

Claimant, who was discharged for leaving her work as front desk manager for her employer hotel, lacked requisite wilful disregard of employer's interest state of mind for disqualification. She also had mitigating circumstances, where review examiner credited her belief that her replacement's arrival was imminent, she informed the employer's security guard she was leaving, and she had been sick during her shift.

**Board of Review
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Issue ID: 0019 9807 87

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Rorie Brennan, 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 her position with the employer on October 24, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 14, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner reversed the agency's initial determination and awarded benefits in a decision rendered on February 8, 2017. 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 entitled to benefits, 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 to allow the employer an opportunity to provide testimony and evidence. Both parties attended the two-day remand hearing. 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 before the Board is whether the review examiner's conclusion that the claimant's discharge for leaving work before her replacement arrived was neither deliberate misconduct nor a knowing violation of a reasonable and uniformly enforced policy or rule of the employer 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 full time as an Assistant Front Desk Manager for the employer, a hotel, from 06/08/16 through 10/23/16. The claimant's rate of pay was \$1,300.00 bi-weekly.
2. The employer has a written policy that prohibits job abandonment.
3. The text of the policy states that violators will be subject to either suspension or discharge.
4. The employer determines discipline for violations of the policy on a case by case basis depending upon severity.
5. The claimant was aware of the policy having signed off on receipt of it upon hire.
6. The purpose of the policy is to ensure employees are performing their job duties and providing adequate customer service to hotel guests.
7. Beginning around 10/20/16, the claimant was suffering from bronchitis and under the care of a physician. The claimant's physician instructed the claimant not to work until 10/23/16.
8. On 10/23/16, the claimant reported to her 3:00 p.m. – 11:00 p.m. shift.
9. The claimant felt ill all during her shift and telephoned her sister to pick her up after her shift so she wouldn't have to walk home.
10. At 11:00pm, the claimant's shift ended but her replacement for the next shift had not yet arrived. The claimant's replacement was routinely late reporting to work.
11. The claimant remained at work waiting for the replacement.
12. Sometime after 11:00 p.m., the replacement called and told the claimant she was on her way to work. The claimant expected the replacement's arrival at work imminently.
13. Some minutes passed. The claimant, feeling ill, decided to leave.
14. The claimant informed the security guard that she was leaving for the night and her replacement was on her way.
15. The claimant left the hotel and went home.

16. The claimant did not believe that leaving her shift would jeopardize her employment.
17. The claimant's replacement arrived and clocked into work at 11:15 p.m.
18. The replacement reported to the General Manager that, when she arrived for work, the hotel was unsecured and the security guard did not know where the claimant was.
19. The Human Resources Manager commenced an investigation into the matter and determined the claimant had "abandoned her job."
20. On 10/24/16, the claimant reported to work. The General Manager and Human Resources Representative met with the claimant and discharged her for leaving the hotel before the arrival of her replacement the previous night.
21. On 10/25/16, the claimant filed a claim for unemployment benefits with an effective date of 10/23/16.

[CREDIBILITY ASSESSMENT:] The employer did not attend the original hearing. Both parties attended the two hearings remanded for additional evidence. At the remand hearings, the parties disagreed about the date the final incident occurred. However, the employer's business records (Remand Exhibit 12) are found reliable and establish the date was 10/23/16. Although the employer witness submitted hearsay documents into the record that question the claimant's timeline of events on 10/23/16 and dispute whether she informed the security guard that she was leaving before her replacement arrived, the claimant's direct testimony is found more reliable. In addition, the claimant's testimony and medical documentation strongly supports [sic] the conclusion that the claimant was, in fact, sick on the night in question and that her illness undoubtedly affected her state of mind and decision to leave work before the replacement—who was late—arrived that night.

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.

