Board of Review
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Issue ID: 0012 2005 49
Claimant ID:

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rachel Zwetchkenbaum, 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 December 3, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 13, 2014. 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 April 16, 2014. 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 clarify and resolve the circumstances of the claimant's separation from employment. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 conclusion that the claimant violated the employer's expectation when he went to the employer's shop and worked on personal vehicles without the employer's permission, 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 assessments are set forth below in their entirety:

1. The claimant worked as a Service Technician, for the employer, a Car Dealership, from May 1, 2011 through December 3, 2013, when he was discharged.

2. The claimant worked a full-time schedule.

3. The employer expects all employees to get permission from the employer before performing non-assigned and non-paid work on their personal vehicles or vehicles of friends or family and if/when permission is given to do so that all employees fill out the proper work orders for the work to be done to the car in order to avoid liability issues. Employees are prohibited from working on personal vehicles without permission from the employer and filling out a work order properly, whether or not the employee is working at the time.

4. During the claimant's tenure with the employer, the claimant was not informed of these expectations.

5. The employer conducted monthly meetings with the employees, which the claimant attended. These meetings went over various employer policies. The topic of working on personal vehicles did not come up at these meetings.

6. The claimant did not know that he could be discharged for working on a personal vehicle without permission from the employer.

7. The claimant thought the employer allowed employees to work on personal vehicles without employer permission because he had seen many other employees do it on various occasions without any repercussions.

8. The claimant worked on November 15, 2013.

9. On November 17, 2013, the employer realized that they were missing some metal from the shop.

10. On November 19, 2013, the employer looked at surveillance video of the claimant, taken on November 15, 2013, and saw on the video that the claimant had been walking back and forth where the metal should have been. The employer concluded that the claimant had taken the missing metal from the shop.

11. On November 20, 2013, the employer met with the claimant to discuss the possibility that the claimant stole the missing metal from the shop on November 15, 2013.

12. On November 20, 2013, the employer gave the claimant a warning for taking metal from the shop.

13. There were no witnesses to the incident on November 15, 2013, only surveillance video.

14. On November 20, 2013, the claimant's supervisor and the general manager informed the claimant that taking metal from the shop was unacceptable.

15. The claimant was warned that such behavior was unacceptable.

16. During the meeting on November 20, 2013, the topic of working on personal cars at the shop came up, but the employer did not address it and instead focused on the missing metal.

17. At the time of the meeting on November 20, 2013, the claimant had worked on personal vehicles without permission, but the claimant never got in trouble for such behavior.

18. On November 30, 2013, the claimant went to his employer's shop and worked on non-work related vehicles (his cousin's car and his brother's car). The claimant had not asked for permission to do so from the employer for either car. Additionally, the claimant did not fill out work orders for either car.

19. On November 30, 2013, the claimant did not know that he was acting contrary to the employer's interests when he worked on a personal vehicle at the worksite without permission.

20. On December 3, 2013, another employee reported to the employer that he saw the claimant working on a personal vehicle at work on November 30, 2013.

21. On December 3, 2013, the claimant was questioned by the employer about his actions on November 30, 2013. The claimant admitted he had been at the employer's shop on November 30, 2013 and while he was there he worked on his brother and cousin's cars without permission and without filling out a work order. At that meeting the claimant was informed that such behavior was unacceptable. This was the first time that the claimant had learned this.

22. On December 3, 2013, the claimant was terminated for working on a personal vehicle without permission on November 30, 2013.

23. The claimant filed for unemployment benefits, effective the week beginning December 1, 2013.

CREDIBILITY ASSESSMENT

The employer presented inconsistent testimony. The employer first testified that before the November 30, 2013 incident, they were unaware whether or not the claimant had previously worked on a personal vehicle without permission. The employer also testified that they did not know if the claimant had ever received a warning for working on a personal car without permission. The employer later testified that the claimant had received a warning for working on a personal car without permission and that it was given to him at the November 20, 2013 meeting with the claimant. The employer was unable to provide any evidence that corroborated that. The claimant testified that he was never given a warning for working on a personal car without permission and the warning he got on November 20, 2013 was for

> allegedly taking metal from the shop. Additionally, the employer testified that they did not know if the claimant was told about the policy pertaining to working on a personal vehicle without permission at hire or whether or not he received a copy of the policy. The employer then testified that the claimant was told about the policies "at meetings and what not" but could not give any specific dates that any of these meetings took place. When the employer was questioned about the November 20, 2013 meeting, the employer was unable to give any clear and consistent answers. Given the record as a whole, the claimant is found to be more credible.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the consolidated findings do not reflect that the claimant knowingly violated the employer's expectation.

Since the claimant was discharged 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 . . .

Under the foregoing section of the law, it is the employer's burden to establish that the claimant engaged in the alleged conduct and that such conduct violated either a written, uniformly enforced rule or a reasonable expectation so as to constitute misconduct. Further, a showing of misconduct alone will not disqualify the claimant from receiving benefits. The employer must also show that the conduct was deliberate, or intentional. In discharge cases, the "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine the employee's state of mind, we "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id

Following remand, the review examiner's findings establish that the claimant did not know that he could be discharged for working on a personal vehicle without permission from the employer. The claimant thought that the employer allowed employees to work on personal vehicles without employer permission, because he had seen many other employees do it on various occasions without any repercussions. The claimant did not know that he was acting contrary to the employer's interest when he worked on a personal vehicle at the worksite without permission.

Although the employer testified that it had made the claimant aware of its rule, the lack of consistency in the employer's testimony led the review examiner to find the claimant more credible on this point. The review examiner provided a detailed credibility assessment setting forth her reasons for accepting the claimant's testimony over that of the employer. The review examiner provided specific examples of the conflicts and inconsistencies in the employer's testimony, including that the employer was unable to give any clear and consistent answers when questioned about a meeting with the claimant. 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). Thus, we conclude that the employer's testimony cannot be relied upon.

We, therefore, conclude as a matter of law that the claimant did not engage in a knowing policy violation or deliberate misconduct in wilful disregard of the employer's interest, and is not subject to disqualification.

The review examiner's decision is reversed. The claimant entitled to receive benefits for the week ending December 1, 2013, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 19, 2015

Stephen M. Linsky, Esq.
Member

Judith M. Neumann, Esq.
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR BOSTON MUNICIPAL 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.
SPE/rh