

The employer demonstrated that the claimant's failure to make his daily number of sales calls and monthly revenue targets was deliberate misconduct in wilful disregard of the employer's interest and not inability to perform, as the record showed that the claimant spent half his work time surfing the internet. Held the claimant was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0078 7218 54

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 in December, 2022. He reopened his existing 2022-02 claim for unemployment benefits with the DUA, which was approved in a determination issued on December 6, 2022. The employer 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 awarded benefits in a decision rendered on February 2, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 consider further evidence pertaining to employer communications and the claimant's efforts to perform his work. Only the employer attended 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 was discharged due to his inability to meet performance expectations, 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 was a full-time sales executive with the employer, a telecommunications distributor from August 22, 2022, through December 2, 2022, when he separated from his employment.
2. The claimant's direct supervisor was the director of sales (director).
3. The claimant worked 8 hours a day, 5 days a week.
4. The employer maintained a "computer and email" policy in its handbook which included in part, "Access to the internet is given principally for work-related activities or approved education/training activities. Incidental and occasional personal use and study use may be permitted. This privilege should not be abused and must not affect a user's performance of employment activities."
5. The disciplinary consequence for violating the policy, "may result in sanctions; from restriction of access to electronic communication facilities, to disciplinary action including dismissal."
6. The policy was communicated to the claimant through the employee handbook, which the claimant signed an acknowledgment of receipt on August 22, 2022.
7. The employer maintained an expectation for employees to perform job duties pursuant to their job requirements, including meeting a monthly \$50,000.00 revenue goal and making 40 outbound calls a day to clients and potential clients.
8. The purpose of this expectation is to ensure employees were motivated to meet individual goals.
9. The employer communicated the expectations to the claimant during the third day of employment when the director verbally discussed the revenue and phone call metrics, which included making 40 outbound calls per day, and earning a monthly \$50,000.00 per month [sic] revenue goal.
10. As a new employee and subsequently, the employer expected the claimant to make 40 original sales calls per day because the core focus of the sales executive position was to make outbound calls to give clients and potential clients specific information on the business.
11. The original sales pitches to clients and potential clients were not to occur through text message or email correspondence.
12. In addition to the 40 sales calls per day, the claimant was allowed, but not required, to follow up with clients and potential clients by email or text message, as long as the correspondence was not an original sales pitch.
13. The claimant would utilize a company computer database that provided hundreds of clients and potential clients to call.

14. The employer kept Agent Call Summary logs for employees, including the claimant. On the claimant's Agent Call Summary log, calls categorized as "outbound calls" are the claimant's sales calls to customers or potential customers.
15. From August 22, 2022, through August 31, 2022, the claimant made a total of 10 outbound calls.
16. From September 1, 2022, through September 30, 2022, the claimant made a total of 71 outbound calls.
17. From October 1, 2022, through October 31, 2022, the claimant made a total of 35 outbound calls.
18. From December 1, 2022, through December 2, 2022, the claimant made a total of 4 outbound calls.
19. Between August 22, 2022, and December 2, 2022, the claimant averaged approximately 5 outbound calls per day.
20. The claimant did not have other job duties that would have prevented him from being able to make the required numbers of sales calls each day.
21. The employer expected sales executives to make \$50,000.00 per month when making the required number of sales calls.
22. In practice, sales executives produced \$50,000.00 in monthly revenue.
23. From August 22, 2022, through December 2, 2022, the claimant accumulated \$8,174.00 in total sales.
24. On December 2, 2022, the director was reviewing the claimant's online activities and discovered that the claimant was surfing the internet.
25. Between September 6, 2022, and December 2, 2022, the claimant averaged approximately 4 hours per day surfing the internet for personal use.
26. The claimant's use of the internet for personal reasons while at work prevented him from meeting the employer's performance standards.
27. On December 2, 2022, the claimant made one outbound call, and sent 14 emails.
28. On December 2, 2022, the director and human resources associate requested an in-person meeting with the claimant.

29. During the meeting, the director informed the claimant he was being discharged for not meeting performance expectations, which the claimant disagreed with.
30. On December 2, 2022, the employer discharged the claimant from employment due to not meeting performance standards.
31. The employer does not have written records of any sales emails or text messages from the claimant to clients or potential clients.

Credibility Assessment:

Though the claimant asserted during the original hearing that he thought the expectation was to make at least 40 contacts per day by any means, this is not credible. The director offered specific and detailed testimony that the claimant was required to make at least 40 phone calls per day, and that the director himself verbally informed the claimant of this during the claimant's third day of employment when discussing revenue and phone call metrics. The director was also clear during the remand hearing that while follow-up emails or text messages were allowed, these were not required and did not count towards the 40 sales calls per day. The director's testimony surrounding the employer's expectations is more credible than that of the claimant.

During the original hearing, the claimant asserted that he was meeting the expectations by making approximately 75 contacts to clients each day. It is not believable that the claimant was making this quantity of daily contacts. The claimant's Agent Call Summary log does not establish that he was making at least 40 sales calls per day, as required. Instead, the evidence establishes the claimant making approximately 5 outbound calls per day, and a total of 120 outbound calls from August 22, 2022, through December 2, 2022. The Board of Review expressly requested parties to submit documentation showing any contact the claimant made with customers via text or email pertaining to sales. The director testified they had nothing to provide, while the claimant did not provide any supporting documentation to corroborate these alleged contacts.

