Nineteen months after beginning her per diem employment as a nurse practitioner who performed health assessments for the employer, the employer noticed that she had never signed an employment contract. At that point, the claimant was asked to sign one, but she refused because it contained a noncompete clause. As a result, the employer stopped providing her with work. Held this was a discharge from employment and the claimant was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2). Because the noncompete clause was presented to the claimant after she had been hired and without any consideration beyond her continued employment, it was in violation of G.L. c. 149, § 24L(b), and against public policy.

Board of Review
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Issue ID: 0079 1903 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. Benefits were denied pursuant to G.L. c. 151A, § 25(e)(1), on the grounds that the claimant did not voluntarily leave employment for good cause attributable to the employer or urgent, compelling and necessitous reasons.

The claimant had filed a claim for unemployment benefits, effective March 20, 2022, which was denied beginning August 21, 2022, in a determination issued by the agency on September 9, 2022. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination in a decision rendered on December 23, 2022. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On June 28, 2023, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the circumstances leading to the claimant's separation from the instant employer, as well as the circumstances leading to separation from her previous employer. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant voluntarily resigned from her employment when she refused to sign an employment contract that contained a non-compete clause, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. In February 2021, the claimant began working as a per-diem nurse practitioner health assessor for the instant employer, a health assessment company in the medical cannabis industry.

2. Every month, the claimant would notify the instant employer of her availability for that month. The instant employer would then assign hours to the claimant based on her availability.

3. The claimant worked different hours every week, depending on her availability. The claimant would work for anywhere between 6–20 hours every week, for $60 per hour.

4. The claimant's direct supervisor was the company's president.

5. When the claimant was hired by the instant employer, the instant employer did not provide her with an employment contract. The claimant did not sign any employment contract when she was hired by the instant employer.

6. When the claimant was hired by the instant employer, a non-compete was neither provided to her nor mentioned to her by the instant employer.

7. In January 2022, the claimant began working for employer B, a medical physician employment agency.

8. Employer B hired the claimant as an onsite nurse practitioner responsible for conducting COVID-19 health screens for high-risk travelers at a Massachusetts airport.

9. Employer B hired the claimant in a per-diem capacity, providing her with around 24 to 32 hours of work per week.

10. From January 8, 2022, the claimant attended Employer B's three and a half days training in [City A], Georgia.

11. After the training in [City A], the claimant attended training at the Massachusetts airport.

12. After the airport training, the claimant awaited her security clearance from the airport.

13. The claimant received her security clearance on March 28, 2022.

14. On March 28, 2022, employer B informed the claimant that employer B had ended their contract with the airport, and that therefore there was no more work available for the claimant.

15. On March 28, 2022, the claimant was discharged by employer B, for lack of work, after employer B ended their contract with the airport.

16. On March 29, 2022, the claimant filed for unemployment insurance (UI) benefits with the Department of Unemployment Assistance (DUA), effective March 20, 2022. The claimant was approved for benefits.

17. In August 2022, the instant employer was in the process of renewing their malpractice insurance. For this process, the instant employer reviewed the employee's [sic] employment contracts.

18. During the review, the instant employer discovered that there was no employment contract on the record for the claimant.

19. In August 2022, after the instant employer discovered that there was no employment contract on the record for the claimant, they provided her with an employment contract to sign.

20. The employment contract provided to the claimant had a non-compete clause.

21. The non-compete clause stated that the claimant was not allowed to compete with the instant employer for at least one year after signing the contract.

22. Although the claimant was not asked to sign a non-compete at hire, she knew that other nurse practitioners had to sign them while employed.

23. The claimant refused to sign the contract because she did not want to assent to the non-compete clause.

24. The claimant did not want to assent to the non-compete clause because "in the near future", she intended to start doing the same kind of work that the employer was doing in the cannabis industry. The claimant intended to begin working independently by starting a business at some point in the same line of work.

25. Once she began to work independently, the claimant intended to compete with the instant employer.

26. The claimant told the supervisor that she was uncomfortable with the non-compete clause.

27. The employer was not willing to waive the non-compete clause.

28. Had the non-compete clause been offered to the claimant when she was originally hired in February 2021, she would have signed it. Her refusal to sign it in August 2022 was because after working for the instant employer, she had come to enjoy the kind of work she did and had started to think of venturing into the same line of business independently. The claimant did not harbor such thoughts when she was hired in 2021.

