

0019 4380 59 (June 29, 2017) – Claimant left his shift early after his supervisor warned him not to and was subsequently fired. The Board disqualified him under G.L. c. 151A, § 25(e)(2) for deliberate misconduct in wilful disregard of the employer's interest. Being tired did not provide mitigating circumstances.

**Board of Review**  
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**Issue ID: 0019 4380 59**

## **BOARD OF REVIEW DECISION**

### **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 affirm.

The claimant separated from his position with the employer on August 1, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 7, 2016. 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 December 15, 2016.

Benefits were denied after the review examiner determined that the claimant, by abandoning his job, voluntarily left employment without good cause attributable to the employer 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 evidence as to what happened on the claimant's last day of work, whether he was, in fact, discharged from his position, and whether his prior absences contributed at all to the decision to separate him from his job. 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 abandoned his job, and, therefore, is subject to disqualification, under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where, according to the review examiner's consolidated findings of fact, the claimant was on a final warning for prior attendance issues, left work early without permission on July 29, 2016, while work was still available for him to do on that date, and the employer prevented him from returning to work after July 29.

### **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 for the employer, a distribution warehouse, as a full-time replenishment associate from July 2013 until August 1, 2016.
2. The employer's Attendance and Work Schedules policy (Remand Exhibits 5-6) states that an employee is not to leave their job during normal work hours without permission from a supervisor, and that a supervisor must be notified upon an employee's arrival at work in the event they must leave immediately following their shift.
3. The policy allows the employer to plan for adequate staffing for both regularly scheduled shifts and overtime. The policy defines leaving the job without permission as a "Serious Offense" which will result in disciplinary action up to and including termination for a first offense.
4. The Attendance and Work Schedules policy is contained in the employee handbook that the claimant received when hired, and it was reviewed with the claimant when he was issued each of at least 2 attendance-related disciplinary actions.
5. The employer allows 3 unexcused absences in a rolling 12-month period. An unexcused absence is any absence which is not scheduled in advance, regardless of reason, after the employee has exhausted their Massachusetts Earned Sick Time.
6. The claimant's Massachusetts Earned Sick Time was exhausted in approximately March 2016.
7. The 4th unexcused absence in a rolling 12-month period results in a written warning. The 5th results in a final warning, and the 6th results in termination.
8. On an unknown date during the 12 months prior to May 5, 2016, the claimant received a written warning for excessive absences. The dates of and reasons for the absences resulting in disciplinary action are unknown.
9. On May 5, 2016, the claimant was issued a final warning as the result of excessive absences. The dates of and reasons for the absences resulting in disciplinary action are unknown. The warning indicated that if the issue was not corrected, any incident would result in further disciplinary action up to and including termination.
10. On July 29, 2016, the claimant was replenishing stock in the employer's warehouse while routine daily repairs were taking place. As part of the repairs, a piece of maintenance equipment was set up near an area of the warehouse which required restocking.

11. The claimant believed that stocking merchandise near the machinery presented a potential safety hazard. He did not notify his supervisor, the safety officer, or human resources that he believed any safety concern existed in the workplace.
12. If all available work was completed prior to the end of a scheduled shift, it was common for employees to be allowed permission to leave work early. The claimant had been granted verbal authorization to do so on multiple occasions.
13. Approximately 2.5 hours prior to the end of his scheduled shift, the claimant asked his supervisor if he could leave for the day because he was tired.
14. The claimant's work was not limited to the area of the warehouse where maintenance was being performed, however he did not inquire whether work was available to be completed in alternate locations.
15. Approximately 50 pallets of product were available to be stocked in other parts of the warehouse and could have been retrieved from the employer's second building within minutes.
16. The supervisor responded by stating that the claimant was on a final warning, a significant amount of merchandise remained to be stocked before the end of the claimant's shift, and if he left it would be considered walking off of the job without permission.
17. The claimant was not given verbal authorization to leave work and he walked of the job without permission at approximately 10 a.m., 2½ hours before the end of his scheduled shift.
18. The claimant was aware at the time he left work that there was inventory which had not yet been stocked.
19. The following morning, July 30, 2016, the claimant appeared for a pre-scheduled training, and the warehouse manager asked why he was present. He then instructed the claimant to go home and to speak to human resources the following Monday.
20. On August 1, 2016, the claimant asked why he was not allowed to remain for training. The human resources representative informed the claimant that he was being discharged for walking off the job without permission on July 29, 2016.
21. The claimant was discharged solely for leaving work without authorization. His prior disciplinary and attendance histories were not contributing factors to his August 1, 2016 separation.

