Claimant hair stylist discharge was for deliberate misconduct, after he had received warnings for poor attendance and inappropriate workplace behavior. Although the employer did not establish that the claimant had engaged in theft – one reason alleged for his discharge – the employer nevertheless established that the claimant engaged in inappropriate conduct around customers and continued tardiness. Claimant did not establish mitigating circumstances.

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Issue ID: 0022 1951 23

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) awarding 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 June 15, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 20, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 29, 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 pursuant to 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 additional evidence regarding the reason(s) for the claimant's discharge, the reason(s) for his tardiness during his last two weeks of employment, and whether or not he discussed his mother's alleged illness with the employer. We also invited the claimant to produce evidence corroborating his mother's alleged health condition generally, and particularly during his last month of employment. However, only the employer 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 employer failed to show that the claimant engaged in misconduct is supported by substantial and credible evidence and is free from error of law, where, after remand, the record indicates the claimant was discharged for attendance issues, inappropriate workplace behavior as well as suspected theft.

Findings of Fact

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

1. The claimant worked for the employer, a salon, from December of 2016 to June 15, 2017 as a Hair Stylist.

2. The employer had policies which prohibited theft, required professionalism, and encouraged good attendance.

3. The claimant knew the policies.

4. The employer did not apply a progressive system of discipline as it was discretionarily enforced.

5. On February 19, 2017, the claimant received a written warning for initially calling the employer to inform of his impending tardiness of two hours and for then calling in his absence ten minutes prior to his impending arrival time. The claimant allegedly has an elderly mother with dementia and was at the hospital with her. The claimant anticipated being two hours late, but it ended up being more. The claimant did not comment on the warning what his reasons for the absence were, though space provides for such comments.

6. On March 28, 2017, the employer received a complaint regarding the claimant being inappropriate with the customer on March 24, 2017. The claimant alleged that the customer was intoxicated and was being rude to a female employee, which the claimant addressed with him.

7. On April 3, 2017, the claimant received a final warning for unacceptable conduct in the workplace occurring on February 24 2017, which was an argument on the floor involving the claimant and another employee, who made the initial complaint about the claimant's conduct. Because the employer was unable to discern who was culpable, both received disciplinary action for the argument in general.

8. On April 7, 2017, the employer issued a second final warning for inappropriate behavior in the workplace on March 24, 2017, which was due to a customer complaint about the claimant having inappropriate conversation of a sexual nature while making lewd gestures. No other witnesses availed themselves.

9. On May 16, 2017, the claimant received a final warning and suspension of one week for an absence without notification occurring on an unknown date and continued customer complaints.

10. On May 27, 2017, the claimant was one hour and eight minutes late.

11. On May 28, 2017, the claimant was fifty-eight minutes late.

12. On May 31, 2017, the claimant was fourteen minutes late.

13. On June 1, 2017, the claimant was eighteen minutes late.

14. On June 2, 2017, the claimant was six minutes late.

15. On June 3, 2017, the claimant was four minutes late.

16. On June 4, 2017, the claimant was three hours and twenty-one minutes late.

17. On June 5, 2017, the claimant was thirty-eight minutes late.

18. On June 9, 2017, the claimant was four hours and twenty-five minutes late.

19. In regards to his attendance issues, the claimant never mentioned issues with his mother. If the claimant discussed any matter regarding the care for his mother, the employer would have attempted to accommodate him with a more favorable schedule.

20. On the various dates of tardiness and absence, the claimant generally gave the excuses of: car problems, sick, forgot schedule, etc.

21. Between May 16, 2017 and June 13, 2017, the employer received two complaints from customers, one alleging that the claimant engaged in sexually suggestive conversation and the other alleging that the claimant discussed prostitution while the customer's child was waiting in an adjacent chair. The employer confronted the claimant about the allegations, which he denied.

22. From June 8, 2017 to June 13, 2017, the employer was short a total of $122.73 before overages for an overall total of $73.65.

23. The employer attributed the shortages to the claimant due to the claimant being the closer and the one responsible for counting the cash in the common register, documenting how much cash there was, and dropping the cash in the bag at the end of the night. The employer observed that the documented amount was not the amount in the bag.

24. On June 15, 2017, the employer discharged the claimant from employment for suspected theft, continuing attendance issues and inappropriate behavior in the work place.

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 review examiner 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. The review examiner initially concluded the employer had not met its burden. After remand, we conclude that the employer has met its burden.

The review examiner initially found that the employer discharged the claimant for "suspected theft." His analysis noted that the claimant denied stealing any cash and attributed any discrepancies to "clerical error." The employer presented no further evidence to the contrary and, consequently, resulted in the review examiner initially concluding that the employer did not meet its burden under G.L. c. 151A, § 25(e)(2).

After remand, the consolidated findings now show that the employer discharged the claimant for "continuing attendance issues and inappropriate behavior in the work place," as well as "suspected theft." *See* Consolidated Finding # 24.

The employer had policies prohibiting theft, requiring professional conduct in the workplace, and encouraging regular attendance and punctuality. *See* Hearings Exhibit # 7. The review examiner found that the claimant was aware of these policies. Arising from the policies were expectations that the claimant would report to work on time, conduct himself appropriately in the workplace, and not steal from the employer. The claimant was aware of the employer's expectations because he was familiar with the policies from which they arose, and because he had received documented disciplinary warnings regarding attendance and inappropriate conduct violations.

The consolidated findings show that, on February 19, 2017, the claimant was issued a written warning for attendance. He called to say he would be in at 5:00 p.m. (two hours late for his 3:00 shift), then called again at 4:50 p.m. to say he would not be coming to work. This warning indicated a suspension would result if there were two more attendance infractions. The claimant

did not avail himself of the opportunity to provide a reason for his absence in the space provided for such comments on the warning. *See* Hearings Exhibit # 8.