Because the claimant was discharged from her employment, her 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 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 the foregoing provision, it is the employer's burden to establish that the claimant was discharged 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. After the initial hearing, attended only by the claimant, the review examiner awarded benefits. 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's consolidated findings reflect that the claimant was discharged for conduct that took place on October 23, 2016. The claimant had suffered from bronchitis earlier in the week, and her medical provider had instructed her not to return to work until October 23. *See* Hearings Exhibit # 6. The claimant reported to her shift that day, which began at 3:00 p.m. and ended at 11:00 p.m. The claimant still felt ill at work and called her sister to pick her up when her shift ended. At 11:00 p.m., the claimant's replacement had not reported to relieve her, so she remained at work. Sometime after 11:00, the replacement called to tell the claimant she was on her way to work. The claimant, feeling ill and expecting the replacement to arrive imminently, left work before the replacement arrived, not believing that doing so would jeopardize her employment. The replacement clocked into work at 11:15 p.m. *See* Remand Exhibit # 12. The record reflects that the replacement emailed the general manager to report the claimant was not at work when she arrived, the hotel was unsecured, and the security guard did not know where the claimant was (*see* Remand Exhibit # 7),¹ the review examiner accepted the claimant's testimony and found that the claimant told the security guard on duty that she was leaving for the night and that her replacement was on her way. The employer discharged the claimant before her next shift on October 24, 2016, for leaving the workplace before her replacement had arrived the night before.

As to whether the claimant's conduct violated a uniformly enforced employer policy, the consolidated findings reflect that the employer has a written policy prohibiting job abandonment, which states employees who violate the policy will be subject to suspension or discharge. The policy, which ensures employees perform their job duties and are available to provide customer service to hotel guests, is reasonable and the claimant was aware of this policy, having signed for it upon hire. However, as, on its face, it allows for discretion in enforcement, the employer did not establish that it was uniformly enforced.

As to the "deliberate misconduct" prong, the review examiner failed to issue a finding regarding any relevant expectations the employer may have maintained related to the claimant leaving her post before her replacement arrived. For purposes of analysis, we will assume that the employer

¹ We note that although Remand Exhibit # 7 was a two-page document, the back side of the document was not scanned into the DUA's UI Online electronic database. Since the review examiner read the contents of the missing page into the record during the remand hearing, it is not necessary to remand the case further to produce a replacement copy of the document.

had an expectation that employees would not engage in that behavior. Clearly, the claimant failed to comply with that expectation. The question is whether she had the necessary “state of mind,” *i.e.*, whether she understood that expectation at the time she left work on October 23.

It may seem likely that an employee who is left in charge of the front desk of a hotel, where the employer had cash accessible, should not leave the hotel premises without ensuring that her coverage had arrived to relieve her of her duties, and that failure to wait for her relief could jeopardize her employment. However, the review examiner’s consolidated findings state that the claimant did not believe that leaving her shift would jeopardize her employment. This, coupled with her belief that relief would arrive imminently and her testimony that she told the security guard she was leaving, supports a conclusion that the claimant was not acting in wilful disregard of the employer’s interest. Thus, she lacked the requisite state of mind for disqualification, under G.L. c. 151A, § 25(e)(2).

On the disputed issues of fact, we note that the review examiner included a credibility assessment finding the claimant’s direct testimony more “reliable” than the hearsay documents produced by the employer.² Although this analysis is truncated, it is not unreasonable in relation to the record and hence we defer to it, with the following caveat. The credibility assessment asserts that the claimant’s medical documentation corroborating her recent illness shows that the illness “undoubtedly affected her state of mind and decision to leave work before the replacement . . . arrived that night.” We find no medical evidence in the record to support the review examiner’s conclusion that the claimant’s bout with bronchitis affected her state of mind. That said, if the findings had established that the claimant understood she was engaging in misconduct, the overall facts suggest that her lingering illness may have constituted a mitigating circumstance for her failure to comply with the employer’s expectation.

While discharging the claimant may have been the appropriate decision for the employer to make after investigating her conduct on the night at issue, the review examiner’s consolidated findings of fact lead us to conclude it failed to meet its burden to support disqualification from benefits. We, therefore, conclude as a matter of law that the conduct for which the claimant was discharged did not constitute deliberate misconduct in wilful disregard of the employer’s interest, or a knowing violation of a reasonable and uniformly enforced policy or rule of the employer, within the meaning of G.L. c. 151A, § 25(e)(2).

² In addition to the email from the claimant’s replacement, the employer’s investigative documents also included a brief signed statement from the security guard on duty that night, who stated the claimant had not told him she was leaving. See Remand Exhibit # 11.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending October 29, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – May 23, 2017



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, 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 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

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