

The claimant's discharge for excessive absence and tardiness after receiving two final written warnings was deliberate misconduct in wilful disregard of the employer's interest, where the review examiner found no mitigating factors for the conduct.

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Issue ID: 0025 5104 76

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 affirm.

The claimant was discharged from his position with the employer on May 1, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 9, 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 August 18, 2018. We accepted the claimant's application for review.

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 remanded the case to the review examiner to provide the claimant with an opportunity to testify. 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 was subject to disqualification for violating the employer's attendance policy by showing up late to work, without explanation, and after receiving several prior warnings, 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 as a collections account associate for the employer's sales and lease business from 8/28/17 until 4/27/18. The claimant worked five days per week, including Saturdays. The claimant worked 40-50 hours per week; he was paid \$12.48 per hour.
2. The claimant was scheduled to begin work at 8:00am or 9:00am. The claimant was always scheduled to start work at 8:00am on Fridays and Saturdays. The claimant's work schedule was posted at the workplace four weeks in advance. The claimant's schedule for the week of 4/22/18 through 4/28/18 was posted sometime in March and was not changed after it was posted. The claimant was scheduled to start work at 8:00am on 4/27/18.
3. The employer maintains an attendance policy that is intended to avoid disruption of the workflow and to ensure the employer's ability to service its customers. The policy informs all employees of the expectation that they report to work on time and that they work their scheduled shifts. The policy reads in relevant part: "Excessive tardiness and poor attendance disrupts workflow, customer service and may result in disciplinary action up to and including termination of employment." The employer's human resources staff determines the specific discipline that will result for violations of the employer's policy.
4. At the time of hire, the claimant received a copy of the employee handbook that contains the employer's attendance policy. The claimant was aware that the employer expected him to report for work as scheduled and to be punctual.
5. During the term of his employment, the claimant was issued discipline for attendance issues. On 11/2/17, the employer issued the claimant a verbal warning after he failed to report to work for a scheduled shift on 11/1/17. The warning was documented; the claimant signed the warning notice.
6. On 11/3/17, the employer issued the claimant a written warning because he reported to work late on five occasions during the period of 10/4/17 through 10/28/17. The claimant signed the warning notice.
7. On 3/26/18, the employer issued the claimant a written warning because he reported to work late on 3/23/18 and on 3/24/18. The warning reads in part: "Any subsequent infraction of the same or related nature will result in further disciplinary action up to and including termination." The claimant signed the warning notice.
8. On 4/7/18, the employer issued the claimant a final written warning because he was late for work on 4/6/18 and on 4/7/18. The warning reads in part: "Any subsequent infraction of the same or related nature will result in further disciplinary action up to and including termination." The claimant signed the warning notice.

9. On 4/19/18, the employer issued the claimant a final written warning because he reported to work late on 4/17/18 in violation of the employer's attendance policy. The notice reads in part: "Unauthorized or excessive absences or tardiness will result in disciplinary action up to and including termination of employment." The claimant signed the warning notice.
10. On 4/27/18, the claimant arrived at work at 8:35am; he was thirty-five minutes late for his shift. The claimant did not offer his supervisor an explanation for his tardiness. Near the end of the shift, the supervisor told the claimant that he was being suspended until further notice.
11. On 5/1/18, the supervisor notified the claimant that his check was at the business. When the claimant arrived at the workplace, the supervisor told the claimant that his employment was terminated due to excessive absences and tardiness. The employer discharged the claimant for violating the employer's attendance policy by reporting to work late after being issued a final warning for attendance. The supervisor did not tell the claimant that his employment was terminated because of a customer complaint.
12. The claimant filed an initial claim for unemployment insurance benefits, effective 5/6/18.
13. On 5/14/18, the claimant completed a DUA fact finding questionnaire in which he wrote that he was discharged because of a customer complaint. The claimant did not inform the DUA that he was discharged because of attendance issues.

Credibility Assessment:

The testimony of the employer witness was given greater weight in disputed areas because the claimant's overall credibility was diminished by contradictory and inconsistent testimony.

For example, the claimant testified that on 4/26/18, he went to bed planning to get up in time to go to work at 9:00am on 4/27/18 because he thought he was scheduled to start work at 9:00am. Yet, he testified to having called the employer on the morning of 4/27/18 because he was uncertain whether he was scheduled to start work at 8:00am or 9:00am. The testimony of both parties established that the claimant was always scheduled to start work at 8:00am on Fridays and Saturdays. Likewise, the claimant's work schedule was posted one month ahead. The claimant's contention that he was uncertain as to his scheduled start time was not credible and was contradicted by his initial testimony that he thought he was scheduled to start work at 9:00am on 4/27/18.