With regard to his behavior in the workplace, the claimant and another employee had an argument on February 24, 2017, involving the use of profanities on the floor, after which the other employee complained. The employer could not determine whether the claimant or the other employee was more culpable, so the employer issued a warning to both employees on April 3, 2017. The warning to the claimant cautioned if the behavior persisted, he would be terminated. The claimant did not provide a written response in the space provided for such comments on the warning. *See* Hearings Exhibit # 10.

On March 28, 2017, the employer received a written complaint which had been forwarded from its corporate headquarters. *See* Hearings Exhibit # 9. The complaint alleged that, on March 24, a customer had come to the salon and received a haircut from the claimant. During the haircut, the customer alleged the claimant said "inappropriate" things that "made [him] feel uncomfortable," including making "an inappropriate hand gesture," which he later repeated, when his back was to his coworker so that she could not see him.[1] The employer issued a final warning to the claimant on April 7, 2017, for the March 24 incident, noting he had been previously spoken to about inappropriate conversations, and that he will be terminated if a similar incident should occur. *See* Hearings Exhibit # 11.[2]

On May 16, 2017, the employer issued a warning and one-week suspension to the claimant for being a "no call, no show" on May 12 and 13 (with other, somewhat less egregious attendance infractions documented for May 1 through 14), as well as for repetition of customer complaints. *See* Hearings Exhibits # 12–13. Again, the claimant provided no written explanation for his conduct in the section of the warning available for employee responses.

After his suspension, the claimant's attendance problems persisted, reporting to work late for all 12 of his scheduled shifts between May 27 and June 12, including being almost 3½ hours late on June 4, almost 4½ hours late on June 9, and being 3 hours late on June 10, 2017. *See* Hearings Exhibits # 14–16. The review examiner found that the claimant never mentioned issues with his allegedly ill mother as a reason for his tardiness. Rather, the claimant's litany of excuses for being late included car problems, feeling ill, and forgetting his schedule. The review examiner credited the employer's testimony that if the claimant had discussed any issues regarding care for his mother, the employer would have tried to accommodate him with a more favorable schedule.

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[1]In his consolidated findings, the review examiner summarized the employer's testimony at the remand hearing as "a customer complaint about the claimant having inappropriate conversation of a sexual nature while making lewd gestures." *See* Consolidated Finding # 8. The employer testified that, in addition to the written complaint he received from the customer through corporate headquarters, he spoke with the customer directly. The customer complained that the claimant made unwanted references to masturbation, including simulated masturbatory gestures with his hand, in a manner that his coworker could not see. The employer's more detailed testimony about the customer's complaint, while not explicitly incorporated into the review examiner's consolidated findings, is part of the unchallenged evidence introduced at the remand hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[2]In the "Employee's Response" section of this warning, the claimant blamed the customer for being obscene, using "fowl [sic] language," and being intoxicated. There was no other witness to the alleged interaction.

Moreover, between May 16 and June 13, 2017, the review examiner credited the employer's testimony that he received two more customer complaints about the claimant's workplace conduct: one alleging that the claimant engaged in sexually suggestive conversation, and another alleging the claimant discussed prostitution while a child was waiting in an adjacent chair. Also from June 8 through 13, 2017, the employer determined it was missing $73.65 in cash, which it attributed to the claimant closing on the nights at issue. *See* Hearings Exhibit # 17, and Remand Exhibit # 6. On June 15, 2017, the employer discharged the claimant. *See* Hearings Exhibit # 18. The review examiner found that the claimant was discharged for attendance issues, inappropriate workplace behavior, and suspected theft.

After remand, the review examiner did not disturb his finding regarding the claimant's "suspected" theft of the employer's cash during his last week of employment. Consequently, we cannot conclude that the employer established that the claimant was discharged for stealing cash.

However, the review examiner found that the employer also discharged the claimant for attendance infractions and inappropriate workplace behavior. With regard to these issues, the employer has met its burden under G.L. c. 151A, § 25(e)(2). The claimant was aware of the employer's expectation not to engage in inappropriate workplace behavior, having been warned on April 7 and suspended on May 16, 2017, for such conduct with customers. The review examiner credited the employer's testimony that two more customers complained about the claimant after he returned from his suspension.

Similarly, the claimant had received a warning and suspension for poor attendance. Nevertheless, he was late for *every scheduled shift* between his return from suspension and his eventual discharge. While he was only late a handful of minutes on several of the days, he was several hours late on three of those days. We note that, at the initial hearing, the claimant contended his attendance problems derived from caring for his allegedly ill mother. Consequently, we invited the claimant to corroborate her condition with documentary evidence on remand. *See* Remand Exhibit # 3, Questions 1(c) and 3(c). The claimant failed to appear at the remand hearing to corroborate her medical conditions, and the review examiner modified his findings accordingly. *See* Consolidated Findings # 5 and # 19. During the proceedings in this matter, the claimant also offered general, vague and unsupported reasons for his tardiness — car problems, episodic and unspecified illness, and forgetting his schedule. The review examiner, however, declined to include any of these asserted reasons in his findings. We reasonably infer the review examiner did not make these findings because he did not believe there was substantial and credible evidence to support any such findings. Based on the record before us, we see no reason to disturb the review examiner's implied credibility assessment. Thus, we conclude that the claimant failed to establish mitigating circumstances for his failure to meet the employer's reasonable expectation regarding attendance.

The review examiner's consolidated findings establish that the employer met its burden in showing that the claimant was discharged for inappropriate workplace conduct and poor attendance, without mitigating circumstances, after final warnings and a suspension. We, therefore, conclude as a matter of law that the claimant was discharged for 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 denied benefits for the week ending June 17, 2017, 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 - March 28, 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