

The claimant could not work or find coverage for her shift due to factors over which she had no control. Under the circumstances, enforcement of the employer's strict policy requiring finding a replacement or being fired was unreasonable. She is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0024 3831 85

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 December 18, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 11, 2020. 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 April 22, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant 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 allow the claimant an opportunity to present evidence pertaining to her separation from employment. 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 decision, which concluded that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant attempted to comply with the employer's shift coverage policy.

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 part-time cashier and crew member for the employer, a coffee shop, between 06/20/2017 and 12/18/2017, when she separated.
2. The claimant's direct supervisor was the manager. The claimant's upper level manager was the CEO.
3. The employer maintains a policy of "Do's and Don'ts" that states, in part, "Don't - miss your shift without finding coverage. Failure to do so will result in termination."
4. The purpose of this policy is to reduce call outs and ensure sufficient staffing.
5. The claimant signed the policy on 06/03/2017.
6. Other employees who have missed a shift without finding coverage have been terminated from employment.
7. The employer expected employees to find coverage for any scheduled shift that they could not work.
8. The purpose of this expectation is to reduce call outs and ensure sufficient staffing.
9. The employer communicated this expectation to the claimant through the policy.
10. At other times during the claimant's employment, she could not work as scheduled and did find coverage for her shifts.
11. On 12/18/2017, the claimant was scheduled to work between 7:00 a.m. and 12:00 p.m.
12. On 12/17/2017, at approximately 6:00 p.m., the axle broke in the claimant's car. The claimant called the manager. The claimant told the manager that her car broke and that she could not get to work or get her children to school. The manager told the claimant to find coverage and that if she did not find coverage, the claimant would be considered a no call no show. The claimant did not have any questions.
13. The claimant planned to take the bus from her home in [Town A] to the work location in [Town B] ("location A") if she could not find coverage for her shift on 12/18/2017.
14. During the evening on 12/17/2017, the claimant called another employee (employee A) about covering her 12/18/2017 shift. Employee A told the claimant, "Oh, I'm already working" and did not agree to cover the claimant's shift.

15. The employer maintains a list of contact information for employees who work at other locations so that employees may call others to cover shifts they cannot work themselves. Throughout the evening on 12/17/2017, the claimant called “random” names and numbers from this list and did not secure coverage for her 12/18/2017 shift.
16. The claimant woke up at 5:00 a.m. or 6:00 a.m. on 12/18/2017, and learned her son had a fever and was ill.
17. The claimant’s son was three (3) years old. The son could not attend daycare with a fever and could not remain home alone. The claimant called her best friend to watch the son. The friend was unavailable. The claimant did not have family who could watch the son.
18. The claimant called the manager on 12/18/2017. The claimant told the manager that she did not have a ride and that the son had a fever. The manager told the claimant that employee A may be able to pick the claimant up for work if the claimant could find someone to watch the son. The claimant told the manager that she tried and that there was no way she could work that day.
19. The claimant did not work as scheduled on 12/18/2017 and did not find coverage for her shift.
20. The claimant called location A throughout the day on 12/18/2017 in case someone picked up her shift. The claimant did not receive an answer.
21. The manager worked alone between 7:00 a.m. and 12:00 p.m. on 12/18/2017.
22. Employee A worked beginning at 12:00 p.m. on 12/18/2017.
23. The manager questioned employee A on 12/18/2017 about whether the claimant called her to cover the claimant’s 12/18/2017 shift. Employee A told the manager that the claimant did not call, and employee A alleged that she could have come in earlier for her own shift.
24. The manager questioned employee B who worked at location A on 12/19/2017 about whether the claimant called her to cover the claimant’s 12/18/2017 shift. Employee B told the manager that the claimant did not call her.
25. The manager did not question any other employees from any other locations on the list about whether the claimant contacted them to cover the claimant’s 12/18/2017 shift.
26. The manager informed the CEO that the claimant did not work and did not find coverage for her 12/18/2017 shift.

27. The employer discharged the claimant on 12/18/2017 for failing to find coverage for the shift she missed on 12/18/2017.
28. The claimant contacted the manager the following week to inquire about her hours and the claimant was informed of her separation from employment.