The claimant wrote in his responses on the DUA fact finding questionnaire that he was told he was being discharged due to a customer complaint. The claimant's contention that he was discharged because of a complaint was unsupported and

not credible, in light of the evidence in the record. The claimant was issued several disciplinary warnings, including two final warnings, for attendance. The supervisor's direct testimony that he told the claimant he was being discharged for excessive absences and tardiness is supported by the evidence and the undisputed testimony that the claimant was late for work on 4/27/18.

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 believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we affirm the review examiner's legal conclusion that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2).

Because the claimant was terminated from his employment, his 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, 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

Pursuant to G.L. c. 151A, § 25(e)(2), a claimant will be disqualified from benefits if his or her separation was solely attributable to either a knowing violation of a reasonable and uniformly policy or deliberate and wilful misconduct. Under this provision, the employer bears the burden of proof. We note at the outset that the review examiner ultimately concluded that the employer presented insufficient evidence to show that the attendance policy at issue was uniformly enforced. We concur, and thus we conclude the employer has not met its evidentiary burden under the "knowing policy violation" prong of G.L. c. 151A, § 25(e)(2). We next consider whether the employer has established that the claimant was discharged for deliberate and wilful misconduct within the meaning of this provision.

In rendering her findings, the review examiner made a detailed credibility assessment in favor of the employer, finding that the claimant's overall credibility was diminished by his contradictory and inconsistent testimony. She also found that the claimant's contention that he was discharged due to a complaint was unsupported and not credible in view of the evidence in the record, including a number of disciplinary warnings for attendance and two final written warnings. Additionally, the review examiner found that the claimant's contention that he did not know his scheduled start time on Friday, April 27, 2018, was not credible, given that his schedule was posted one month in advance, and that the parties had both testified that the claimant was always

scheduled to start work at 8:00 a.m. on Fridays. The claimant also contradicted his earlier testimony that his start time that day was 9:00 a.m. Such credibility 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 see no reason to disturb either the credibility assessment or the findings derived from said assessment.

The consolidated findings establish that the claimant was discharged for excessive absenteeism and tardiness in violation of the employer's attendance policy. The claimant received the employer's attendance policy when he was hired and was aware that the employer expected that he report to work as scheduled, and that he be on time. The claimant was scheduled to begin work at 8:00 a.m. on Fridays and Saturdays, and at 9:00 a.m. on his other work days. The claimant's schedule was posted four weeks in advance. His schedule for the week of April 22, 2018, through April 28, 2018, had been posted in March and had not been not changed. The claimant was scheduled to begin work at 8:00 a.m. on Friday April 27, 2018, as usual.

Despite the claimant's awareness of the employer's expectation that he report to work as scheduled, and be punctual, the claimant violated the employer's attendance policy for which he was disciplined. He received a verbal warning in November, 2017, for failing to report to work for a scheduled shift. A day later, he received a written warning for being late five times in the month of October, 2017. The claimant received another written warning after twice reporting to work late in March, 2018. On April 7, 2018, the claimant received a final written warning for being late twice. He received a second final written warning on April 19, 2018, after being late again. Yet, on April 27, 2018, after have receiving the two final written warnings, the claimant was suspended for being thirty-five minutes late for his shift without any explanation. The claimant was terminated on May 1, 2018, for reporting to work late after a final written warning.

Thus, the findings establish that the claimant repeatedly violated the employer's reasonable expectation that employee report timely for their scheduled shifts. The fact that the claimant was late on numerous occasions, however, does not itself establish deliberate and wilful misconduct on her part. "Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). Thus, 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 noted above the employer's expectation that its employees report timely to work is inherently reasonable. It is also clear from the numerous warnings that he received that the claimant was well aware of this expectation. The claimant has not established the presence of any factors beyond his control which mitigated his repeated failure to abide by the employer's tardiness expectation. Thus, our review of the entire record shows: (1) the existence of a reasonable expectation regarding calling out from work; (2) the claimant's awareness of this expectation; (3)

the claimant's failure to abide by this expectation; and, (4) a lack of circumstances mitigating the claimant's failure in this regard. On this basis, we believe that the employer has met its burden of establishing deliberate and wilful misconduct on the claimant's part.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), when, on April 27, 2018, the claimant once again reported to work late, without explanation or mitigating circumstances.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning April 22, 2018, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 21, 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.

SPE/rh