

The review examiner's credibility assessment was unreasonable in relation to the evidence presented. Looking at the record as a whole, it shows that the claimant's many errors stemmed from poor performance, being ill-equipped for the job, and bad judgement, but not from deliberate misconduct in wilful disregard of the employing unit's interest. Held he is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0079 9918 87

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 April 26, 2023. He filed a claim for unemployment benefits with the DUA, effective April 23, 2023, which was approved in a determination issued on April 29, 2023. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 5, 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). 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 concluded that the claimant deliberately and in wilful disregard of the employer's interest did not perform his work to the best of his ability, 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. From February 7, 2022, to April 26, 2023, the claimant worked full-time (40+ hours weekly) as an outside sales representative for the employer, a company that sells, fabricates, and installs fences.

2. As an outside sales representatives [sic] the claimant's duties and responsibilities included, (1) meeting with prospective clients on-site, (2) taking measurements, and (3) preparing and submitting sales proposals to prospective clients.
3. The employer expected the claimant to provide prospective customers with accurate sales proposals within 24 hours of a sales call, to track his communications with customers daily using the employer's sales software, to have sales proposals over \$3,000.00 initialed by the office manager before they were submitted to the customer, and to promptly respond to prospective customers' communications.
4. The claimant was aware of the employer's expectations through his receipt of the owner's June 3, 2022, email, the owner's January 1, 2023, letter, his February 7, 2023, written performance review, and multiple verbal warnings.
5. The purpose of the employer's expectation is to ensure customer satisfaction in order to increase sales and prevent financial losses.
6. The claimant's direct supervisor was the employer's owner/chief executive officer (Owner).
7. The claimant worked Monday through Friday from 7:30 a.m. to 4:00 p.m.
8. The claimant was a salaried employee. The claimant's annual salary at the time of separation was \$77,500. The claimant also received sales-based bonuses.
9. The claimant typically went on 6 or 7 sales calls a day. Typically, a sales call lasted 30 minutes.
10. The claimant trained on-site with his coworker the first six weeks of his employment.
11. The Owner gave the claimant dedicated office time to complete sales proposals multiple times.
12. The Owner, the claimant's coworker, and the employer's office manager offered to help the claimant multiple times. Multiple times, the claimant declined assistance and told the Owner and the office manager that he was "all caught up." At the time, the claimant knew he had outstanding sales proposals.
13. The claimant never asked the office manager to review a sales proposal. There was nothing that prevented the claimant from asking the office manager to review a sales proposal.
14. When the claimant asked the Owner, the owner's father who was also an employee, and a coworker for help, they helped the claimant.

15. As of February 7, 2023, the Owner declined to give the claimant additional office time to complete sales proposals.
16. Effective February 7, 2023, the Owner gave the claimant a 3% salary raise.
17. On or about the beginning of March 2023, the claimant asked the Owner for fewer sales calls and spoke to the office manager who scheduled the claimant's sales calls. The Owner's father, who was also an outside sales representative, told the office manager that the claimant had too many sales calls to get his office work done. The Owner instructed the claimant to work outside of regular office hours if he fell behind because the claimant was a salaried employee.
18. On March 23, 2023, the employer learned the claimant had failed to include \$6,000 in labor costs in a sales proposal that he had submitted to a prospective customer. The customer had already signed the proposal, and declined to pay the labor costs when informed of the mistake.
19. The last week of his employment, the claimant went on sales calls with a 25-foot tape measurer, a 200-foot tape measurer, and without a measuring wheel. The claimant had left the measuring wheel at a customer's home, and had not told the employer. Without a measuring wheel, the claimant was more likely to not accurately record distances in excess of 200 feet.
20. The claimant had to visit the same sites multiple times because he did not take the necessary measurements and/or the correct measurements initially.
21. The claimant submitted inaccurate measurements to the employer's fabricators, which resulted in delays and increased costs for the employer.
22. On April 26, 2023, the Owner discharged the claimant for poor performance.
23. The claimant did not perform his work to the best of his ability.

[Credibility Assessment:]¹

[T]he employer's witness, the office manager, credibly testified that the employer expected the claimant to prepare and provide prospective customers with accurate sales proposals in a timely manner, and to respond to prospective customers' communications in a timely manner. . . .

