

The claimant's conversation with a coworker about going to his house after work to use marijuana was not deliberate misconduct in wilful disregard of the employer's interest. The review examiner's credibility assessment, which provided that the claimant engaged in the sale of marijuana while at work, was not supported by substantial evidence and was set aside. Held the claimant was eligible for benefits pursuant to G.L. c. 151A § 25(e)(2).

**Board of Review
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Issue ID: 0078 1042 20

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 22, 2022. He filed a claim for unemployment benefits with the DUA, effective August 21, 2022, which was denied in a determination issued on September 8, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 11, 2023. 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 and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). 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 disqualified the claimant for offering marijuana to a coworker during the workday, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as a receiver for the employer, a food company, beginning about October 11, 2021, until he was discharged effective March 22, 2022.
2. The claimant was paid \$20 per hour.

3. The claimant worked Monday through Friday from 1 p.m. to 9 p.m. and overtime when available.
4. The employer has a code of conduct that prohibits use or solicitation of controlled substances by employees while working.
5. The terms, definitions, and discipline called for if [sic] code of conduct is violated are unknown because the employer failed to provide the written code of conduct to DUA.
6. The claimant knew of the code of conduct from his employee handbook but believed he could not have marijuana at work.
7. The employer expects employees to not use or offer other employees-controlled substances while at work.
8. The claimant believed he could make plans at lunch in the employer's cafeteria to offer an unknown coworker to try his father's "homegrown" marijuana. The claimant denies use of and sale of his father's marijuana to the unknown coworker but admits he offered for the coworker to come to his house after work to try the "homegrown marijuana".
9. An unknown coworker overheard the claimant's conversation with the coworker about the offer of his father's marijuana and reported the claimant to the employer and the employer suspended the claimant while investigating.
10. On March 22, 2022, the claimant was called by unknown human resources personnel and was informed he was discharged for use and soliciting a controlled substance, marijuana.
11. On March 22, 2022, the claimant was discharged by the employer for offering marijuana to another employee while at work.

[Credibility Assessment]¹:

The claimant admitted he knew he could not bring marijuana to work but believed he could offer a coworker to come over to his house to try some of his father "homegrown" marijuana. The claimant's belief is found to be unreasonable given the record. The employer's allegation of marijuana use by the claimant is not substantiated by the evidence in the record but rather the solicitation for distribution or offering of a controlled substance, *i.e.* marijuana, is substantiated by the record. Notably, the claimant denies using marijuana, and asserts the marijuana in question was his father's marijuana for a medical condition. Though the claimant denied

¹ We have copied and pasted here the review examiner's credibility assessment, which appears in the conclusions and reasoning section of her decision.

selling the marijuana and “offered” for a coworker to try his father’s marijuana, this belief is unreasonable because he offered the marijuana (a controlled substance) which was not his, while at work, to a person known from work. It does not stand to reason the claimant would offer the coworker marijuana that was not his, without some exchange of value.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner’s 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, we reject the review examiner’s legal conclusion that he was not entitled to benefits.

G.L. c. 151A, § 25(e)(2), 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. . . .

Under this section of law, the employer has the burden of showing that the claimant is not eligible to receive unemployment benefits. “[The] 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).

For benefits to be denied, the claimant must have engaged in some type of misconduct. The employer discharged the claimant for using and soliciting marijuana. Finding of Fact # 10. However, there are no findings in the review examiner’s decision indicating that the claimant used, possessed, or solicited marijuana while at work, nor was there anything in the record to substantiate that he did so. The claimant agreed to let his coworker come over to his house after work to try some of his father’s marijuana. Finding of Fact # 8. This conversation with the coworker did not involve the use or solicitation of marijuana while at the workplace. This was merely a conversation between two employees about their plans after work.

Moreover, in Massachusetts, it is legal for anyone over 21 years old to possess, give away or otherwise transfer without remuneration up to one ounce of marijuana. *See* G.L. c. 94G, § 7. Nothing in the record suggests that the claimant was not an adult or that this involved more than one ounce of marijuana.

The employer did not appear at the hearing to offer testimony, nor did the documents provided by the employer show the claimant engaged in a company rule violation. Since the employer has not established that the claimant engaged in the conduct he was accused of, it did not carry its burden of proof.

In her credibility assessment, the review examiner made a statement that the claimant was offering marijuana in exchange for something of value. Effectively, she stated that the claimant was offering marijuana for sale. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Because the employer has not shown that the claimant engaged in the sale of marijuana at the workplace, this portion of the credibility assessment is set aside. It is not supported by the evidence.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning August 21, 2022, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 8, 2024



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

MR/rh