0024 6526 03 (Nov. 29, 2018) – Held claimant, who failed to comply with the employer's reasonable expectation that she not report to her work area earlier than her start time, is disqualified under G.L. c. 151A, § 25(e)(2). She needed to comply even though she disagreed with it.

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

Issue ID: 0024 6526 03

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 February 6, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 27, 2018. The claimant appealed the determination to the DUA hearings department. Following an initial hearing on the merits attended by both parties, and a continued hearing attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on July 21, 2018. 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 evidence pertaining to the circumstances leading to the claimant's discharge 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 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 review examiner found that the claimant was aware of the employer's expectation that she not report to work earlier than her start time.

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 Payroll Collection Associate for the employer, a university, from 11/26/07 until she separated from the employer as of 2/6/18.

2. The claimant was hired to work full-time, Monday through Friday from 7:30 AM to 3:30 PM, earning $35 an hour.

3. The claimant was discharged for coming to work 1/2 hour early on 2/6/18. The employer has no uniformly enforced, written rule or policy which addresses this behavior. Whether an employee is discharged for this reason is left to the discretion of the Manager in conjunction with Human Resources.

4. The claimant takes a car, bus and train to work. She likes to give herself enough time to get to work so she would leave her home early.

5. When she initially started her employment, her Manager, the Comptroller of the Business Office, commended her for coming in early. In several of her reviews, the claimant was praised for being dependable because she would arrive early to work.

6. In late December of 2013, the claimant had been informed by her Manager that her hours needed to be changed. She was told she could no longer work 7:30 AM to 3:30 PM; she now needed to work 9:00 AM to 5:00 PM. The claimant informed her Manager that the change in her hours made it difficult for her because she needs to drop her son off for a before school program.

7. The claimant filed a grievance which was resolved a year later. The claimant was allowed to keep her original hours until her son graduated from high school. In 2015, the claimant's hours were changed to 9:00 AM to 5:00 PM.

8. The claimant began taking a later bus and would arrive to work just before 9 AM. Three weeks after the claimant's hours were changed, in June of 2015, her Manager informed her that he paid her to start at 9 AM and that meant that she needed to be at her desk and ready to work at 9 AM.

9. The claimant then began coming in at 8:40 AM but was not getting paid for this time.

10. The claimant was involved in an accident and was out on FMLA from November of 2016 until March 2017 when she returned to work. The Supervisor had found issues with the claimant's performance while she was out on leave, which he addressed with the claimant upon her return. The Human Resource Officer had been working with the claimant's Immediate Supervisor in addressing the claimant's job performance.

When the claimant returned to work she was called into a meeting with the Union Representative, Human Resources, and her Manager and was informed that while she was out her Manager had been doing her work, and that she did not need a full day to complete her work so they were cutting her hours. The employer told the claimant as of 5/16/17, she would be working 17.5 hours a week, and that she would work 9 AM to 12:30 PM or she could accept a severance package being offered.

11. The claimant accepted the cut in her hours and continued to work. She would continue to arrive early due to her transportation. The claimant's colleague would come in at 8:45 AM with no issues.

    The claimant had made a verbal complaint to the CFO on 9/1/16 regarding sexual harassment by her Supervisor. The claimant reported a second incident of sexual harassment in early October of 2016 to the CFO and Human Resources. On 12/14/17, the claimant sent an email to Human Resources and updated the new CFO about her prior verbal complaints and a new complaint that occurred on 10/3/17 by the Director of the Department. The claimant was referred to the Vice President of Human Resources and the President of the University. The claimant had also spoken to her Union Representative. The claimant met with the Director of Human Resource Consulting on 12/22/17 in regards to her sexual harassment complaint. The Coordinator provided the claimant with three separate links to file a formal complaint so the employer could address her issue. The complaint needed to come in to the Office of Dispute and Resolution. The claimant began sending emails about her complaints to the new CFO and everyone else she felt should know on 1/16/18. On 4/13/18, the claimant sent the Human Resource Officer an email asking to meet with her. The Human Resource Officer met with the claimant on 4/14/18. The claimant told the Human Resource Officer about her concerns regarding sexual harassment by her Immediate Supervisor. The Human Resource Officer explained to the claimant that she could not handle the complaint because she had been working with her Immediate Supervisor in issuing the claimant discipline for her performance. On 5/4/18, in response to an email sent by the claimant to the Human Resource Officer looking for [sic] name and number of the Title 9 Coordinator who handled sexual harassment claims, the Human Resource Officer referred the claimant to the Director of Human Resource Consulting to file a formal complaint with the employer. The claimant never filed a formal sexual harassment complaint.

