

The employer fired the claimant from his DOT-regulated position after he tested positive for marijuana on three occasions. The claimant failed to show that this violation of the employer's drug policy was due to mitigating circumstances. Specifically, the claimant failed to present evidence to corroborate that he had a medical marijuana card, or that his doctor advised him to use marijuana and would prescribe no other medication to treat his anxiety and depression. The Board disqualified him under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0039 9769 44

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 reverse.

The claimant was discharged from his position with the employer on December 16, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 5, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 14, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for urgent, compelling, and necessitous reasons, and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(1). 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 pertaining to a medical need for the claimant to use marijuana. Only the employer participated in 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's health condition and medical marijuana use constituted urgent, compelling, and necessitous reasons for his separation from employment, 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 are set forth below in their entirety:

1. The employer is a locksmith service. The claimant worked as a full-time technician and locksmith for the employer. The claimant worked for the employer from 1/04/2018 to 12/16/2019.
2. The claimant is a military veteran. The claimant has anxiety and chronic depression.
3. The employer's owner supervised the claimant.
4. The employer has vehicles. The federal Department of Transportation (DOT) regulates the employer's vehicles.
5. The claimant's assigned duties included operation of the employer's DOT-regulated vehicles. The claimant drove the employer's vehicles to customer locations to perform locksmith services.
6. The claimant had a DOT certification when he worked for the employer.
7. The DOT did not allow the employer's workers to test positive for marijuana. The employer faced possible fines and other penalties if its workers tested positive for marijuana.
8. The claimant was arrested in March 2019. The claimant was charged with multiple felonies. The claimant did not perform any work for the employer from his arrest through 7/15/2019.
9. The employer created a policy titled "Drug and Alcohol Policy." The policy went into effect on 7/01/2019. The policy reads, in part, "The presence of any detectable amount of any illegal drug, illegal controlled substance or alcohol in an employee's body system, while performing company business or while in a company facility, is prohibited." The policy indicates that workers are subject to drug tests. The policy reads, in part, "Employees who test positive, or otherwise violate this policy, will be subject to discipline, up to and including termination."
10. The employer's owner allowed the claimant to return to work on 7/16/2019. The owner required the claimant to agree to the Drug and Alcohol Policy. The claimant agreed to the policy and signed it on 7/16/2019. The owner told the claimant that he must submit to periodic drug tests.
11. The owner sent the claimant for a drug test on 7/16/2019. The claimant tested positive for marijuana. The claimant told the owner that he had a medical marijuana card after he tested positive on 7/16/2019. The owner allowed the claimant to continue to work. The owner told the claimant that the claimant could seek substance abuse help with the Veterans Administration and via the MassHealth health insurance system.

12. The owner sent the claimant for a drug test on 7/29/2019. The claimant tested positive for marijuana. The test revealed a lower amount of marijuana than the test from 7/16/2019. The owner allowed the claimant to continue to work. The owner told the claimant that he would discharge the claimant if the claimant tested positive for marijuana again. The owner told the claimant that the claimant could seek substance abuse help with the Veterans Administration and via the MassHealth health insurance system.
13. The owner sent the claimant for a drug test on 12/12/2019. The claimant tested positive for marijuana.
14. The owner did not allow the claimant to continue his employment because the claimant tested positive for marijuana on 12/22/2019. The owner determined that the claimant's marijuana use subjected it to penalties from the DOT.

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 and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the employer discharged the claimant, 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

“[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).

Since the employer's drug and alcohol policy provides that employees who test positive may be subject to a range of discipline up to and including termination, there is no basis to conclude that any employee who violates this policy under similar circumstances would be treated the same as the employer treated the claimant. For this reason, the employer has not met its burden to show a

knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may establish that the claimant engaged in deliberate misconduct in wilful disregard of its interest. 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 "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) (citation omitted).

In the present case, there was no dispute that, as of July, 2019, the employer prohibited the use of marijuana at all times, because it was required to abide by the U.S. Department of Transportation (DOT) regulations that did not allow such use. *See* Consolidated Finding # 7. The parties also agreed that the claimant was made aware of the policy and that, between July and December, 2019, the claimant tested positive for marijuana on three separate drug tests and that he was discharged because of the final test result. *See* Consolidated Findings ## 10–14. This establishes that the claimant knew of the employer's expectation that he not use marijuana at all while employed there. Given the DOT prohibition, we believe the expectation is reasonable. Lacking any indication that the claimant's use of the drug during this period was accidental, we can also infer that the misconduct was deliberate.

The question is whether a need to use marijuana for medical purposes may have constituted mitigating circumstances. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

Based upon the claimant's testimony at the first hearing, the review examiner initially found that the claimant needed to use marijuana to treat anxiety and depression, that he had a state-issued medical marijuana card, and that, despite the employer's policy, he had been unable to stop using marijuana. *See* Remand Exhibit 1.¹ Given the claimant's medical condition and inability to control his use of marijuana, the review examiner concluded that the claimant's separation was not disqualifying.²

We remanded the case for additional evidence to support the original findings about the claimant's medical condition, his state-issued marijuana card, and any efforts which the claimant made to seek drug treatment to avoid continuing to violate the employer's drug policy. The claimant did not participate in the remand hearing or submit any corroborating documents, such as a copy of

¹ Remand Exhibit 1 is the original hearing decision. Although not explicitly incorporated into the review examiner's findings, the decision and original findings of fact are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

² For some reason, the review examiner applied the urgent, compelling, and necessitous circumstances provision of G.L. c. 151A, § 25(e), which provides an exception to individuals who quit their job. Because the claimant in this case did not leave voluntarily, but was fired, the review examiner's use of this provision was an error.

his medical marijuana card or the notes from his physician about his need to use medical marijuana, as the Board requested.³ Consequently, the consolidated findings look very different from the original findings of fact.

Presumably because the claimant did not submit any of the requested evidence to corroborate his initial testimony, the review examiner attributed less weight to it after remand. For example, the consolidated findings now state that the claimant merely *told* the employer that he had a medical marijuana card. *See* Consolidated Finding # 11. They no longer include anything about a physician prescribing medical marijuana for his anxiety and depression, that the claimant actually had a medical marijuana card, that his doctor would not prescribe any other medication to treat these conditions, or that he had used marijuana for this purpose.⁴

Because neither the consolidated findings nor the underlying record include substantial evidence that the claimant's marijuana use was due to factors over which he had no control, the claimant has failed to show that his deliberate violation of the employer's drug and alcohol policy was due to mitigating circumstances.

We, therefore, conclude as a matter of law that the employer has met its burden to prove that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).⁵

³ *See* Remand Exhibit 3, the Board's remand order.

⁴ *Compare* Remand Exhibit 1, Findings of Fact ## 13–17, and 19.

⁵ Because the claimant was required to drive DOT-regulated vehicles as part of his job, he is not protected by G.L. c. 94C, § 32L, a state law which provides that individuals may not be denied unemployment benefits simply for a positive marijuana test. *See* Board of Review Decision 0014 7523 34 (Sept. 28, 2016) (G.L. c. 94C, § 32L does not provide a safe haven for DOT drivers who test positive for marijuana, because such positions are regulated by federal law).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning April 26, 2020, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 4, 2020



Charlene A. Stawicki, Esq.
Member



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.

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