

Where a claimant, who was discharged for not reporting to work, could not go to work due to the effects of snow storm, including a downed powerline blocking her driveway, she is not subject to disqualification under G.L. c. 151A, § 25(e)(2), because the claimant's failure to go to work on the final day was not deliberate or done in wilful disregard of the employer's interests, but is attributable to circumstances beyond her control.

**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: 0025 0774 89

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 March 9, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 30, 2018. 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 July 31, 2018.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest 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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence. Only the claimant 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 is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant was discharged for her attendance and the claimant's final absence from work was related to downed power lines in front of her home.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The employer is a carpet store. The claimant worked as a bookkeeper for the employer. The claimant worked for the employer from 8/23/16 to 3/09/18.
2. The claimant worked part-time hours in her last month of employment.
3. The claimant worked at the employer's store.
4. The employer never told the claimant how it expected her to report her absences. The claimant customarily called the owner to report her absences from work.
5. The employer assigned the claimant to work a shift scheduled to start at 8:00 a.m. on 3/07/18. The claimant worked her entire scheduled shift on 3/07/18.
6. The employer assigned the claimant to work a shift scheduled to start at 8:00 a.m. on 3/08/18. The employer closed its store on 3/08/18 due to a power outage. Early in the morning on 3/08/18, the employer's manager sent a text message to the claimant. The message informed the claimant that the store was closed. The claimant did not work on 3/08/18 because the store was closed.
7. The employer assigned the claimant to work a shift scheduled to start at 8:00 a.m. on 3/09/18. Power lines fell in front of the claimant's home. The downed power lines blocked the claimant's driveway. The claimant discovered this when she woke up on 3/09/18. The claimant could not drive to work because the power lines blocked her driveway. The claimant called the employer's owner to report her absence. The owner did not answer. The claimant called the employer's manager to report her absence. The manager did not answer. The claimant sent a text message to the owner and the manager that explained that she could not come to work due to the downed power lines. The claimant sent a photograph of the downed power lines to the manager via text message.
8. The claimant did not ask anyone to drive her to work on 3/09/18 because she did not have any acquaintances in the area who could drive her. The claimant did not take a taxicab to work because she determined that she could not financially afford the journey. The drive from the claimant's home to the employer's store was thirty-five minutes and the claimant anticipated that a journey via taxicab would cost \$50.00.
9. On 3/09/18, the owner sent an e-mail to the claimant. In the e-mail, the owner notified the claimant that she was discharged because she did not come to work that day.

Credibility Assessment:

In the hearing held on 7/25/18, the employer's owner testified about the claimant's work attendance in March 2018. In the hearing held on 9/24/18, the claimant testified about her work attendance in March 2018. The employer's testimony differed from the claimant's testimony. Given the totality of the testimony and evidence presented, the claimant's testimony in its entirety is accepted as more credible than the employer's owner's testimony because the owner did not attend the hearing held on 9/24/18 and thus was not available for cross-examination or additional questions from the examiner.

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. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2).

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

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. After the first hearing, at which only the employer attended, the review examiner concluded that the employer had carried its burden. Following our review of the entire record, including the new consolidated findings of fact, we disagree.

There was no dispute that the claimant was discharged on March 9, 2018, for attendance issues the claimant had in the final days of her employment. In his credibility assessment, the review examiner noted that the parties offered conflicting testimony as to what occurred in the final days. In short, the employer testified that the claimant did not work at all on March 7, 8, or 9, 2018. The claimant testified, however, that she worked on March 7, the employer's store was closed on March 8, and she could not get to work on March 9 due to downed power lines at her home. The review examiner appears to have weighed all of the testimony. He found the claimant's testimony to be more credible. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Here, the credibility assessment is not unreasonable in relation to the evidence presented. Therefore, we

will not disturb it or the consolidated findings of fact. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

The final attendance incident occurred on March 9, 2018. The review examiner found that the claimant was specifically discharged, “because she did not come to work that day.” Consolidated Finding of Fact # 9. Although it is reasonable to think that the employer expected the claimant to report to work each day she was scheduled, and the claimant did not report to work as scheduled on March 9, 2018, *see* Consolidated Finding of Fact # 7, we cannot conclude that the claimant’s conduct on March 9 was deliberate or done in wilful disregard of the employer’s interest. The claimant testified that a snow storm hit the area around March 8 and 9, 2018. The review examiner found that, on March 9, 2018, a power line was down in front of the claimant’s home, and it blocked her driveway. She could not get out of the driveway to transport herself to work. No other alternative transportation arrangements were feasible. *See* Consolidated Finding of Fact # 8. Although the claimant tried to notify the employer about the situation in multiple different ways, it does not appear that she received a response from the employer until she was notified of her discharge.

Even if missing work on March 9, 2018, could be considered a type of misconduct, the claimant’s inability to get to work that day shows that she did not deliberately fail to go to work. She could not do so due to circumstances beyond her control. Therefore, the separation is not due to deliberate and wilful misconduct, and she cannot be denied benefits.

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the claimant’s inability to get to work on March 9, 2018, due to circumstances beyond her control shows that she did not have the state of mind necessary to disqualify her under the law.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week beginning March 4, 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.

SF/rh