CREDIBILITY ASSESSMENT: The claimant and employer provided conflicting testimony regarding the circumstances under which the claimant left work on July 29, 2016. The claimant initially testified that, at the time he left work on July 29, 2016, there were approximately 5 remaining pallets of candy, all of which required stocking in the area rendered inaccessible by maintenance. He stated that the employer would have been unable to provide any additional work prior to the end of his scheduled shift because it took 1-2 hours to obtain pallets from the employer's second building. He testified that his supervisor had previously granted him permission to leave work prior to the end of his shift non-verbally, but rather with only "a look" which he was unable to describe. He reported that on July 29, 2016, he had no verbal interaction with his supervisor but believed that the supervisor's facial expression indicated indifference regarding whether the claimant remained to complete his shift. The claimant did not describe what about the supervisor's face led him to that conclusion, but stated that he believed the supervisor nodded.

The claimant later provided conflicting testimony indicating that there was "always plenty of other work", a statement that is consistent with the employer's assertion that additional pallets could have been obtained for the claimant if the employer was aware that the claimant felt unsafe restocking candy. The claimant's supervisor testified that he allowed the claimant to leave work early on prior occasions, but never via a "look" or facial expression. He denied that he granted the claimant permission to leave work prior to the end of his July 29, 2016, shift via facial expression or any other manner. The claimant's allegation that his supervisor allowed him to leave work without any verbal communication, on July 29, 2016, or any other date, is contradicted by the direct, reasonable, and credible testimony of the employer.

The claimant's supervisor testified that he explicitly reminded the claimant on July 29, 2016, that he was on a final warning, stated that a significant amount of work remained to be completed prior to the end of the claimant's shift, and that if he left it would be considered walking off of the job. The claimant denied this conversation, but acknowledged that he was not granted permission to leave. This admission negated the claimant's prior argument that he believed he had been granted authority to leave work prior to the end of his shift on July 29, 2016. Based on the testimony and evidence provided, the claimant's assertion that he left early on July 29, 2016 because he believed his supervisor had authorized him to do so is not credible.

NOTE: The claimant provided extensive testimony regarding his belief that he had been unjustly disciplined as the result of absences which were beyond his control and for which he had provided physicians' notes. He presented multiple records documenting physicians' and hospital visits between July 18, 2013 and March 15, 2016. His attendance and disciplinary history were not

contributing factors in his separation. The claimant was discharged strictly for leaving work without permission on July 29, 2017.

### 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 deems them to be supported by substantial and credible evidence. The credibility assessment is also supported by the record, except for the portion in the third paragraph which begins with the phrase "... but acknowledged that he was not granted permission to leave." The claimant testified that he thought that he was granted permission to leave the premises via his supervisor's "look" or facial expression. He did admit that he was not given verbal permission to leave. Thus, his testimony was that he thought that he was granted permission to leave, just not verbally. The portion of the assessment from "... but acknowledged" to "... the end of his shift on July 29, 2016" is not supported by a reasonable view of the record. However, this one sentence does not undermine the entirety of the credibility assessment. Given the prior practice of the claimant receiving verbal permission to leave, and the supervisor's comment to the claimant that work remained to be done on July 29, it is not credible that the claimant believed that he had permission to leave. As discussed more fully below, we conclude that G.L. c. 151A, § 25(e)(2), rather than G.L. c. 151A, § 25(e)(1), applies to the claimant's separation, but that the claimant is still subject to disqualification from the receipt of unemployment benefits.

