Board upheld the ruling that the claimant's no-call, no-show attendance incidents were deliberate misconduct in wilful disregard, and, therefore, they disqualified him pursuant to G.L. c. 151A, § 25(e)(2). However, because the employer was his primary base period employer, the claimant was subject to a complete disqualification from benefits and not the constructive deduction imposed by the review examiner.

Board of Review
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Issue ID: 0079 2933 78

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. We affirm the denial of benefits, but we conclude that the proper outcome here results in a total disqualification from benefits, rather than the constructive deduction imposed by the review examiner.

The claimant was discharged from his position with the employer on February 3, 2023. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 15, 2013. The claimant 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 denied benefits in a decision rendered on June 21, 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).

While the review examiner concluded that the claimant was not entitled to benefits based on this separation, the review examiner also concluded that the claimant was subject to a constructive deduction based on subsidiary employment with another employer, resulting in the claimant receiving weekly unemployment benefits of $496.00 — the difference between the weekly benefit amount on his claim ($633.00) and the $211.00 constructive deduction imposed after the claimant's $211 earnings disregard was incorporated ($137.00) — for all of the weeks for which he certified.

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted this case for review. 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 disqualifying separation from this employer required the imposition of a constructive

deduction rather than total disqualification from benefits, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. From April 18, 2022, until January 24, 2023, the claimant worked as a housekeeper/houseman for the employer, a casino/hotel.

2. The claimant worked 40 hours, 3-11 p.m. shift, and was paid 25.00 hourly.

3. The employer has a business code & ethics with an attendance standards policy, the relevant section of the attendance [sic] is the employer has no call, no show written policy, with a points system that accumulates with each infraction. The total points are adjusted to zero on employee [sic] anniversary year.

4. If an employee is no call/no show=7 points, 2nd no call/no show=7 points, total of 14 points [sic]. The employee is suspended and facing possible termination.

5. On the first no call/no show, the employee receives a written warning. On a second no call/no show, the employee is suspended/pending investigation, possible termination.

6. On April 15, 2022, the claimant received a copy of the employee's handbook and signed an acknowledgment of having received it.

7. The employer has a reasonable expectation that employees will call-out when they will be absent or tardy.

8. The purpose of the expectation is to maintain adequate staffing for the employer's department. If staff are unexpectedly out or do not call in to report their absence, the employee's work is reassigned to the existing staff assigned to the shift.

9. The claimant's direct supervisor is assistant director of housekeeping.

10. On December 13, 2022, the claimant received an attendance warning, the claimant attendance points at the time was 8 points, and the claimant received a written warning.

11. On or about January 15, 2023, the claimant reported to his supervisor that [sic] allegedly had an altercation with a co-worker.

12. The human resource department investigated the complaint (spoke with co-worker) [sic] reviewed the camera footage as to where the alleged altercation had occurred.

13. The HR department did [not] substantiate the altercation. HR did not see in the video footage the alleged altercation.

14. The claimant missed work January 28, 29, and 30, 2023. The claimant did not call in on those three days. The employer treated the claimant's absence for those three days as violation [sic] of the attendance standards.

15. The supervisor called the claimant after he missed work [on] January 28, 2023.

16. The claimant had accumulated 21 points based on the three absences no call/no show. The claimant's total point accumulation was at 29 points, when the prior attendance infraction from December 2022 is factored in.

17. The employer placed the claimant on suspension on January 31, 2023, after the third missed work date. The employer would have accepted a reasonable explanation from [the] claimant about the no call/no shows, and would not have immediately moved for an immediate termination depending on [the] claimant's explanation.

18. The claimant was allegedly advised by his union representative to stay away from work as the matter was being investigated.

19. On February 3, 2023, the employer discharged the claimant for violation [sic] the no call/no show policy/expectation when the claimant did not report to work January 28, 29, and 30, 2023.

20. The claimant filed for unemployment benefits on February 17, 2023, with an effective date February 12, 2023.

21. The claimant WBA was $633, earnings disregard is $211 [sic]. The claimant's subsidiary employer listed wages for claimant in his base period.