29. Once the claimant refused to assent to the non-compete clause, the employer informed her that they considered her a competitor, and that there was no more work available for her.

30. The claimant separated from the instant employer on August 31, 2022, due to her refusal to assent to the instant employer's non-compete clause located in the instant employer's employment contract.

31. On September 9, 2022, the DUA sent the claimant a notice of disqualification, disqualifying her from receiving benefits from August 21, 2022. The notice stated that the claimant had left work with the instant employer to become self-employed which was considered leaving work voluntarily and without good cause attributable to the employing unit.

Credibility Assessment:

The claimant and the instant employer's president participated in the initial telephone hearing held on December 21, 2022. Both of them gave credible, consistent and noncontradictory testimon[y] indicating that the claimant had separated from the instant employer in August 2022 due to her refusal to assent to the instant employer's non-compete clause.

Only the claimant participated in the remand telephone hearing held on September 5, 2023. The claimant provided detailed, forthcoming, consistent, and credible testimony regarding her employment with the instant employer and with employer B, and the circumstances under which she separated from both employers.

The employer did not participate in the remand hearing. As such, no findings were made as to whether or not the non-compete agreement was an industry standard practice. The claimant testified at the remand hearing that although she was not asked to sign a non-compete at hire, she was aware other nurse practitioners were required to. It remains unclear as to why the noncompete was not presented to the claimant at hire. There is no substantial and credible evidence showing that the noncompete agreements are an industry standard practice.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's decision to disqualify the claimant from receiving benefits.

The first question is whether to analyze the claimant's separation from employment as a voluntary resignation or a discharge. In her original decision, the review examiner concluded that the claimant had resigned. However, after remand, Consolidated Finding # 29 provides that, when the claimant refused to sign the non-complete clause, the employer informed her that there was no more work available to her. When an employer stops providing work to an employee, the separation is treated as a discharge from employment.

Where a claimant is discharged from employment, her 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).

Because there is insufficient evidence in the record to demonstrate that the employer discharged other employees for similar behavior, the employer has not established that the claimant's refusal to sign the agreement violated a *uniformly enforced* rule or policy. Alternatively, the employer may show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

There is no question that the claimant refused to sign the employment agreement, which the employer asked her to sign. *See* Consolidated Findings ## 19 and 23. In that regard, she engaged in misconduct. Further, Consolidated Finding # 23 indicates that this was a deliberate action, inasmuch as she was clear that she did so because the agreement contained a noncompete clause. The question is whether it was done 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) (citation omitted).

The employer expected the claimant to sign the employment agreement, which it presented to her in August, 2022. Consolidated Finding # 19. For whatever reason, the employer had not asked the claimant to sign such an agreement when she was hired in February, 2021. *See* Consolidated Findings ## 6 and 18. Even if this was an oversight, the fact remains that the employer presented this agreement to the claimant in August, 2022, 19 months after she had begun her employment. *See* Consolidated Finding # 7.

G.L. c. 149, § 24L, the Massachusetts Noncompetition Agreement Act, sets forth certain parameters for valid and enforceable noncompetition agreements. In relevant part, G.L. c. 149, § 24L(b), states:

> To be valid and enforceable, a noncompetition agreement must meet the minimum requirements of paragraphs (i) through (viii). . .
>
> (ii) *If the agreement is entered into after commencement of employment* but not in connection with the separation from employment, *it must be supported by fair and reasonable consideration independent from the continuation of employment*, and notice of the agreement must be provided at least 10 business days before the agreement is to be effective. Moreover, the agreement must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing.

(Emphasis added.)

Here, there is nothing in the record to indicate that the employer offered the claimant any consideration other than the right to continue working for the employer. As such, its expectation that she sign an agreement with a noncompete clause at that point was in violation of G.L. c. 149, § 24L(b). This expectation was against public policy and, therefore, unreasonable.

We, therefore, conclude as a matter of law that the employer discharged the claimant. We further conclude that, because the employer did not sustain its burden to show that the claimant knowingly violated a reasonable and uniformly enforced rule or policy or that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, the claimant is not disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(2).

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

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 20, 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.

AB/rh