharged for violating a reasonable and uniformly enforced rule or policy of the employer, as the employer did not provide an applicable policy during the hearing. On the basis of the record before us, we concur. Thus, the issue before us is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest on March 23, 2020, when he threw a six-foot metal rod into some boxes in the employer's facility.

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. Dir. 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. 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, 377 Mass. at 97.

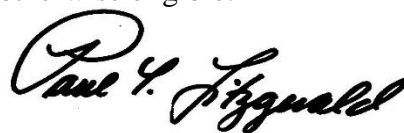
The review examiner found that the claimant was aware of the employer's expectation that employees work in a safe manner. Due to the COVID-19 pandemic, the employer notified all employees that they had to maintain six feet of distance between each other, and failure to do so would result in a one-week suspension. The review examiner found that the claimant threw a metal rod into some boxes of product out of frustration, after the maintenance manager approached him approximately four times without following the social distancing guidelines. The employer discharged the claimant because it believed that throwing a metal rod inside the employer's facility was unsafe.

However, during the hearing, the claimant explained that at the time he threw the metal rod, he was upset that the maintenance manager continued to ignore a different safety measure, the employer's distancing guidelines, even after the claimant continually asked him to back off. Based on the above, it is clear that the claimant reacted emotionally to the maintenance manager's repeatedly unsafe behavior toward the claimant. The record does not suggest that the claimant's action in throwing the metal rod into the bin was driven by the claimant's desire to contravene reasonable safety expectations. Rather, his behavior was triggered by the manager's continued breach of the employer's six-foot distance rule and the claimant's inability to stop him. Although, upon reflection, the claimant might have found another way to address his manager's unsafe conduct, we believe that, at the moment, the claimant was not acting in wilful disregard of the employer's interest, but in response to the mitigating circumstances of the manager's breach of other safety protocols. *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).

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interests, as meant under 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 March 28, 2020, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 22, 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/ jv