

Employer failed to establish by substantial and credible evidence that the claimant pre-school teacher was insubordinate to the administrator in charge. She is not disqualified by G.L. c. 151A, § 25(e)(2).

**Board of Review
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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 reverse.

The claimant was discharged from her position with the employer on July 7, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 15, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on October 13, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to provide the claimant with an opportunity to present evidence. 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 was insubordinate when she refused to assist a teacher with transitioning a child to naptime is supported by substantial and credible evidence and is free from error of law, where, following remand, the record indicates that on the day in question the claimant complied with the employer's directives.

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 for the employer, a preschool, from 3/30/15 to 7/7/17. The claimant started as a Teacher in the Pre-K 1 classroom.
2. The Program Director supervises Teachers and the Education Coordinator. The current Program Director assumed that role at the end of April/beginning of May 2016.
3. The previous Program Director asked the claimant if she would like to be a Lead Teacher, approximately two months after the claimant started working for the employer. The claimant declined because there was a more senior Teacher in the classroom and the claimant thought this other Teacher should be offered the opportunity first.
4. The previous Program Director renewed the above offer a few months later, and the claimant accepted. The previous Program Director also encouraged the claimant to become Director-Certified. The claimant did so.
5. The employer's current Education Coordinator is also Director-Certified. The claimant and the Education Coordinator took the class to become Director-Certified, together, when the claimant and the Education Coordinators were both Teachers.
6. In late June 2017, the current Program Director offered the claimant a Family Involvement position in which the claimant would work as a Teacher in different classrooms, rather than remaining in one classroom.
7. The employer has a written policy which states that the employer has two levels of corrective action, including: probation, and automatic termination from employment. Grounds for automatic termination from employment include insubordination.
8. The above policy is in place to ensure that employees follow reasonable supervisors' directives. The claimant was aware of this policy. All other employees who violated employer policy in the past by acting in an insubordinate manner have been discharged from employment.
9. The Program Director was on vacation beginning 7/17/17. She returned to work on 7/24/17.
10. The Program Director asked the claimant to open the office for her while she was on vacation. The claimant arrived at work at 7am on 7/17/17, as the Program Director worked 7am to 3pm. The claimant usually worked 8am to 4pm.
11. The Program Director left instructions for the claimant to have a parent sign an intake form. The Program Director also left instructions for the employer's Social Worker and for the Education Coordinator to complete various tasks.

12. On the morning of 7/17/17, the claimant told the Education Coordinator that the Program Director left some things for her, and the claimant put them on her desk. The Education Coordinator told the claimant not to touch anything that has the Education Coordinator's name on it.
13. Later that morning, the Social Worker asked the claimant to help downstairs in a classroom with a child who has speech delays and behavioral issues. The claimant told the Social Worker she could not restrain the child, and she may need to call for assistance. The claimant went to the classroom, took a walk with the child, and the child behaved more calmly, and returned to the classroom.
14. The Education Coordinator told the claimant she would like her to work in a specific classroom for the rest of the week, as a third Teacher is needed in that room. The claimant said, "Okay." The Education Coordinator later gave the claimant a schedule to cover while Teachers went on their lunch breaks.
15. The claimant returned to the office and used a computer to print documents. The Education Coordinator was also in the office. She asked the claimant to stop printing the documents while the Education Coordinator made copies of some documents. The claimant did so.
16. The claimant later covered for a Teacher in a classroom while that Teacher took a lunch break. There was one other Teacher in the room. It was naptime for the children in this class when the claimant covered for the Teacher.
17. The Teacher spoke with the claimant about one of the children in the classroom. She asked the claimant if this child sleeps during naptime. The claimant said, "In my experience, no, but he is usually allowed to sit quietly."
18. The above Teacher then spoke with the Education Coordinator. The Education Coordinator then entered the classroom and asked the claimant to rub the child's back. The claimant said, "Okay, but he doesn't sleep."
19. The Education Coordinator later told the claimant she asked another Teacher, and that Teacher said the child does sleep at naptime.
20. The claimant later told the Teacher who initially asked about whether the above child sleeps that she was going to speak with the Program Director. The Teacher then told the Education Coordinator that the claimant said this.
21. The Education Coordinator then met with the claimant and asked if there was anything the claimant wanted to talk to about.

