

Claimant bank officer who refused to identify the coworker who told her to participate in a conference call to which she had not been invited was discharged for deliberate misconduct. Even where the employer did not explicitly tell the claimant that failure to disclose would result in termination, claimant's 23-year tenure and status as a bank officer meant she knew the employer expected honest cooperation in internal investigations. Her deliberate refusal to identify her source was in wilful disregard of the employer's interest. Trying to protect a coworker from discipline does not constitute mitigating circumstances.

**Board of Review
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Issue ID: 0026 5654 23

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 her position with the employer on July 25, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 29, 2018. The claimant appealed the determination to the DUA hearings department. Following a two-day hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on November 24, 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 also knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 took this case for review. 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's discharge for failing to disclose the identity of the person who had informed her of a confidential conference call violated the employer's policy and expectation regarding honesty, and constituted both a knowing violation of a reasonable and uniformly enforced policy as well as deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the employer, a bank, from June of 1995 to July 25, 2018, most recently as a Loan Service Officer.
2. The employer had a policy that prohibited: "dishonesty; misappropriation or mishandling of bank, customer or co-worker property; violation of safety or security policies or procedures; falsifying of bank, personnel medical records or any other records; possession, or use of alcohol or non-medically prescribed controlled substances (or containers thereof) on bank time or property or being under the effects or impaired by alcohol or non-medically prescribed controlled substances while at work; insubordination; and violence of any kind."
3. The purpose of the honesty policy was to ensure the integrity of information in a highly regulated industry.
4. The policy stated that "due to the nature of our business, there are certain behaviors that may result in immediate disciplinary action, up to and including termination..."
5. The claimant acknowledged and viewed the policy as recent as March 3, 2017.
6. The employer did not apply a progressive system of discipline, consisting of a conversation, a 30-day written warning, a 60-day written warning, a 90-day written warning prior to termination, to that [conduct] which gave rise to the claimant's discharge from employment consistent with the policy.
7. The employer applied the policy to all employees.
8. During the week of [July] 15-20, 2018, the claimant was absent due to a medical issue.
9. On July 16, 2018 at 3:09 p.m., an email was sent to all senior officers and select few at the levels of Assistant Vice President and Branch Manager and above to attend a conference call on July 17, 2018 at 8:30 a.m. for an announcement regarding the bank's strategic plan [Exhibit # 11]. The email contained the number and access code. The claimant was not on the list of invitees.
10. The claimant's former mentor (a Branch Manager) texted the claimant [Exhibit # 12], "I'm being told there is a conference call tomorrow for alllll [sic] officers of the bank." The claimant replied, "Wow.... is that me too." The former mentor responded, "You can call in." The claimant stated, "Ok."

The former mentor stated, "I asked [a Regional Manager] and she said bankwide."

11. On July 17, 2018, the conference call took place with the Bank President.
12. The former mentor was on the call as well and did not hear any roll-call being taken.
13. The claimant joined the call, but did not hear any roll-call being taken. The claimant did hear a lot of noise and the bank president asking those on the call to mute their phones, with which the claimant complied. The Bank President concluded the hearing by inviting questions. The claimant did not have any.
14. The Bank President made the announcement regarding an acquisition of another bank.
15. At 10:00 a.m., the announcement was made public.
16. That day, the claimant's supervisor (the 1st Vice President of Consumer Products) texted the claimant wishing her a good recovery and asking her to give her a call about some news at the bank [Exhibit # 9]. The claimant thanked the supervisor and commented that if she was talking about the meeting with the Bank President, she was on the call further stating that a couple of the officers sent her an email knowing how the Bank President is with communication and they thought it was important. The claimant also commented that she wished the messages were from the supervisor. The supervisor then stated that she did believe the news to be important which is why she tried to call the claimant hours ago versus sending an email. The claimant stated that she received the emails the day before and heard the news straight from the Bank President. The claimant's supervisor then questioned how she was on the call and inquired about the email referenced by the claimant. The claimant stated that she received an email on her personal account about the announcement from the Bank President for the officers. The claimant said that she said she was on vacation but that they told her she could call in. The claimant went on to say that it was no big deal and thanked her supervisor for the call, that she has the information and does not have any questions. The claimant then stated that she could not talk because she was at an appointment. The supervisor then asked if HR sent the message, to which the claimant responded, "No." The supervisor then asked who forwarded the message and the claimant did not respond.
17. The claimant's supervisor then reported the issue to the employer.
18. The employer investigated the matter.
19. The employer interviewed the claimant's immediate supervisor and her second-line supervisor regarding the matter.

20. On July 23, 2018, the employer met with the claimant and asked why she was on the call and how she got the information to be on it. The claimant declined to divulge. The employer warned of possible termination if she did not disclose.
21. The employer suspended the claimant.
22. On July 25, 2018, the employer discharged the claimant from employment for dishonesty.

Ruling of the Board

Upon review, the Board adopts the review examiner's findings of fact except for the last sentence of Finding # 20, which indicated the employer warned the claimant of possible termination if she did not disclose how she found out about the call.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's decision is based on substantial evidence and is free from any error of law affecting substantive rights.

The review examiner denied benefits pursuant to 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest, or for a knowing violation of a reasonable and uniformly enforced policy. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Notwithstanding the lone sentence in Finding # 20, we agree with the review examiner that the employer has met its burden.

The review examiner found that the claimant was familiar with the employer's discipline policy, which prohibited dishonesty. She had acknowledged the policy as recently as March 3, 2017. *See* Exhibit # 5. The policy is reasonable, insofar as the employer needs to ensure the integrity

¹ On the second day of the hearing, the employer's witness testified that she did not explicitly caution that, if the claimant did not disclose who had told her about the conference call, she would be discharged, claiming she did not "make a practice of threatening people."

of information in its highly regulated industry. The claimant knew that the employer had a parallel expectation of honesty and candor, because she was aware of the underlying policy.

We conclude that it is immaterial that the employer did not specifically caution the claimant on July 23, 2018, that she was putting her employment at risk by refusing to identify who had told her about the July 17 conference call. After working for the employer for 23 years, the claimant knew the employer expected employees to cooperate with investigations into business-related issues. As an officer of the bank, the claimant had or should have had a heightened awareness of the importance of honesty and candor regarding such investigations.

Moreover, the nature of the claimant's meeting with the employer on July 23 also made her aware that the employer wanted information from her for its investigation. Rather than providing the information the employer explicitly requested, the claimant chose to put her own interests (and those of her coworker friend) ahead of the employer's, and refused to cooperate.

The record before us is clear: the employer had a reasonable expectation that the claimant would cooperate honestly and fully with investigations into business-related matters. Despite her familiarity with the employer's policy and expectation, the claimant deliberately refused to provide the information requested. This deliberate refusal evinces specific intent to disregard the employer's interest, and supplies the requisite state of mind necessary to support disqualification. Finally, refusing to comply with an investigation to protect a coworker from potential discipline does not constitute mitigating circumstances.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending July 28, 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 - March 28, 2019



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.

JPC/rh