

**Board of Review
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Issue ID:0002 3213 45

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Kathleen Della Penna, 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 affirm.

The claimant was discharged from his position with the employer on October 29, 2012. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 27, 2012. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 14, 2013. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant 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, 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 for another hearing to allow the employer to present testimony and evidence. Both parties attended two days of remand hearings. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, who was discharged after he was unable to return to work by the employer's deadline following a leave of absence for a work-related injury, established mitigating circumstances for his failure to return to work by that deadline.

Findings of Fact

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

1. The claimant worked as a senior refrigeration mechanic and he was employed from 8/19/07 until his separation on 10/29/12 [sic].
2. The claimant was discharged while on leave for an injury.

3. The employer is a state operated medical school.
4. On 5/26/12 while at work the claimant pulled something in his groin area, but after a long weekend he felt able to return to work.
5. On 6/5/12 the claimant pulled the same area and he was in excruciating pain and informed his supervisor that he was leaving work.
6. The claimant was told by his supervisor to get in touch with a representative of the state Department of Industrial Accidents and he did.
7. The claimant remained in contact with the Department of Industrial Accidents and provided them all of the medical documentation that was requested and he understood that this information was passed along by this agency to the company.
8. The claimant also made several calls to the instant employer during the time that he was out and left messages. The claimant does not recall all the contacts he attempted during this period as he was in pain and on pain medication.
9. On 6/15/12 the claimant was notified that he had been approved for worker's compensation.
10. On 10/12/12 the employer mailed the claimant the following:

According to Human Resources records you have been on a medical leave of absence from your position as Refrigerator and AC Mechanic in the Facilities Department at UMMS since 6/6/2012. As you may be aware the first twelve weeks of a medical leave or absence, including leaves affiliated with a Workers' Compensation claim, are covered under the Family Medical Leave Act. A letter indicating this was sent out to you on 6/11/12. The Medical School has placed you on a temporary extension of medical leave following the expiration of your Family Medical Leave period on September 28, 2012.

Unfortunately, the Department cannot indefinitely hold your position until you can resume your full duties. The Medical School's leave policies note that failure of an employee to return from an approved leave of absence within an agreed upon time frame may constitute voluntary termination. The most current medical documentation you submitted indicates you should be capable to return to work on or about 10/22/12. In the event you cannot resume your full duties by this date, UMMS will consider your continued absence as a failure to return from an approved leave and we will process your termination accordingly. The decision to terminate your leave of absence is independent of any benefits you have received or may continue to receive from your Workers' Compensation claim. Those benefits will continue to be

administered by the Commonwealth of Massachusetts, Human Resource Division.

If you believe that you will be able to resume your full duties at the close of this leave extension, UMMS will require that you finish [sic] a statement from your medical provider that you are fit to return to duty. Enclosed is a fitness for duty form that will need to be completed by your physician prior to your return.

11. Upon receipt of the letter the claimant called the employer and indicated he was still under doctor's care. The claimant was instructed to make an appointment with his doctor and to have the paperwork provided on 10/12/12 filled out by his doctor.
12. The claimant was able to schedule a doctor's appointment on 10/16/12; however the doctor had a medical emergency and canceled that appointment. The claimant's appointment was rescheduled for 10/19/12. The doctor had a medical emergency and canceled that appointment. The claimant rescheduled that appointment for 10/22/12. On 10/22/12 the doctor canceled the appointment due to a medical emergency and the claimant was rescheduled for 10/23/12.
13. On 10/23/12 the claimant was seen by his doctor who filled out the Fitness for Duty form that was requested by the employer. On this form the doctor indicates that on 10/29/12 the claimant may return to work.
14. On 10/23/12 the claimant was mailed the following:

Our records indicate that you have been on a medical leave of absence from your position as Senior Refrigeration and Air Conditioning Mechanic in the Jamaica Plain Facilities Department since June 6, 2012. This leave has run concurrently with your Family Medical Leave and as a result your current leave has extended well past the expiration of your Family Medical Leave period on August 29, 2012. The Medical School's leave policies note that failure of an employee to return from an approved leave of absence within an agreed upon time frame may constitute voluntary termination. The Medical School can no longer extend your leave of absence and therefore this letter shall serve as notice that effective October 23, 2012 the Medical School will terminate your leave status and we will process your termination accordingly. Once you have been cleared to return to work without restrictions by your health care provider, you may apply to openings within the Medical School at that time. Enclosed is a Separation of Employment packet which explains how this action impacts your benefits. Please contact a Benefits Representative at (508) 856-5260, option 1, for further information and assistance about these materials. For questions concerning ongoing Workers Compensation benefits you may contact (name) at (508) 856-3580.

