

Employer's directive to transfer or be fired was unreasonable. Because the claimant's supervisor knew the claimant would not want to transfer and lose a significant portion of his commissions, he deliberately failed to tell the claimant that the transfer was only temporary for training purposes, and when the claimant refused the transfer, the supervisor deliberately failed to share the claimant's reasons for doing so with his superiors. Held claimant's termination was not for deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0024 8697 40

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 affirm.

The claimant was discharged from his position with the employer on February 20, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 23, 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 July 18, 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, 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 provide the employer with the opportunity to present evidence. Both parties 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 before the Board is whether the review examiner's decision, which concluded that the claimant did not knowingly violate any employer rule or policy and did not engage in deliberate misconduct in wilful disregard of the employer's interests, is supported by substantial and credible evidence and is free from error of law.

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 this employer's cash register company (and its predecessors) as a Retail Salesperson from 11/04/59 until he separated from employment on Tuesday 02/20/18.
2. At the end of his employment, the claimant was paid a salary of \$500.00 per week plus Commission of 10% of sales, which for the claimant was approximately \$600.00 per week. The claimant also received health and vacation benefits.
3. Throughout his approximately 60 years of employment, the claimant had been based out of the same office in [City A], Massachusetts. The claimant had developed a strong base of customers, which allowed him to earn more in commissions than in salary.
4. The employer had purchased the predecessor company on 04/01/16 and they were working to fully integrate the [City A] office to operate similarly to the employer's other office locations.
5. On 02/20/18, the claimant's immediate supervisor, the Assistant Vice-President of Deployment, [A], told the CEO that he wanted to discharge the claimant because he felt the claimant was not conforming quickly enough with the changes in office procedures he was attempting to implement following the purchase of the company.
6. The CEO told [A] that he did not want to discharge the claimant but instead wanted to have the claimant come to the employer's [City B], Massachusetts office location temporarily for a short period of training beginning on Monday, 02/26/18.
7. The final incident that triggered the separation occurred on 02/20/18 when the Assistant Vice-President of Deployment, [A], told the claimant via telephone that as of Monday, 02/26/18, the claimant would be working out of the employer's office in [City B], Massachusetts. The claimant protested that he would be giving up most of his income by starting over in a new office location far from his client base. The claimant understood that the move would result in a more than 50% reduction in his total earnings. The claimant told [A] that if he were being transferred to work in [City B] than [sic] he would consider giving his notice. It was clear from the conversation that the claimant understood the transfer to [City B] was a permanent job transfer.
8. At no time did the [Assistant] Vice President of Deployment indicate to the claimant that the transfer to the [City B] office location was a short-term

temporary transfer or that it was for purposes of training and not a permanent transfer.

9. The [Assistant] Vice President of Deployment contacted the COO, [B], via telephone and told him that the claimant was refusing to begin working in [City B] on 02/26/18. The [Assistant] Vice President of Deployment did not tell the COO the claimant's specific stated concerns about needing to start over in a new office location and losing all his long time clients that he had accumulated over his nearly 60 years at the [City A] office location. The COO was told that the claimant had indicated that he was considering giving his notice rather than be transferred to the [City B] office.
10. Later on 02/20/18, the COO next met with the CEO and told him what the Assistant Vice-President of Deployment had said to him that the claimant was considering giving his notice rather than be transferred to [City B].
11. The CEO told the COO to contact the claimant and direct him to report to begin work at the [City B] office location the next day on Wednesday, 02/21/18. The CEO told the COO to tell the claimant that if he refused, the employer would view that as a resignation and the claimant's job would terminate immediately. The employer policy is not to allow a notice period because management does not trust employees who have resigned to remain working for any period of time.
12. On 02/20/18, the COO called the claimant by telephone from the employer headquarters and told him he needed to begin work in [City B] the next day on 02/21/18.
13. During the 02/20/18 telephone call with the COO, the claimant protested that he felt he was being treated unfairly and that he would need to give his notice if forced to relocate his job to the [City B] office location.
14. On 02/20/18, the COO responded by telling the claimant the employer does not take notices, and, if the claimant was refusing the transfer to the [City B] office, [he] needed to pack up his things and leave immediately. The claimant indicated that he would not accept the transfer to [City B] and would pack up his things and leave.
15. At no time did the COO indicate to the claimant that the transfer to the [City B] office location was a short-term temporary transfer or that it was for purposes of training.
16. After almost 60 years of employment, it took some time to gather the claimant's workplace belongings. The claimant was upset because he felt mistreated by employer management after his long term of employment.