We first must address which section of law applies to the claimant's separation. The review examiner applied G.L. c. 151A, § 25(e)(1), the section of law applicable to quit, or resignation, cases. During our initial review of this case, we noted that although the review examiner found that the claimant walked out of work without permission on July 29, 2016, other evidence suggested that the employer, rather than the claimant, was ultimately responsible for the claimant's separation. For example, the claimant was on a final warning for attendance, and the supervisor told the claimant that, if he left work, the employer would consider him to have separated from his job. The claimant further testified that he tried to report to work on July 30, 2016, but the employer told him that it considered him to have separated from his job when he left work on July 29. Given this evidence, the Board was not satisfied that the claimant "abandoned his job" on July 29, as the review examiner concluded in Part III of her decision. Consequently, the Board remanded the case for additional evidence as to whether the claimant was ultimately discharged for failing to perform his assigned tasks by leaving work on July 29.

The review examiner's consolidated findings of fact now give a clearer picture of what transpired on July 29, July 30, and August 1, 2016. On July 29, the claimant was replenishing stock in the employer's warehouse while certain repairs were taking place near his work area. He was concerned about his safety; however, his work was not limited to any area, and he could have worked in a space which was not near the ongoing repairs. Consolidated Findings of Fact ## 10, 11, and 14. Several hours before the end of his shift, the claimant asked to leave early, but his supervisor responded that there was still work to do, and, if the claimant left, that the employer would consider him to have walked off the job without permission. Consolidated Findings of Fact ## 13 and 16. The claimant walked off the job anyway, roughly two and a half

hours prior to the end of his shift. He did not have authorization to do so, and he was aware that there was other work to do. Consolidated Findings of Fact ## 17 and 18. The following day, the claimant appeared for a training session but was instructed to go home and speak to human resources on August 1. On that day, a human resources representative told the claimant that he was discharged for walking off the job without permission on July 29. Consolidated Finding of Fact # 20.

Based on these updated findings, we conclude that G.L. c. 151A, § 25(e)(2) applies in this case. That section of law applies to discharge situations, and the review examiner has clearly found that the claimant was discharged on August 1, 2016.

G.L. c. 151A, § 25(e)(2), provides, in relevant 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Following our review of the record and the review examiner's consolidated findings of fact, we conclude that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

To carry its burden, the employer must first show that the claimant engaged in an act of misconduct which ultimately led to his separation. Here, the employer discharged the claimant for leaving his shift on July 29, 2016, without permission. The review examiner's findings show that this conduct occurred. The claimant left work approximately two and a half hours prior to the end of his shift on July 29, after he was reminded by his supervisor that he was on a final warning and that merchandise remained to be stocked. Consolidated Finding of Fact # 16. The review examiner specifically found that the claimant was not given authorization to leave early, which is something he had been verbally granted to him on prior occasions after asking permission. Consolidated Findings of Fact ## 12 and 17. By leaving without permission on July 29, he engaged in misconduct.

Our inquiry does not end there, however. The claimant must also have engaged in the conduct deliberately and in wilful disregard of the employer's interest. "The critical factual issue in determining whether an employee's discharge resulted from his wilful or intentional misconduct is the employee's state of mind at the time of his misconduct." Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 779 (1982). To determine if the conduct was deliberate and wilful, 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." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

Here, the review examiner's findings support a conclusion that the claimant was aware of the expectations that he stay at the employer's facility and that he continue to work his shift. Indeed, he was specifically told by his supervisor about the work to be done and that leaving the workplace would be considered to be leaving without permission. The employer's expectation that the claimant stay was reasonable. There was work to be done, the claimant's shift was not yet over, and the claimant was not confined to the area of the warehouse which was under repair. It was not unreasonable for the supervisor to deny the claimant's request to go home early, where there was work for the claimant to do, the claimant only indicated that he was "tired" (and not something more serious, like a health issue), and there was over two hours left on the shift. Finally, we discern nothing in the findings which could have mitigated the claimant's deliberate action to leave work early without permission. Being tired, even if true, would not have altered the claimant's state of mind to a degree that leaving would be considered unintentional or accidental.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits is supported by substantial and credible evidence in the record, but the applicable section of law is G.L. c. 151A, § 25(e)(2), rather than G.L. c. 151A, § 25(e)(1), because the claimant left work without permission and was discharged from his position several days later for doing so.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning July 24, 2016, and for subsequent weeks until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 29, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE 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](http://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.

SF/rh