

Claimant, who left work early without notifying general manager, was discharged for deliberate misconduct wilful disregard of employer's interest. Because the review examiner did not believe there was a family emergency, the claimant's behavior is not excused due to mitigating circumstances.

**Board of Review
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Issue ID: 0026 7961 70

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 August 22, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 7, 2018. The claimant appealed the determination to the DUA hearings department. Following a 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 October 23, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, she 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 for further subsidiary findings of fact from the record pertaining to whether the claimant left work early on August 17, 2018, and whether she notified management of her need to leave early. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest when she left work early on August 17, 2018, without notifying management, 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 the instant employer as a Clinic Manager from October, 2013, until her separation on 8/22/2018.
2. The employer has an employee handbook which states that poor communication may result in disciplinary action.
3. The claimant signed a form acknowledging her receipt of the employee handbook.
4. During the course of the claimant's employment, the General Manager had received multiple complaints from employees complaining that the claimant was not working at the location from 9:00 a.m. to 7:00 p.m. as expected.
5. The claimant was a salaried Clinic Manager and aware of the employer's expectation to work from 9:00 a.m. to 7:00 p.m. which is the hours of the business.
6. The General Manager did not follow up on the complaints since she did not believe that the claimant was not working her hours as a Clinic Manager.
7. On 8/17/2018, the General Manager received a phone call from an employee at the claimant's location at approximately 4:30 p.m. The employee was asking how to process a transition.
8. The General Manager informed the employee to direct the question to the Clinic Manager for help and the employee reported that the Clinic Manager left early to go to the gym.
9. The claimant had left work early on 8/17/2018 without notifying management.
10. In the past, the claimant had always notified the General Manager when arriving to work late or leaving work early.
11. The claimant was aware to inform the General Manager if she was arriving late or leaving early.
12. As a result, the General Manager called the claimant and asked her where she was, since an employee stated that she was at the gym.
13. The Clinic Manager told the employer that the employee was lying and that she left work early to care for [sic] father who had fallen in his home.
14. The claimant told the General Manager that she was upset and that was the reason she did not inform her that she was leaving early.

15. On 8/22/2018, the General Manager was present when the claimant was informed that she was terminated for leaving work [sic] without notifying management.
16. At the time of termination, the General Manager did not inform the claimant that she was laid off due to a lack of work.
17. The claimant filed her unemployment claim listing lack of work as her reason for separation.

Credibility Assessment:

The employer's testimony is accepted as credible in all contested areas since the employer witness, the General Manager, was forthright in giving testimony and her version of the events made more sense. The claimant's testimony was evasive and lacked logical sense thus causing the claimant's testimony to be less credible in all contested areas.

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 also agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

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 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

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

As discussed above, under G.L. c. 151A, § 25(e)(2), a claimant will be disqualified from benefits if her separation was attributable to either a knowing violation of a reasonable and uniformly policy or deliberate misconduct in wilful disregard of the employer's interest. We note that, in his decision, the review examiner ultimately concluded that the employer presented insufficient evidence to show that the communication 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 now consider whether the employer has established that the claimant's action of leaving work early on August 17, 2018, without providing notice to the employer, constituted deliberate and wilful misconduct within the meaning of this provision.

In order to carry its burden, the employer must first show that the claimant engaged in some form of misconduct or prohibited behavior. After that is shown, the employer then has the burden to show that the misconduct was deliberate and done in wilful disregard of the employer's interest. In discharge cases, the "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine the employee's state of mind, we "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

The consolidated findings show that the claimant was aware of the employer's expectation to work from 9:00 a.m. to 7:00 p.m. and to notify the General Manager if she was arriving late or leaving early. *See* Consolidated Findings 5 and 11. On August 17, 2018, however, the claimant admitted to the General Manager that she left work early. She denied telling an employee that she was leaving early to go to the gym and informed the General Manager that the reason she left work early is because her father had fallen in his home and she was too upset to notify the employer that she was leaving early. If true, the father's sudden fall might constitute circumstances that mitigated the claimant's failure to contact the employer. However, the review examiner found that the claimant's asserted reason for leaving work early without notification was not credible. He reached that finding after weighing the evidence, as described in the credibility assessment. "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). Unless such an assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). We believe his assessment is reasonable in relation to the evidence presented.

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 supported by substantial and credible evidence and free from error of law, because claimant intentionally left work early, without notifying her employer and without mitigating circumstances.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning August 22, 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 - January 29, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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.

CAS/rh