

Claimant, who was discharged after telling the dispatcher she wasn't "fucking coming in that early" the next morning, failed to establish she was sick when she called out overnight, did not submit a contemporaneous medical note, and her remark to the dispatcher suggested she failed to report to work because she did not want to begin as early as scheduled, not because she was actually too sick to work.

**Board of Review
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Issue ID: 0020 8560 61

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by A. Williams, 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 reverse.

The claimant was discharged from her position with the employer on January 21, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 28, 2017. 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 October 28, 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 take the employer's testimony, as well as to seek more specific information (and contemporaneous documentation from) the claimant regarding her alleged illness that she contended had required her to call out from work. Only the employer attended the 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 employer failed to substantiate misconduct by the claimant which prompted her discharge, and thus failed to establish deliberate misconduct in willful disregard of the employer's interest, 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 assessment are set forth below in their entirety:

1. The claimant worked as a Chair Van Driver for the employer, an ambulance company, from 8/1/16 until she separated from the employer on 1/21/17.
2. The claimant was hired to work full time, earning \$14.50 an hour.
3. The claimant was discharged for misconduct. The employer has no uniformly enforced rule or policy accompanied by specific consequences which addresses this behavior.
4. In the event of unacceptable work conduct as defined within the employee manual, employees may be subjected to discharge at the employer's sole discretion. (Remand Exhibit 5)
5. The claimant received a copy of the employee manual on 7/28/16. (Remand Exhibit 6)
6. The claimant had received a verbal warning two months prior to her separation from the CEO for inappropriate behavior. It had been reported to the employer that the claimant had flipped someone [sic], who had pulled up to a gas pump she intended to use at a local gas station, her middle finger.
7. On 1/19/17, the claimant came back to the office at approximately 6 or 7 PM, the end of her shift, to return her keys and Nextel radio. While speaking to the Dispatcher and after looking at her schedule for 1/20/17 the claimant stated she was not "fucking" coming in that early.
8. The claimant called out of work on 1/20/17 at 1:40 AM to the Dispatcher.
9. On 1/20/17, the General Manager left the claimant a voicemail message asking what had happened and why she did not come into work that day. The claimant never responded to the employer's voicemail message.
10. On Saturday, 1/21/17 the claimant received a call from her Manager informing her she needed to meet with the Owner. The claimant met with the Owner and was informed that she was being discharged and that calling out because she did not want to come into work early was unacceptable.
11. The employer never received any medical documentation for the claimant's absence on 1/20/17. The employer never saw the medical documentation dated 6/16/17 and provided by the claimant at the initial hearing. (Exhibit 1, page 4)

CREDIBILITY ASSESSMENT: The employer's testimony regarding the events leading to the claimant's separation are deemed more credible in the absence of any testimony from the claimant regarding the doctor's note she provided at the original hearing. It cannot be established that the claimant had been treated for an alleged stomach illness on or about January 19-21, 2017 or if this was the actual reason for her calling out on 1/20/17 given the comment the employer testified the claimant had made to the Dispatcher the day before her absence.

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 of fact and credibility assessment 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 credibility assessment and deems them to be supported by substantial and credible evidence.

The review examiner initially 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 deliberate misconduct in wilful disregard of the employer's interest. Solely on the basis of the claimant's testimony at the initial hearing, the review examiner concluded 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 met its burden.

Initially, the review examiner found the employer discharged the claimant after she called out sick from a shift, the employer had not issued any written policies addressing such conduct, and the claimant was not told she had violated any applicable rule or policy at the time of her discharge. The review examiner also found that the claimant established she had been sick with a stomach illness, which prompted her to call out.

After remand, the review examiner found that the employer had a general policy requiring "professional conduct," which contemplated discharge without prior warning for "inappropriate behavior." The policy also specifically prohibited dishonesty, including "misrepresentation of the reasons for a leave of absence [and] fraudulent use of sick days." *See* Remand Exhibit # 5.

The claimant was aware of the policy, having signed an acknowledgement upon receipt (Remand Exhibit # 6), and having been issued a verbal warning for inappropriate behavior after it was reported to the employer that she gave another driver the middle finger at a gas station, where she was trying to refill the company vehicle while in uniform.

The review examiner found that on January 19, 2017, the claimant returned to the employer's office at the end of her shift, turned in her keys and radio, and looked at her schedule for the next day. After seeing her schedule, the claimant told the dispatcher that she was "not 'fucking' coming in that early." The claimant called out from work at 1:40 a.m. on January 20, 2017.

The general manager left the claimant a voicemail message on January 20, 2017, asking what had happened and why she did not come into work that day. The claimant did not return his message. On Saturday, January 21, 2017, the claimant met with the owner and was discharged because she called out from work because she did not want to come to work early.

Although the review examiner initially credited the claimant's testimony that she had been sick, the review examiner's consolidated findings after remand eliminated references to the claimant being ill on January 20, 2017. Instead, the review examiner found the employer never received any medical documentation from the claimant regarding her absence, and provided a detailed credibility assessment finding the employer's testimony regarding the events surrounding the claimant's separation was more credible than the claimant's, where she did not establish that she was actually "treated for an alleged stomach illness on or about January 19–21, 2017, or if this was the actual reason" she called out, in view of the employer's testimony regarding the comments the claimant made to the dispatcher on January 19, 2017. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

Where the review examiner has rejected the claimant's testimony that she was never issued any policies or procedures, and that she was not actually sick on the day she called out, the claimant cannot credibly argue that she did not know it was contrary to the employer's interest to call out sick when she wasn't actually ill. Rather, the review examiner credited the employer's testimony that the claimant used coarse language to express her unhappiness with having to start early the next day, then called out because she did not feel like beginning work as early as scheduled.

Since the review examiner credited the employer's testimony that the claimant stated that she wasn't coming in so "fucking early," the claimant's actions constitute a deliberate response to the employer's reasonable expectation that she report to work as scheduled. The claimant's conscious decision to call out rather than to report to work evinces the requisite state of mind to support disqualification from benefits. We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 21, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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