

The review examiner rejected the notion that the claimant's failure to complete his assigned duties was attributable to poor performance or ADHD. The claimant was aware of what he needed to do, he was capable of doing it, but failed to do it anyway. Thus, his conduct rose to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2) and he was ineligible for benefits.

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0078 4758 97

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 separated from his position with the employer on October 21, 2022. He filed a claim for unemployment benefits with the DUA, effective October 16, 2022, which was approved in a determination issued on November 4, 2023. 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 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 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 remanded the case to the review examiner to obtain additional evidence relevant to the reason for the claimant's discharge. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. The Board then remanded the case to the review examiner to obtain subsidiary findings of fact pertaining to the claimant's state of mind. 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 was discharged for deliberate misconduct in wilful disregard of the employer's interest because he repeatedly failed to follow the employer's instructions about securing employer property despite receiving several warnings about similar behavior in the past, 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 claimant worked full-time for the employer, a garage door and loading dock equipment installer, as a technician assistant from September 6, 2022, to October 21, 2022. The claimant's rate of pay was \$20.00 per hour.
2. The claimant's job duties included assisting with the installations of doors, performing set-up work, clean-up, general labor.
3. The employer has a general expectation that all employees perform the work assigned to them by their managers and/or site supervisors.
4. On or about the end of September of 2022, the claimant attended a meeting during which the employer's Code of Conduct was read and the employer's expectations were discussed. The claimant understood and was aware of what was expected of him.
5. Between September 6, 2022, and October 21, 2022, on several occasions, the employer found that the claimant was not performing his work. On one job, the claimant was told to secure trash bags closed in the back of the work truck. The claimant did not do the task and as a result, the trash blew out of the company's truck onto the roadway as they were driving causing a dangerous situation. The company is registered with the Department of Transportation and could have also faced fines. Similarly, on another occasion the claimant was instructed to lock the company toolboxes attached to the trucks. The claimant did not perform this job and the employer found over a dozen toolboxes left unlocked and vulnerable to theft of the expensive tools.
6. The President met with the claimant after each incident and explained the safety and financial importance of following direction as given. The claimant was asked if he understood his expectations and if he had any questions. The claimant did not have any questions for the employer.
7. On October 21, 2022, the President of the company met with the claimant a final time to discuss recent absences and not following direction. The President believed that the claimant was not putting in effort to perform his work. The tasks assigned to the claimant were basic and not technical in nature. The President informed the claimant that because he was not performing his work, the Company was being put in jeopardy both in a safety sense with other workers and financially, therefore his employment was terminated effective immediately.
8. In the hearing, the claimant did not dispute the testimony the employer's witness brought up regarding the claimant's failure to perform tasks as given. The claimant stated that he has "ADHD" and did not do anything on purpose. The claimant stated he never had any issues with any other employer.

Credibility Assessment:

The claimant testified at the remand hearing that his failure to perform tasks given to him by his employer was due to his attention deficit disorder and therefore not an intentional action on his part. This testimony is not found to be credible. The claimant did not provide evidence at the hearing to substantiate his claim of a medical diagnosis that would have affected his ability to perform work. Also, there was no testimony that the claimant informed his employer of a medical condition at the multiple meetings they had after each incident. Furthermore, the claimant stated that he did not have any issues with employers other than the instant employer. The employer's witness testified consistently over both hearings and his testimony was not refuted by the claimant.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we agree with the review examiner's conclusion that the claimant is not entitled to benefits.

Because the claimant was discharged from his employment, his eligibility 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).

While the employer maintained a Code of Conduct policy requiring its employees to perform their assigned duties, it did not provide any evidence showing it discharged all other employees who failed to complete their assigned duties under similar circumstances. *See Consolidated Findings ## 3 and 4.* Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged. As the claimant conceded he did not complete all the tasks assigned to him, there is no question that he engaged in the misconduct for which he was discharged. Consolidated Finding # 5. However, the claimant asserted that he did not deliberately fail to complete the tasks assigned to him and never purposefully disregarded his job duties. Consolidated Finding # 8.

Thus, the main question presented by the facts of this case is whether the claimant's incomplete and poor work was due to his incompetence or due to deliberate misconduct. If the claimant tried his best, but his performance still fell below the employer's expectations, then he would not be subject to disqualification. *See Trustees of Deerfield Academy v. Dir. of Division of Employment Security*, 382 Mass. 26 (1980) (termination for unsatisfactory work performance not disqualifying). However, if the claimant had the capability to do the work, knew what he needed to do, and still did not do it, the separation could be attributable to an intentional failure to accomplish the work assigned to him, which would be potentially disqualifying. After reviewing the testimonial evidence provided by the claimant at the remand hearing, the Board specifically directed the review examiner to make findings about this issue.

While the review examiner did not make a specific finding as to whether the claimant purposefully disregarded his assigned duties, she has now clarified her view of the conflicting testimony provided by each party. Specifically, the review examiner rejected as not credible the claimant's contentions that he has ADHD and did not purposefully fail to complete the tasks assigned to him. *See Consolidated Finding # 8*. 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). As the claimant did not provide evidence substantiating his testimony about his diagnoses and had not informed the employer of his diagnosis despite receiving repeated warnings for failing to complete his job duties, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence. *See Consolidated Findings ## 6 and 8*.

The review examiner also found that the claimant had received and understood instructions on the specific tasks assigned for him to perform. Consolidated Findings ## 4 and 6. Finally, there was no indication that the claimant lacked the requisite training or experience to complete the tasks assigned to him, as his job duties were basic in nature, and he had performed similar work for other employers in the past. *See Consolidated Findings ## 7 and 8*. Because the findings indicate that the claimant was capable of doing the work assigned to him, and, as the review examiner expressly rejected any assertion that something prevented the claimant from completing his job duties, we can reasonably infer from the consolidated findings and record before us that the claimant deliberately failed to complete the tasks assigned to him.

However, the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, 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).

The claimant understood, from both the training he received at hire and the multiple warnings he had been issued, that he was expected to complete the tasks assigned to him. Consolidated Findings ## 4, 5, and 6. As the employer held this expectation in order to ensure the employer's trucks were being operated safely and to protect the employer's property from theft, we believe this expectation to be facially reasonable. *See* Consolidated Finding # 5.

There are also no mitigating factors present to show that the claimant did not act in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28* (absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest). As noted above, the review examiner reasonably rejected the claimant's contention that he inadvertently acted in a way that was contrary to the employer's expectations due to ADHD. Accordingly, we conclude that the review examiner's consolidated findings of fact support the original conclusion that the claimant understood the employer expected him to complete his assigned duties, he was capable of satisfactorily completing those duties, he did not complete those duties, and nothing prevented him from doing so.

We, therefore, conclude as a matter of law that the employer has met its burden to show the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectations 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 of October 16, 2022, 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 - January 24, 2024



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

LSW/rh