The claimant was a no call no show and refused to work her regular schedule going forward. No mitigation was presented by the claimant.

Board of Review
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Issue ID: 0022 4220 25

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Matthew Shortelle, 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 July 19, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 4, 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 October 5, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest and, thus, was not disqualified 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 obtain additional testimony and other evidence pertaining to the final incidents leading to the claimant's termination. 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 on appeal is whether the review examiner's conclusion that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where, after remand, the examiner found that the claimant did not report to work or notify the employer of her absence on July 13, 2017, and she refused to work her regular schedule going forward.

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 as a full-time Restaurant Manager for the employer, a gas station and restaurant, from June 2, 2016 until July 19, 2017.

2. The employer's Coordinator supervised the claimant's employment.

3. The employer's policy requires employees to notify the employer of any absence. Violators of the policy are punished at the employer's discretion based on the circumstances of the violation.

4. The employer expects employees to notify their supervisor if they are going to be absent. The expectation ensures the employer has enough staff coverage.

5. The employer reviewed the policy and expectation with the claimant when she was hired.

6. At the time the employer hired the claimant, the Owner notified the claimant she was expected to be available to work as needed, based on the employer's needs, seven days per week, opening and closing, and to cover shifts when employees could not work as scheduled.

7. The employer's locations open at 8 A.M. and close at approximately 9 P.M. Employees opening and closing are required to work before opening and after closing.

8. As Restaurant Manager, the claimant enforced the policy and expectation.

9. On November 3, 2016, the corporate franchisor (Corporate) notified the employer the claimant's location would be placed on probation as a result of inventory and cash shortages.

10. On November 10, 11, 12, and 17, 2016, Corporate notified the employer of cash variances in the claimant's locations.

11. On January 27, 29, 30, and 31, 2017 and on February 1, 3, and 16, 2017, the claimant's time card showed she was at work when security footage confirmed she was not.

12. In May 2017, the employer assigned the Coordinator to work in the claimant's locations to assist the claimant.

13. On February 16, 2017, the employer offered the claimant a raise if she corrected the issues regarding cash and inventory variance and time cards in her locations.

14. On June 20, 2017, the employer issued the claimant a warning for her time card reflecting she was at work when she was not.

15. Before July 11, 2017, the claimant promised employees raises.

16. Before July 11, 2017, the claimant's locations experienced cash and inventory shortages.

17. Before July 11, 2017, Corporate audited the employer.

18. Before July 11, 2017, the claimant's time card was punched to reflect her being at work when she was not.

19. Before July 11, 2017, extra office staff were assigned to the claimant's location and issues arose weekly.

20. Before July 11, 2017, the claimant did not notify the Coordinator she would only be available 8 A.M. to 4 P.M., Monday through Friday.

21. On July 11, 2017, the employer's Operations manager issued the claimant a warning for the claimant as a result of her creating employee expectations regarding raises and misrepresenting her level of authority.

22. On July 12, 2017, the claimant texted the Coordinator she would not work as scheduled because she had gone with her husband (the Husband) to the hospital due to his chest pains.

23. On July 13, 2017, at 9:15 A.M., the Coordinator texted the claimant about her failing to arrive for work as scheduled and the claimant texted the Coordinator she would not work as scheduled because she was still at the hospital with the Husband.

24. On July 13, 2017, after 12:55 P.M., the claimant texted the Coordinator she was available Monday through Friday, from 8 A.M. to 4 P.M. or 7:30 A.M. to 3:30 P.M. if the claimant's mother did not work in those times due to children and grandchildren.

25. The Coordinator did not reply to the claimant's text regarding availability.

26. On July 13, 2017, the Coordinator emailed the Bookkeeper the claimant had failed to work as scheduled or call out.

27. On July 14, 2017, the claimant texted the Coordinator she would not work as scheduled because she was ill and would provide a medical note.

