Claimant refused to sign three disciplinary action forms, because she felt they were factually wrong, even though the employer made it clear that she would be fired for refusing to sign. Disagreement with the factual allegations did not constitute mitigating circumstances, where she could have expressed her disagreement in the space provided for the employee's response on each form. Held claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest.

Board of Review
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Claimant ID: 10689036

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 we affirm on different grounds.

The claimant separated from her position with the employer on May 11, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 16, 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 October 16, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer, and thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 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 denied benefits to the claimant, who separated from employment because she refused to sign a disciplinary warning, 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 are set forth below in their entirety:

1. The claimant worked part-time for the employer, a fast food franchise, from February 28, 2014 to May 11, 2018 as a Shift Manager.

2. On May 10, 2018 at 5:49 p.m., a Manager contacted the claimant and told her not to come to work.

3. On May 11, 2018, a suspension document was drafted, which stated that the claimant will be suspended from May 10, 2018 to May 21, 2018 "until this matter is investigated" and a second suspension document was drafted for another issue, which stated that the claimant will be suspended for a week. A third warning for unexcused absence was also drafted, which did not mention suspension.

4. On May 14, 2018, the claimant went to the workplace to retrieve her paycheck. The claimant received the letter of suspension with her paycheck. The claimant observed that she was not on the schedule for the following day.

5. The claimant refused to sign the disciplinary forms because she felt that they were factually wrong. The Manager informed her that if she did not sign, she will be fired, so she cannot come back to work until she does.

6. On May 15, 2018, the Area Supervisor signed the forms, which noted that the claimant "refused to sign."

7. The claimant did not believe that she should call the Area Supervisor if a Store Manager or Night Manager instructs her not to return to work.

8. No other contact was made.

9. The claimant's employment terminated.

10. On or about September 5, 2018, the claimant's daughter arrived at the office to request a letter confirming her employment dates.

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 agree that the claimant is ineligible for benefits, but under a different section of law.

The first question we must decide is whether the claimant resigned or was fired. Upon hearing evidence only from the employer at the initial hearing, the review examiner concluded that the claimant resigned when she failed to return to work or contact the employer following her

disciplinary suspension.[1] After both parties' participation at the remand hearing, the consolidated findings now show that the employer would not allow the claimant to return to work if she refused to sign a disciplinary form. *See* Consolidated Finding # 5. The claimant refused to sign and she was terminated. *See* Consolidated Findings ## 6 and 9. Based upon these clarified findings, we conclude that the claimant had been fired.

Because the claimant was terminated from 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 . . . .

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

The record shows that the employer was disciplining the claimant for unsatisfactory performance, poor customer relations, and an unexcused absence. *See* Exhibits 8, 9, and 10.[2] It is undisputed that the claimant did not agree with these allegations. *See* Consolidated Finding # 5. However, we need not decide whether she did or did not engage in the behavior described in these exhibits, because she was not terminated for that conduct. She was discharged for refusing to sign them. Thus, to meet its burden under G.L. c. 151A, § 25(e)(2), the employer must show that the claimant's refusal to sign its disciplinary action forms constituted 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 "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).

When the claimant went to pick up her paycheck on May 14, 2018, the manager made the employer's expectation very clear – if she did not sign the disciplinary forms, she would be fired. Consolidated Finding # 5. In refusing to sign, the claimant deliberately disobeyed a directive which demonstrated a wilful disregard of the employer's interest in having documentation that she had read and received the disciplinary action forms. To be sure, the claimant may have disagreed with the factual allegations on these forms. However, that does not constitute

[1] *See* Remand Exhibit 1, which is the original hearing decision.

[2] Exhibits 8, 9, and 10 are the disciplinary action forms, which the claimant declined to sign. While not explicitly incorporated into the review examiner's findings, they are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

mitigating circumstances, as she could have disputed the allegations in the space provided on each form, which is left for the employee's comments and/or response. Given this opportunity to express her disagreement, we think the employer's demand to have her sign the disciplinary form was reasonable.

We, therefore, conclude as a matter of law that the employer has met its burden to show it terminated the claimant's employment for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending May 12, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019

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/ab/jv