22. The claimant started working a part-time job in late December 2022, the claimant's payrate was $15.00 hourly, [sic] worked 20-24 hours per week. This part-time job wages are less that his primary employment wages.

[Credibility Assessment:][1]

[1] We have copied and pasted here a portion of the review examiner's conclusion, which includes his credibility assessment.

> The claimant offered in mitigation that he was advised by the union that he should stay away from work because he was previously assaulted and that the employer/HR was investigating the matter. The employer (assistant director) testified that the claimant did report an alleged assault, but that HR could not substantiate the assault after speaking with the coworker and the viewing video footage. The claimant failed to offer any direct evidence, (text, letter, email, testimony) from his union advising him to stay away from work for three days. Given the totality of the evidence presented, it cannot be concluded that the claimant's testimony is credible and/or that there are mitigating circumstances sufficient to excuse the claimant's conduct.

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, while we agree with the review examiner's legal conclusion that the claimant's separation from employment is disqualifying under G.L. c. 151A, § 25(e)(2), we conclude that he is not subject to a constructive deduction, but rather a full disqualification from unemployment benefits.

Because the claimant was terminated from his employment, 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. . . .

Under this section of law, the employer bears the burden to show that the claimant is ineligible to receive unemployment benefits. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

The review examiner found that the employer discharged the claimant for failing to report to work for three consecutive days in violation of its expectation that employees who are unable to report to work will notify the employer of their absence. Finding of Fact # 19. Although the claimant contended that he was advised by his union to stay away from the workplace due to an alleged altercation with a coworker earlier in the month, the review examiner did not credit the claimant's testimony on this matter. He concluded that the claimant was discharged for deliberate misconduct and failed to establish mitigating circumstances to excuse his failure to report to work or call out.

The review examiner provided a credibility assessment explaining his reasons for deeming the claimant's version of events less credible than the employer's, and we cannot set aside his credibility assessment unless it is unreasonable or unsupported by the evidence before him. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). We believe that the review examiner's credibility assessment and the resultant findings are reasonable in view of the evidence before him.

In light of these findings, the review examiner's decision that the claimant's engaged in deliberate misconduct in wilful disregard of the employer's interest is based on substantial evidence and is free from any error of law affecting substantive rights. Thus, we agree that the claimant's separation from the instant employer was disqualifying under G.L. c. 151A, § 25(e)(2).

Our analysis does not end here, however. In his decision, the review examiner further concluded that, because the claimant had part-time employment with another employer, the claimant's benefits should be subject to a constructive deduction rather than a full disqualification from benefits, pursuant to the provisions of 430 CMR 4.71–4.78. In implementing his decision, the review examiner imposed a constructive deduction of $360.00 per week to the claimant's $633.00 weekly benefit rate. This led to the claimant being retroactively issued weekly disbursements of $496.00 going back to the start of his claim (and thereafter, following the review examiner's decision). By imposing a constructive deduction rather than total disqualification, the review examiner erred as a matter of law.

A constructive deduction, rather than a full disqualification, will be imposed if the separation is from "subsidiary part-time work or newly obtained part-time work in the benefit year under disqualifying circumstances within the meaning of G.L. c. 151A, § 25(e)(2)." 430 CMR 4.72. Here, however, the claimant's work for the instant employer was full-time and primary; he worked 40 hours per week and was paid $25.00 per hour for this employer. *See* Finding of Fact # 2. The claimant began working for his other employer in December, 2022, worked 20 to 24 hours per week, and was paid $15.00 per hour. *See* Finding of Fact # 22. Thus, his work for the other employer was subsidiary, and the instant employer was the claimant's primary employer. *See* 430 CMR 4.73 – 4.75. Because the claimant's separation from this primary employer is disqualifying under G.L. c. 151A, § 25(e)(2), he is subject to total disqualification rather than a constructive deduction.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and is disqualified under G.L. c. 151A, § 25(e)(2). We further conclude that the disqualification from benefits is total, not subject to any constructive deduction.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week ending February 4, 2023, 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. Because the claimant's work for this employer was his primary employment, he is not entitled to a constructive deduction.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 31, 2023

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.

JPCA/rh