The director further testified at the remand hearing that the claimant's personal use of the internet prevented him from making the expected 40 outbound calls per day, as the claimant was spending approximately 4 hours per day from September 6, 2022, through December 2, 2022. This testimony is deemed credible given that it was substantiated by the claimant's 486-page internet usage statement from September 6, 2022, through December 2, 2022, that included all the claimant's internet usage during his employment. The claimant did not participate in the remand hearing to offer any explanation for his internet usage.

Lastly, the director testified that the average monthly revenue goal for the claimant and the sales executive team was \$50,000.00, which other executives achieved in practice when making the required daily sales calls. The director's testimony that the claimant was not meeting this sales requirement is deemed credible given that

it was corroborated by documentation showing the claimant's total accumulated revenue from August 22, 2022, through December 2, 2022, was \$8,174.00.

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 reject the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant was discharged from his employment, his eligibility for benefits is properly analyzed pursuant to 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 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. . . .

“[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).

Although the consolidated findings refer to a computer and email policy, and the record suggests that the claimant had violated that policy, this was not the reason for his discharge. *See* Consolidated Findings ## 4, 24, 25, and 30. Rather, the employer discharged the claimant for not meeting performance expectation standards, which had been communicated to the claimant at the beginning of his employment. *See* Consolidated Findings ## 9 and 30. Inasmuch as he was not fired for a policy violation, he may not be disqualified under the knowing violation of a reasonable and uniformly enforced policy provision.

Alternatively, we consider whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The findings show that the claimant did not meet the employer's expectation to make 40 initial sales calls per day and to generate \$50,000.00 in monthly revenue. His failure to do so constitutes misconduct.

The question is whether this failure was deliberate. The purpose of the unemployment statute is to provide temporary relief to persons who are out of work through no fault of their own. Connolly v. Dir. of Division of Unemployment Assistance, 460 Mass. 24 (2011) (further citations omitted).

“When a worker is ill equipped for his job . . . , any resulting conduct contrary to the employer’s interest is unintentional; a related discharge is not the worker’s intentional fault, and there is no basis under § 25(e)(2) for denying benefits.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). If this were a case where the record showed that the claimant applied his best efforts to meet the employer’s call and revenue goals, but could not, we would agree with the review examiner’s original decision to award benefits.

Here, the record shows that the claimant did not put in the effort to meet the employer’s expectations. Over the course of his four months of employment, he made an average of five calls per day rather than 40. Consolidated Finding # 19. Likely as a result, he averaged \$8,174.00 in monthly revenue rather than \$50,000.00. Consolidated Finding # 23. What makes these performance metrics deliberate misconduct rather than an inability to perform is that instead of spending work time making calls, the claimant spent half his workday surfing the internet for his personal interest. *See* Consolidated Finding # 25. There is nothing in the record to suggest that these personal internet activities were accidental or in any way related to his sales work.¹ As such, we can reasonably infer that he deliberately spent his time on the internet instead of making sales calls.

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, 377 Mass. at 97 (citation omitted). 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).

The employer had communicated its expectation to make 40 sales calls per day and to generate \$50,000.00 in monthly revenue at the outset of the claimant’s employment. *See* Consolidated Finding # 9. During the hearing, the employer’s Sales Director explained that 40 calls a day was easy to achieve, particularly as it takes less than 45 seconds to make a call and leave a voicemail, which happens frequently.² Further, as noted in the credibility assessment, the \$50,000.00 in monthly revenue is an average of what a salesperson achieved in practice when making the required number of calls. Given this evidence, we are satisfied that these two sales metrics were a reasonable business expectation.

In his defense, the claimant had asserted that he was contacting potential customers via text message or email in lieu of making the phone calls. This might indicate that he was not acting in wilful disregard of the employer’s interest, but attempting to meet the employer’s business goals in a different way. *See* Fallon Community Health Plan v. Acting Dir. of Department of

¹ *See* Exhibit 8, a 486-page list of websites the claimant visited over the course of his employment, which showed that the claimant visited LinkedIn, ebay, Amazon.com, reality television shows, among many others. While not explicitly incorporated into the review examiner’s findings, the content of this exhibit is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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 This portion of the employer’s testimony is also part of the unchallenged evidence in the record.

Unemployment Assistance, No. SJC-13440, 2024 WL 899770 at 4 (Mass. Mar. 4, 2024), Slip Opinion (rather than disregarding employer's interest, claimant offered to take several measures in lieu of vaccination to safeguard employer's vulnerable patient population); Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 98 (1979) (claimant took alternative steps to prepare store for his absence, where he believed he could not reach the district manager).

However, the claimant did not present any evidence of such text or email communications, as requested by the Board. Even if he had, the review examiner has found that he was only permitted to use text messages or email correspondence to follow up with clients, not in lieu of the daily initial sales pitch telephone calls. *See Consolidated Findings ## 10 and 11.* In short, this record shows that the claimant did not put in the effort to meet the employer's reasonable performance expectations, and he failed to demonstrate any mitigating factors which prevented him from doing so.

We, therefore, conclude as a matter of law that the employer has met its burden to show 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).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning November 27, 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 - March 18, 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.

AB/rh