

Board of Review
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Issue ID: 0008 9850 91

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Andrew Yu Cheng, 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 her position with the employer on March 30, 2013. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 30, 2013. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 9, 2013. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 on appeal is whether the review examiner's conclusion that the claimant's failure to properly perform her job duties by failing to correctly transfer phone calls, constituted deliberate misconduct is supported by substantial and credible evidence and free from any error of law.

Findings of Fact

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

1. The claimant was employed part-time as a switchboard operator for the employer, a medical group, from January 28, 2013 to March 30, 2013
2. The employer has an expectation that employees ask callers for their provider's names, so that the call can be properly transferred.

3. The claimant consistently failed to properly transfer calls.
4. The claimant was instructed on this procedure on March 13 and March 20.
5. During the two occasions above, the claimant's supervisor told the claimant that she could be fired for failing to properly transfer calls.
6. The claimant never explained to the employer why or how she was having difficulty properly transferring calls.
7. The claimant had approximately ten years of experience with phone-based customer service in previous occupations.
8. The claimant was discharged on March 30, 2013, for continuing to not follow the paging procedures.

Ruling of the Board

In accordance with our statutory obligation, we review the findings of fact made by the review examiner to determine: (1) whether these findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion that the claimant is entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact. However, as discussed more fully below, we believe that the review examiner's findings of fact do not support a conclusion that the claimant's failure to properly transfer phone calls constituted deliberate misconduct.

G.L. c. 151A, § 25(e)(2), 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 . . .

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, 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, 377 Mass. at 97.

Here, the employer did not meet its burden. The review examiner noted in his decision that there “is no direct evidence that the claimant deliberately failed” to perform her duties. Nevertheless, the review examiner inferred that the claimant acted deliberately based on “circumstantial evidence,” such as the claimant’s work experience, the repeated instructions provided by the employer, and the employer’s argument that the claimant was capable of performing her job duties correctly. This does not constitute substantial and credible evidence to support the review examiner’s conclusion that the claimant intentionally failed to properly perform her job duties. The review examiner’s findings of fact and the competent evidence in the record show only that the claimant failed to perform her job duties according to the employer’s expectations, not that she did so intentionally or in wilful disregard of the employer’s interest. Unsatisfactory job performance, absent a deliberate failure to perform, does not constitute deliberate misconduct and, therefore, is not disqualifying. *See Trustees of Deerfield Academy v. Dir. of Division of Employment Security*, 382 Mass. 26 (1980). With no substantial and credible evidence of such deliberateness, the claimant cannot be disqualified.

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, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending April 6, 2013, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 20, 2014



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Chairman



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.

A.M./rh