Credibility Assessment:

During the original hearing, the manager asserted that the claimant did not contact anyone about covering her 12/18/2017 shift based upon the manager's communications with employee A and employee B. However, during the remand hearing, the claimant provided extensive direct testimony about her efforts to find coverage for her 12/18/2017 shift, including calling employee A, calling other employees from the list, and her own plan to take the bus if she could not find coverage. The claimant also testified about her efforts to secure alternative childcare with her best friend once learning her son was ill with a fever that morning. The review examiner finds the claimant's testimony about her efforts to find coverage for her 12/18/2017 shift more credible than the manager's assertion that the claimant did not contact anyone.

During the original hearing, the manager asserted that the claimant did not contact her on 12/18/2017 and maintained that at no point did the claimant inform the manager about her son being ill. However, when questioned about this during the remand hearing, the manager testified that she did not remember if she and the claimant spoke on 12/18/2017, and did not remember hearing about the son being sick. During the remand hearing, the claimant provided extensive and detailed testimony about her communication with [t]he manager on 12/18/2017, including that she did not have a ride and that her son had a fever, that the manager offered that employee A may be able to pick the claimant up for work if the claimant could find someone to watch her son, and that the claimant told the manager she tried and that there was no way the claimant could work that day. Given the claimant's detailed testimony about this 12/18/2017 communication, and the manager's inconsistencies, the review examiner finds the claimant's testimony to [sic] more credible than the manager's [testimony] about the 12/18/2017 communication.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, in light of the consolidated findings showing that the claimant tried to comply with the employer's coverage policy, we reject the review examiner's original legal conclusion that the claimant is ineligible 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 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

“[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 findings establish that the employer discharged the claimant because she violated its coverage policy on December 18, 2017, when she was unable to work and failed to obtain coverage for her shift, as required under the employer's attendance policy. Her failure to obtain coverage certainly violated the policy, which simply states, “Don't - miss your shift without finding coverage. Failure to do so will result in termination.” *See Consolidated Finding # 3*. However, in order to meet its burden under the knowing violation prong of G.L. c. 151A, § 25(e)(2), the employer must show that the policy was reasonable. The facts in this case illustrate why this policy was not. Although the policy's goal to ensure sufficient staffing levels is reasonable, the policy does not allow for an employee's inability to obtain coverage due to circumstances outside of her control, as the claimant experienced on December 18, 2017. As soon as the claimant realized that she would be unable to work due to a lack of transportation on December 17th, she contacted her manager and several other employees to try and obtain coverage, but no one agreed to work her shift. Additionally, after deciding that she would take the bus to work if she could not obtain coverage, the claimant was ultimately unable to work because her son woke up with a fever on the morning of December 18th. Her son's daycare would not allow him to come in when he was sick, and the claimant could not secure a babysitter for him on such short notice.

The issue before us is not whether the employer made the correct decision to terminate the claimant's employment, but whether the claimant is disqualified from receiving unemployment benefits. Because we believe the employer's strict policy was unreasonable under the circumstances, we cannot conclude that the claimant knowingly violated a *reasonable* and uniformly enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

The employer has also failed to establish that the claimant's failure to secure coverage for her shift constituted deliberate misconduct in wilful disregard of the employer's interests. 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 “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) (citation omitted).

Here, the employer established that the claimant was aware of its expectation that she find coverage if she is unable to work, as she received a copy of the coverage policy at hire. In addition to the concerns already discussed about the reasonableness of this expectation, the employer has not established that the claimant acted in wilful disregard of the employer’s interest when she failed to obtain coverage for her absence. As stated above, the claimant took several steps to try and both make it to work and obtain coverage when it became clear that she could not work. The claimant’s efforts demonstrate that her failure to report to work was mitigated by a medical emergency, and her failure to comply with the employer’s expectation that she find coverage was the result of circumstances outside of her control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control).

We, therefore, conclude as a matter of law that the claimant neither knowingly violated a reasonable and uniformly enforced employer policy, nor engaged in 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 entitled to receive benefits for the week ending December 23, 2017, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
Fitzgerald, Esq.
DATE OF DECISION - June 25, 2020

Paul T.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020ⁱ. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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

ⁱ See Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.