12. The employer never investigated a complaint because there was no formal complaint of sexual harassment made by the claimant. Because the claimant's Immediate Supervisor felt uncomfortable with being accused of sexual harassment, he no longer wanted to have one on one contact with the claimant without someone from Human Resources present. Whenever the Immediate Supervisor needed to speak to the claimant, a Human Resource Personnel Representative needed to be in the room with them. The Immediate Supervisor was complying with his self-implemented restrictions.

13. The claimant's Immediate Supervisor would arrive to work at 7:30 AM. He instructed the claimant on several occasions not to report to work earlier than her 9:00 AM start time. This was because he did not want to be alone with the claimant after she had alleged he sexually harassed her. The reason for this directive was not shared with the claimant. It was okay for the claimant to arrive 5 minutes before her starting time of 9:00 AM and she could not stay any later than the end of her shift at 12:30 PM.

14. The 1/17/18 email referenced in the last and final warning to the claimant was not submitted by the employer, as it was not readily available at the remand hearing.

15. January 1, 2018 was the first time the claimant was told by her Manager she needed to arrive no earlier than 9:00AM. There were at least three times between 1/11/18 and 2/6/18 that the employer reiterated to the claimant that she could not start earlier than 9:00 AM.

16. On the days the claimant was observed in the workspace prior to her start time, she was sitting at her desk. The claimant would prepare for her day by getting coffee, eating breakfast if available, and setting up her work area with items she may need for the day.

17. If the claimant arrived to work prior to 9:00 AM due to the unpredictability of public transportation, there was a lounge on each of the four floors of the building outside the work area where the claimant could have waited prior to going to her work station. The claimant was aware of the lounge areas.

18. The claimant was not confused with the directive of her Supervisor not to arrive to work prior to her start time, she disagreed with it.

19. On 1/31/18, the claimant was asked to meet with her Manager, Human Resources and her Union Representative for a 10:00 AM meeting. The claimant's Union Representative met with the claimant at 9:30 AM. At 10:00 AM, the Union Representative told the Human Resource Officer that she and the claimant were still meeting. At approximately 10:50 AM, the Union Representative called the Human Resource Officer and informed her that the meeting was not going to happen because the claimant was refusing to meet. At 12:30 PM, when the claimant left for the day, the Union Representative went to the Human Resource Officer's office and informed her that the claimant had just fired her as her union representative.

20. The meeting never took place. The claimant's employment was terminated on 2/6/18.

Credibility Assessment:

> The employer's testimony is deemed more credible than the [claimant's], since the claimant had trouble recalling specific information regarding the meetings she had with the employer. In addition, the claimant provided conflicting information, particularly in respect to the 1/31/18 meeting. She initially testified that she did not attend the meeting on this day because it was after her shift that ended on 12:30 PM, but then subsequently testified that the meeting was in the morning. The claimant was also non-responsive to several questions posed during the remand hearing, avoiding the questions being asked.

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 as follows. Per the parties' testimony and the documentary evidence in the record, the April and May events described in Consolidated Finding # 13 occurred in 2017 and not 2018. In adopting the remaining findings, we deem 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, we reject the review examiner's original legal conclusion that the claimant did not have the necessary state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest.

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 . . . .

After remand, the review examiner found that, beginning in January, 2018, the claimant was informed by the employer on several occasions that she could not report to work earlier than her start time of 9:00 a.m. The employer testified that this directive was issued to the claimant to avoid the possibility of any unsupervised interactions between the claimant and her supervisor, who arrived at 7:30 a.m., and who the claimant had accused of sexual harassment. The review examiner found that, while the claimant understood the employer's expectation regarding her start time, she disagreed with it, and on February 6, 2018, she arrived at her work area at 8:30 a.m. and began preparing for her work day.

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).

As stated above, the claimant was clearly aware of the employer's expectation that she refrain from reporting to her work area prior to her start time. The employer's expectation was reasonable in light of the allegations the claimant had made against her supervisor, and the fact that the claimant, for an unknown reason, had failed to follow the employer's known procedure for formally filing a sexual harassment complaint, which could have resolved the situation. We also note that there is no indication in the record that the employer's directive regarding the claimant's arrival time was negatively impacting the claimant's employment. Thus, she needed to comply even though she disagreed with it.

Given that the claimant was aware of the employer's reasonable expectation, the only question that remains is whether any mitigating factors existed that prevented the claimant from complying with the expectation. The review examiner found that the claimant was aware of several lounge areas available at the employer's location where she could go if she happened to arrive to work early. Nothing in the record suggests that the claimant could not take advantage of that space. Thus, the claimant failed to establish any mitigating circumstances for her failure to comply with the employer's expectation on February 6, 2018.

We, therefore, conclude as a matter of law that the claimant 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 denied benefits for the week ending February 10, 2018, 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 - November 29, 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.

SVL/rh