[CREDIBILITY ASSESSMENT:] The claimant's testimony that he attempted to make contact to the employer, is credible, as he provided telephone records to corroborate that the calls were made. The examiner considered the employer's testimony that based by the length of time of the calls he could not have made contact, however the claimant did not indicate that in all cases he made contact and the calls were for at least a minute which is a long enough time to leave a message.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact and credibility assessment. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner awarded benefits after analyzing the claimant's separation under 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 ...

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. Based solely on the claimant's testimony at the initial hearing, the review examiner concluded that the employer had not met its burden. We remanded the case to take the employer's testimony. After remand, we conclude that the employer has not met its burden.

The review examiner found that the claimant suffered a workplace injury that required him to take a leave of absence as of June 5, 2012. The claimant was approved for worker's compensation and was simultaneously put on a Family Medical Leave Act (FMLA) leave of absence for 12 weeks after his injury. When the claimant was unable to return to work after the 12-week FMLA leave expired, the employer put him on a temporary extension of his medical leave.

On October 12, 2012, the employer informed the claimant by letter that the most recent information it had received from the claimant's medical provider indicated he should be capable of returning to work on October 22. If the claimant were unable to return to work by that date, his employment would be terminated. If he were able to return to work, he was required to furnish a fitness for duty form from his provider confirming his ability to work. *See* Hearings Exhibit #2. After receiving this letter, the claimant advised the employer that he was still under

his physician's care, and the employer instructed him to have his doctor fill out the paperwork that was attached to the October 12 letter.

The review examiner found that the claimant made appointments with his physician on October 16, October 19, and October 22, 2012, but his doctor cancelled each of these appointments due to medical emergencies involving other patients. The claimant met with his physician on October 23, 2012, and obtained documentation clearing him to return to full duty as of October 29, 2012. *See* Hearings Exhibit #4. However, also on October 23, the employer mailed a letter to the claimant informing him that he was discharged effective that day. *See* Hearings Exhibit #15.

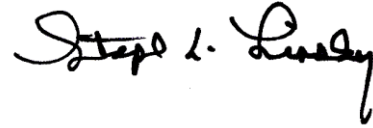
The employer had an expectation that the claimant would return to work with medical clearance, or provide evidence of his need for additional medical leave, by October 23, 2012. The claimant was aware of the expectation, and that he could be discharged for failing to return to work or to provide further medical documentation, having received the letter setting forth the employer's position. The expectation was reasonable, as the letter explained the employer cannot hold the claimant's job indefinitely.

The review examiner found that the claimant attempted to comply with the employer's deadline, crediting the claimant's testimony that he made contacts with the employer and left messages. The claimant's efforts were corroborated by his cell phone records from October 2012, which show he called various staff of the employer during this period of time. *See* Remand Exhibit #16. The review examiner also credited the claimant's testimony that he scheduled three appointments with his medical provider that were cancelled by the doctor, before his physician was finally able to see him on October 23.

The facts as found by the review examiner show that the claimant attempted to inform the employer of his efforts to comply with its directives by the deadline it imposed, but that intervening medical emergencies with other patients required the claimant's doctor to postpone his evaluation until the day of the employer's deadline. The claimant's efforts to meet with his physician – and to keep the employer apprised of those efforts – support the conclusion that he lacked the requisite state of mind to support disqualification for deliberate misconduct in wilful disregard of the employer's interest, since the claimant did what he could to comply with the employer's expectation.

Further, as the review examiner credited the claimant's testimony that his doctor cancelled three appointments due to medical emergencies involving other patients, the physician's cancellations constitute circumstances sufficient to mitigate the claimant's compliance with the employer's expectation. We, therefore, conclude as a matter of law that the claimant was discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending November 3, 2012, and for subsequent weeks if otherwise eligible.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 7, 2013



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

JPC/rh