28. On July 14, 2017, the claimant emailed the Coordinator and the Bookkeeper a medical note and texted the Coordinator she had done so. The Coordinator replied "ok."

29. The claimant did not provide any medical notes regarding the Husband or any hospitalization.

30. Between July 12, 2017 and July 14, 2017, the claimant did not speak with the Bookkeeper, the Coordinator or the Owner.

31. After July 11, 2017, it is unknown whether the claimant's time cards were punched to reflect her being at work when she was not.

32. After July 11, 2017, it is unknown whether the claimant promised employees raises.

33. After July 11, 2017, it is unknown whether the claimant's locations experienced cash or inventory shortages.

34. On July 19, 2017, the Owner discharged the claimant for failing to work as scheduled or notify the employer of her absence.

35. The Owner did not discharge the claimant for any inventory or cash discrepancies occurring after July 11, 2017.

36. The Owner did not discharge the claimant for any time card issues occurring after July 11, 2017.

37. The Owner did not discharge the claimant for promising any employee a raise after July 11, 2017.

38. If the claimant did not have previous issues managing the employer's locations as documented in the July 11, 2017 warning, the Owner would not have discharged the claimant solely because of her availability being changed to 8 A.M. to 4 P.M., Monday through Friday.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and deem thems to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support a denial of benefits to the claimant.

Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which 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 . . . .

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Director of Div. of Employment Security, 377 Mass. 94 at 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause [her] discharge." Id. In order to evaluate the claimant's state of mind, we must "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).

The findings and record before us indicate that in the months leading up to the claimant's separation, the employer had concerns about the claimant's management of cash and inventory and time reporting. As a result, on June 20, 2017, the claimant received a warning for reporting time that she had not in fact worked. On July 11, 2017, the claimant received another warning for misrepresenting her authority to fellow employees. In this warning, the employer informed the claimant that any further inappropriate actions or behavior could result in the claimant's termination. Based on this warning, the claimant was aware her job was in jeopardy.

The review examiner found that, on July 13, 2017 (which was two days after receiving the July 11th warning), the claimant did not report to work or notify the employer of her absence. The review examiner also found that the claimant was aware of the employer's expectations that she notify the employer if she could not report to work as scheduled.

We note that, in his original decision, the review examiner found that the claimant notified the employer of her absence on the morning of July 13th, and that she provided the employer with a medical note excusing her absence that same day. However, after reviewing the additional evidence presented by the employer at the remand hearing, the examiner found that it was the employer who reached out to the claimant on the morning of July 13th after the claimant did not report to work or contact the employer. Furthermore, although the claimant replied to the employer via text that she was not at work because her husband was in the hospital, she never provided the employer with documentation to substantiate that claim, and her testimony at the original hearing that she was sick on July 13th contradicts the text about her husband's illness. In light of the foregoing, we conclude that the claimant did not establish mitigation to excuse her failure to comply with the employer's expectation that she report to work as scheduled or call out if she was going to be absent. *See* Garfield, 377 Mass. at 97.[1]

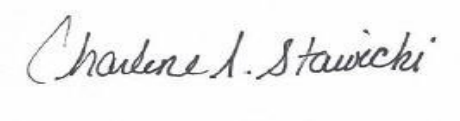
[1] We further note that, after remand, the review examiner found that the claimant informed the employer on July 13th that she was modifying her schedule to work no later than 4:00 p.m. and no earlier than 7:30 a.m., and only Monday through Friday. The claimant was hired as a manager with the expectation that she be available seven days per week as needed, so that she could, for example, open and close the employer's business and cover shifts when employees called out. The claimant had complied with this schedule in the past. On the record before us, however, we cannot determine whether the claimant's decision to change her availability constituted a secondary basis for the employer's decision to discharge the claimant.

We, therefore, conclude as a matter of law that the claimant's discharge is attributable to deliberate misconduct in wilful disregard of the employer's interest as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending July 22, 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.

SVL/rh