22. The claimant told the Education Coordinator she was being rude, disrespectful, and unprofessional, and the claimant did not appreciate the way the Education Coordinator spoke to her.
23. The claimant told the Education Coordinator that she was going to contact the Program Director. The Education Coordinator said she was going to speak with the Program Director as well.
24. The Education Coordinator told the claimant she was sorry she was rude to the claimant and that she had a recent death in her family. She told the claimant not to say that she was rude to her, but to say that the claimant felt the Education Coordinator was rude to her.
25. The claimant said she was sorry about the death in the Education Coordinator's family, but that doesn't give her the right to treat the claimant negatively.
26. The Education Coordinator told the claimant she is expected to cover where assistance is needed and take on the responsibilities of the classroom at that time. The claimant said that is fine, but she cannot restrain any children.
27. The Education Coordinator asked the claimant if she knew that the Education Coordinator was covering Director when the Program Director was not there. The claimant said she didn't know that, and it would be good if the Program Director put information in writing about who would be covering Director and what those duties entail.
28. At 1:40pm on 7/17/17, the claimant sent a text message to the Program Director and said that the Education Coordinator was disrespectful toward her. The Program Director said that the claimant needs to speak with the Education Coordinator about this, as the Education Coordinator is the Director in charge.
29. The claimant was scheduled to work from 7/18/17 to 7/21/17. She was absent from work on those dates. She provided the employer with a note from a healthcare provider dated 7/19/17, stating that the claimant may return to work with no restrictions on 7/25/17.
30. The claimant subsequently provided the employer with a note from a healthcare provider dated 7/24/17, stating that the claimant should take her vacation time starting 7/24/17, for two weeks.
31. On 7/26/17, the Program Director and Education Coordinator called the claimant and said that she was terminated from employment for insubordination. The claimant asked what she did that was insubordinate.
32. The Program Director told the claimant she could not give the claimant probation. The claimant asked if she could get a copy of the letter of

termination. The Program Director told the claimant she could not give it to her, and she has to ask the main office.

Credibility Assessment:

Both parties provided conflicting evidence regarding the events leading to the claimant's separation from employment. The evidence presented by the claimant was more credible than the evidence presented by the employer. The claimant provided detailed direct testimony regarding the events leading to her separation from employment. The documents provided by the employer's CEO and by the employer's Social Worker are hearsay documents. Neither the CEO nor the Social Worker testified at the hearing. The claimant did not know that the Education Coordinator was her supervisor. The employer did not provide detailed information about how the claimant would know that the Education Coordinator was her supervisor, such as how this was communicated to her, when, and by whom. The Education Coordinator testified at the hearing and stated that there were numerous past occasions when the claimant had a difficult time taking direction from her. The employer did not show that the claimant was disciplined in the past for this. It does not make sense that she was not disciplined for past problems taking direction from the Education Coordinator, if the Education Coordinator was her supervisor. The Program Director stated that she asked the claimant to open for her when she was on vacation on 7/17/17, and wait for the next Administrator, which was the Education Coordinator. The claimant agreed that the Program Director asked the claimant to open for her. The claimant first found out that the Program Director intended the Education Coordinator to be the acting Director that day when the claimant sent a text message to the Program Director to complain about the Education Coordinator's behavior at 1:40pm.

The Social Worker's written statement says that the Program Director asked her to be the Administrator in the office from 8am to 9am. The Program Director did not state at the hearing that she asked the Social Worker to be an Administrator that day; she stated that she told the claimant to open for her and wait for the next Administrator, which was the Education Coordinator. No additional evidence was provided to clarify what the Program Director told each of the above individuals about what their roles would be while she was on vacation.

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 credibility assessment and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe these findings of fact support the conclusion that the claimant is eligible to receive benefits.

The claimant was discharged from her employment, and, thus, her eligibility 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] . . . (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 burden of proof is on the employer. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). As an initial matter, the employer must demonstrate by substantial and credible evidence that the claimant actually violated a reasonable and uniformly enforced policy or otherwise engaged in deliberate and wilful misconduct. At the initial hearing, attended only by the employer, the review examiner found that the claimant was insubordinate, when, after being asked by the employer to assist another teacher with a child, the claimant refused to do so. After reviewing the initial hearing record, the Board remanded this matter to obtain additional evidence from the parties. Following remand, the review examiner returned the above-adopted consolidated findings.

In rendering these findings, the review examiner provided a detailed credibility determination, concluding that the claimant's direct testimony regarding the events leading to her separation was more credible than that of the employer. It is the review examiner's role to weigh conflicting evidence and assess credibility. 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). Upon review, we see no reason to disturb the review examiner's credibility assessment.

After remand, the consolidated findings establish that, on July 17, 2017, the claimant complied with the employer's various directives. The findings detail a number of specific incidents showing the claimant's acquiescence to and cooperation with the employer. The claimant followed the instructions left by the Program Director, who had asked the claimant to open the office for her while she was on vacation, changing her schedule to accommodate the request. The claimant also followed the directive of the employer's Social Worker to help in a classroom with a child with speech delays and behavioral issues. The claimant went to the classroom and took the child for a walk, calming the child, who was able to return to the classroom. When asked by the Educational Coordinator to work in a specific classroom for the rest of the week, the claimant complied, and when asked to rub a child's back, the claimant did so as well. The findings indicate that the claimant provided the employer with some input as to what she thought, but she was not insolent or disrespectful, and never refused to comply with any of the employer's directives.

The findings indicate that the claimant asked the employer what she had done that was insubordinate, and requested a copy of the letter of termination. The employer did not provide the claimant with the requested letter, telling her that she had to request a copy of the letter from the

main office. The record in this case does not contain a copy of a termination letter from the employer.

On the record before us, the employer did not sustain its burden of proof to show any insubordination on the claimant's part. We, therefore, conclude as a matter of law that the claimant neither violated a reasonable and uniformly enforced policy of the employer nor engaged in deliberate and wilful misconduct within the meaning of G.L. c. 151A, § 25(e)(2). The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 23, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 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.

SPE/rh