The question becomes why the claimant failed to meet the employer's expectations. The claimant alleged he was unable to meet the employer's expectations because he was overwhelmed due to a lack of experience, insufficient training, a too heavy

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

workload, and insufficient time. The employer's witness, the office manager, credibly testified and the claimant acknowledged that, (1) the Owner gave the claimant additional office time to complete proposals multiple times, (2) the Owner, the claimant's coworkers and the office manager offered to help the claimant multiple times and the claimant declined, (3) the Owner or another sales representative would help the claimant when he asked for help, and (4) the claimant never asked the office manager for assistance, and there was nothing that prevented the claimant from asking the office manager for help. The claimant acknowledged the Owner and other coworkers offered him assistance multiple times, but alleged the Owner would fix the issue without teaching him what he should do in the future. In addition, the claimant asserted he declined help because he did not know what kind of help he needed or he needed help with something that the office manager couldn't assist him with. Further, the office manager testified that the claimant repeatedly told her and the Owner that he was "caught up" and did not need help. The office manager credibly testified that the claimant's dishonesty, as to his backlog prevented the employer from discovering the extent to which claimant had failed to timely respond to customers, until after he was discharged, which resulted in a loss of business. The claimant's response to the office manager's testimony that he had said he was "caught up" was evasive, with the claimant reluctantly admitting he said he was "all caught up" multiple times, but alternatively asserting that (1) at the time, he "believed" he was current on his assignments, then alleging that (2) he believed was caught up or "close to" caught up except for needing to write some proposals. Based on the totality of the evidence, it is concluded that the claimant knew he was not "caught up" and deliberately misled the employer. Further, it is not credible that an employee who deliberately and intentionally refused help multiple times performed his job to the best of his ability.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. Findings of Fact ## 12, 13, and 14 are misleading insofar as they fail to include material, undisputed evidence. We also reject Finding of Fact # 23, as discussed more fully below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject the review examiner's legal conclusion that the claimant was ineligible for 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. . . .

“[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).

Finding of Fact # 22 states that the employer fired the claimant for poor performance. Inasmuch as there is nothing in the record to show that this type of poor performance violated any specific policy or rule, there is no basis to conclude that the claimant knowingly violated a reasonable and uniformly policy or rule. Alternatively, we consider whether the employer has shown deliberate misconduct in wilful disregard of the employer's interest.

The employer expected the claimant to write sales proposals, track customer communication daily, have proposals of over \$3,000 initialed by the office manager before submission to the customer, and promptly respond to customer communication. Finding of Fact # 3. There is no dispute that the claimant did not meet the employer's performance expectations in that he made numerous, costly errors over the course of his employment, and that he could not keep up with his workload. *See* Findings of Fact ## 12, and 17–21. Thus, the record shows that he engaged in the misconduct for which he was fired. The question is whether his poor performance was deliberate.

In her credibility assessment, the review examiner concluded that when the claimant told the employer he was “caught up,” it was a deliberate attempt to mislead. She further determined that, when the claimant refused the help offered by the employer multiple times, it was not credible to believe that the claimant performed his job to the best of his abilities. 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). We believe that the review examiner's assessment is unreasonable in relation to the evidence presented.

As noted in the credibility assessment, the claimant testified that he was offered help, but it was not in a manner that could improve his job performance, so he declined assistance. Specifically, when the owner helped him, the owner fixed issues without training the claimant. As the review examiner also notes, the claimant maintained that he declined the office manager's offer of help because he did not know what type of help he needed or because it was of a nature that the office manager would not have been able to assist with. The findings indicate that the claimant asked for fewer sales calls, which was denied. He also requested more office time to complete his proposals, but this too was denied. *See* Findings of Fact ## 15 and 17. He testified that he requested the

additional office time because he struggled with getting his proposals done.² He continued requesting more in-office time because he could ask his experienced coworkers questions, which he could not do working from home. He typically had six or seven sales calls a day that lasted thirty minutes, plus the time driving to different job sites, leaving him out of the office most of the workday. *See* Finding of Fact # 9. Moreover, the owner's father, another sales representative, observed and even told the office manager that the claimant had too many sales calls to finish his office work. *See* Finding of Fact # 17. Yet, the employer repeatedly denied the help the claimant requested, more office time to work on his administrative responsibilities, when those who could help were available. *See* Findings of Facts ## 12–15, and 17. All of this evidence tends to show that his poor performance was not due to refusing help.

Next, we consider whether the claimant was deliberately dishonest by informing his manager that he was “all caught up” when, at the time, he knew that his sales proposals were not completed. *See* Finding of Fact # 12. The claimant testified that when asked if he was up to date on his proposals, he would respond that he was because what he was behind on was just “background stuff.” He further stated that he was done with the proposals except for “the math,” and believed that just having this portion of the proposal left to be completed meant that he was caught up on his work. Given his explanation, we believe the claimant was not being deliberately dishonest but exercising poor judgment. “When a worker . . . has a good faith lapse in judgment or attention, 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).

In short, the record shows that the employer assigned a workload that the claimant could not handle without making costly mistakes. “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.” *Id.* at 97. Considering the claimant’s struggle to receive appropriate assistance, and his inability to get more office time to complete his proposals, the weight of the evidence shows that the claimant was working to the best of his ability. He was simply ill-equipped for the job.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer’s interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner’s decision is reversed. The claimant is awarded benefits for the week ending April 26, 2023, and for subsequent weeks if otherwise eligible.

² While not explicitly incorporated into the review examiner’s findings, this testimony and the testimony referred to below are part of the unchallenged evidence introduced at the hearing and placed in the record. They are 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 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.

MM/rh