17. A Technician contacted the CEO stating that the claimant was still at the office collecting his belongings.
18. The CEO called the claimant and told him he had five minutes to “get the fuck out of the office” or he would call the police. The claimant then left the office.
19. On 03/05/18, the claimant filed a claim for unemployment benefits effective 03/04/18.

Credibility [Assessment]:

The employer witness offered only hearsay testimony about the final conversations the claimant had on 02/20/18 with the Assistant Vice-President of Deployment and the COO. Notably, the CEO indicated that the claimant’s immediate supervisor was frustrated with dealing with the claimant and had made clear in his conversations with the CEO his desire to discharge the claimant. This could explain why the claimant was never told that the transfer to [City B] was temporary and for training purposes. The hearsay statements of the Vice-President of Deployment and the COO had no indicia of reliability and were not credible evidence of the employer having told the claimant he was only being asked to work a few weeks in [City B] while being trained.

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. 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 conclude that the review examiner’s credibility assessment is reasonable in relation to the evidence presented and is supported by the record. As discussed more fully below, we conclude that the claimant is entitled to receive unemployment benefits.

The first question is whether the claimant voluntarily left his employment or was fired. The consolidated findings show that, although the claimant was preparing to resign, the COO grew impatient and forced the claimant out the door under threat of calling the police. *See* Consolidated Findings ## 13, 14, and 18. Under these circumstances, the claimant’s immediate departure was involuntary, and his qualification for benefits is appropriately analyzed under 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 employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

We agree with the review examiner that, because the employer has not presented any evidence showing that the claimant violated any written rules or policies, it has failed to sustain its burden to show that the claimant's discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy.

Alternatively, we consider whether the termination was due to deliberate misconduct in wilful disregard of the employer's interest. 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).

At first blush, it appears that the claimant was fired for insubordination, specifically, refusing to transfer to the [City B] location. However, the consolidated findings show that there was a lot more going on here. The employer expected the claimant to transfer to [City B] temporarily. Consolidated Findings ## 5 and 6 show that the CEO wanted him to go through a short period of training to help the claimant conform to changes in office procedures that had been implemented after the present employer bought the company. By itself, this expectation is reasonable. However, the review examiner also found that the Assistant Vice President of Deployment (Assistant Vice President) did *not* tell the claimant that this transfer was only a short-term temporary transfer for training purposes only. Consolidated Finding # 8. Omitting the temporary nature of the transfer was an important detail. As a result, the claimant refused to go to [City B] without full knowledge of the employer's expectation. He thought it was to be a permanent transfer. *See* Consolidated Findings ## 7 and 8.

As explained in the credibility assessment, the review examiner viewed the Assistant Vice President's behavior as deliberate. Frustrated with dealing with the claimant, the Assistant Vice President wanted the claimant fired, and he knew that the claimant would not want to transfer permanently because he believed he would lose a significant portion of client-based commissions that had taken years to develop. 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). We believe that the review examiner's assessment is reasonable in relation to the evidence presented.

The consolidated findings further provide that the Assistant Vice President withheld important information again when he reported to the COO that the claimant was refusing to transfer. He did not convey that the claimant believed the relocation to be permanent and was concerned

about losing his client base. *See* Consolidated Finding # 9. Predictably, because the COO did not have this information, he did not share it with the CFO. *See* Consolidated Finding # 10. Thus, the employer issued its directive to transfer or be terminated based upon intentionally misleading communications from a supervisor motivated to end the claimant's employment.

In sum, the employer has failed to show that the claimant had full knowledge of the employer's expectation to report to the [City B] location temporarily, and under the circumstances, the senior officers' directive to the claimant was not reasonable.

We, therefore, conclude as a matter of law that the employer failed to carry its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced policy pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending February 24, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 16, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

SPE/rh