

**Board of Review
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Issue ID: 0002 1392 16

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Christopher Renaud, 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 March 17, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 16, 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 July 10, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer, or urgent, compelling, and necessitous reasons and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1).

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 take additional testimony regarding the circumstances of the claimant's termination from employment. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his 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 brought about his own separation is supported by substantial and credible evidence and is free from error of law, where, after his driver's license was suspended and then reinstated with restrictions, the claimant continued to remain employed and perform his usual work for eight months before being terminated.

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 full-time as a developmental services worker for the employer, the Department of Mental Retardation, from 12/05/10 until his separation on 03/17/13.
2. The claimant brought about his own separation when he no longer possessed a valid driver's license.
3. The employer requires all developmental service workers whom drive clients to/from various appointments to maintain a valid driver's license.
4. The claimant was aware of the above-mentioned expectation, as he was made aware of same upon hire. The claimant acknowledged awareness of the employer's expectation at the hearing.
5. On or about 07/20/12 the claimant had his driver's license suspended due to operating a motor vehicle while under the influence of alcohol. The claimant's license was suspended through 11/04/12 (Sunday).
6. On 11/05/12 the claimant's driver's license was reinstated on a restricted basis. The claimant was restricted to driving his own vehicle, which was fit with an ignition interlock device.
7. The claimant is subject to the above restrictions through 11/04/14.
8. Prior to the 07/20/12 suspension of his driver's license, the claimant's usual work duties included the direct care of residents, assisting nurses, household chores, assisting during meal time, transferring residents to/from wheelchairs, and administering medication.
9. On 03/17/13 the claimant's employment was terminated due to his failure to possess a valid driver's license.
10. The claimant was performing his usual work duties for the employer between 07/20/12 and 03/17/13. The claimant was able to perform the above usual duties without possessing a valid and/or restricted driver's license during this time.
11. The claimant was aware of other employees who had been allowed to continue employment after having their driver's license suspended and/or restricted. The claimant knew of other employees who had been offered third shift assignments upon suspension of a valid driver's license.
12. The claimant was not offered a third shift assignment following the suspension and restriction of his driver's [sic].

Ruling of the Board

In accordance with our statutory obligation, we review the consolidated findings of fact made by the review examiner to determine: (1) whether these consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows: Consolidated Finding # 2 (that the claimant brought about his own separation when he no longer possessed a valid driver's license) is set aside, both because it draws a legal conclusion, which is within the broad purview of this board. *See Dir. of the Division of Employment Security v. Fingerman*, 378 Mass. 461, 463 (1979) and because it is inconsistent with Findings # 9 and # 10, which establish that the claimant's employment was not terminated until eight months after the suspension of his license, during which time the claimant was able to perform his usual duties for the employer.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The review examiner denied benefits after analyzing the claimant's separation under G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent

Under the above provision, a claimant who had created his own impediment to continued employment is deemed to have quit and therefore not entitled to benefits. *Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002 (1985); *Rivard v. Dir. of the Division of Employment Security*, 387 Mass. 528 (1982). In *Rivard*, an employee was unable to meet a deadline for refunding certain pension contributions, which was a statutory condition of employment. Similarly, in *Olmeda*, an employee who was unable to transport himself to work after losing his license was deemed to have brought about his own employment.

Here, in contrast, it is clear that the suspension and subsequent restriction on claimant's driver's license did not create a "bar" to his continued employment, as he continued to perform his usual work duties for the employer for eight months before the employer terminated him. The record provides no explanation as to why, after eight months, the claimant could not have been offered a third-shift position as others had been following suspension. The record simply provides no direct nexus between the suspension/restriction of the claimant's driver's license and his discharge eight months later. Thus, the claimant cannot be viewed as having created a "bar" to his continued employment simply by losing an unrestricted driver's license. Moreover, the separation is not a voluntary quit, governed by G.L. c. 151A, § 25(e)(1). Rather, claimant was discharged. As such, the claimant's separation is controlled by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

¹ We interpret the second sentence of Finding #10 (that the claimant was able to perform his usual duties without possessing a valid and/or restricted license during this time), which, as written, is ambiguous, to mean, consistent with the record, that, during the four months in which the claimant's driver's license was suspended and the approximately four months after it was reinstated with a restriction, the claimant was able to perform his usual duties.

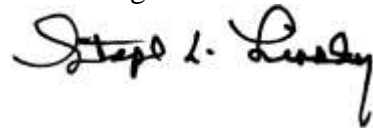
No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to 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 show it discharged the claimant for a knowing violation of a reasonable and uniformly enforced policy or for deliberate misconduct in wilful disregard of the employer's interest.

We remanded the case for further testimony and evidence regarding why the employer decided to discharge the claimant eight months after the suspension and eventual restriction of his driver's license, given that he had continued to perform his usual job duties. However, the employer did not appear at the hearing; and, thus, the record remains silent on this issue. It follows that the employer has not met its burden, under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant was discharged and that there is no evidence in the record of either a knowing violation or deliberate misconduct, 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 March 23, 2013, and for subsequent weeks if otherwise eligible.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 10, 2014



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.

SPE/rh