

Videotape evidence shows the claimant remaining away from her work station for 30 minutes beyond her permissible break. Although the claimant had an explanation for 10 of those minutes, she did not appear at the remand hearing to explain the remaining 20. Therefore, she failed to show mitigating circumstances and is disqualified due to deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0023 9743 28

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) 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 November 30, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 9, 2018. 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 February 9, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she 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 afford the employer an opportunity to present evidence. Only the employer 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 original decision, which concluded that the claimant's absence from her work station for an extra ten minutes beyond her break was not in wilful disregard of the employer's interest, but due to the mitigating circumstance of attending to an injury, is supported by substantial and credible evidence and is free from error of law in light of the new consolidated findings after remand.

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 Front Desk Receptionist for the employer, a hotel, from 4/25/17 until she became separated on 11/30/17. The claimant was suspended from 11/18/17 until her termination on 11/30/17.
2. The claimant was hired to work full time 30 to 40 hours a week, earning \$19.00 an hour.
3. The claimant was discharged for serious misconduct as a result of not punching out or notifying her Supervisor of an extended break period. The employer has no uniformly enforced policy or rule, accompanied by the consequences for violation, which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the Manager in conjunction with peer review of the Manager's decision.
4. The employer expected the claimant not to extend her thirty minute lunch break without punching out or requesting additional time from her Supervisor. The claimant was expected to be at her work station if she was not clocked out on her thirty minute lunch break.
5. On 11/18/17, the claimant left the front desk at 5:03 PM. She did not punch out for her lunch break until 5:39 PM. The claimant did not return to her work station until 6:08 PM.
6. The Supervisor on duty reported the claimant's prolonged absence to the Manager. The Manager brought it to the attention of the Assistant General Manager. The Assistant General Manager told the Manager to speak to the claimant about the incident and to start an investigation by reviewing the cameras.
7. The Manager met with the claimant to ask her why she took an extended break without punching out or notifying her Supervisor. The claimant had no explanation for her actions.
8. The investigation into the video footage found that the claimant had extended her break by approximately 30 minutes without punching out or notifying her Supervisor of her need to extend her break.
9. The Manager presented the claimant with documentation and instructed the claimant that she was being suspended as of 11/18/17 pending termination.
10. On Monday, 11/27/17, the claimant met with Human Resource Manager who asked the claimant about the incident on 11/18/17. The Human Resource [sic] informed her that she was being terminated for serious misconduct.

11. The claimant filed an appeal of her termination with the employer through peer review. (Exhibit 3, page 17) (Remand Exhibit 5) It was ultimately decided that her termination would be upheld. (Exhibit 7)
12. There was no further communication between the parties.

CREDIBILITY ASSESSMENT:

Based on the information and video evidence provided from the employer at the remand hearing, the employer's testimony is deemed more credible. The claimant contended at the original hearing that she extended her break by only 5 to 10 minutes to put cream on an injury to her leg, however her contention is not credible and greater weight is given to the employer's testimony since the video footage marked as Remand Exhibit 6 shows that the claimant actually extended her break by an additional 30 minutes in violation of the employer's expectations.

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 except to note as follows. The statement in Consolidated Finding # 5 that the claimant did not return to her work station until 6:08 p.m. is based upon testimony from the Assistant General Manager. The video evidence presented as Remand Exhibit # 6 shows that the claimant actually returned to her work station at 6:03 p.m.¹ However, this five-minute difference is not material to our decision. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, in light of the consolidated findings, we reject the review examiner's original legal conclusion that the claimant is eligible for benefits.

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 . . . 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

¹ Although not explicitly incorporated into the review examiner's findings, the security camera footage showing the claimant's work station on November 18, 2017, Exhibit # 6, is part of the unchallenged evidence introduced at the 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).

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee’s right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm’r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The review examiner rendered her original decision to award benefits following a hearing in which she heard testimony only from the claimant. That decision reflected the claimant’s version of events, which described how the claimant took 10 minutes beyond her normal 30-minute break on November 18, 2017, because she needed to apply lotion to an infection.² After listening to the employer’s testimony and viewing videotape evidence presented during the remand hearing, the consolidated findings now reflect the employer’s version of events. 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). In her credibility assessment, the review examiner explains that she attributed more weight to the employer’s testimony primarily because key testimony was corroborated by a videotape. Indeed, Remand Exhibit # 6 shows that the claimant was absent from her work station for an hour on November 18th, not 40 minutes. We believe the review examiner’s assessment is reasonable in relation to the evidence presented.

In order to determine whether an employee’s actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee’s state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant’s state of mind, we must “[T]ake 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) (citation omitted).

Consolidated Finding # 4 provides that the claimant was expected to be at her work station if she was not clocked out on her 30-minute break. There is no dispute that she took longer than a 30-minute break on November 18, 2018. We can infer from the claimant’s testimony at the first hearing, where she explained why she had to take a longer break, that the claimant was aware that she was only entitled to 30 minutes. The question is whether there were circumstances that mitigated the misconduct, such as the need to attend to an injury, as the review had originally determined. After remand, the consolidated findings do not mention any injury that required attention. In fact, Consolidated Finding # 7 now states that, at the time, the claimant had no explanation for taking the extended break. Absent mitigating circumstances, the only reasonable inference is that the claimant deliberately extended her break without clocking out in wilful disregard of the employer’s interest.

We, therefore, conclude as a matter of law that the employer has satisfied its burden to show that it discharged the claimant for deliberate misconduct in wilful disregard of the employer’s interest pursuant to G.L. c. 151A, § 25(e)(2).

² See the review examiner’s original decision, entered as into evidence Remand Exhibit # 1.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning November 26, 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 - June 28, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

AB/rh