

**A claimant who was repeatedly late to work is disqualified under G.L. c. 151A, § 25(e)(2), where she was discharged for her tardiness, she could not offer a reasonable explanation for why she was tardy on the day of the final incident, and the review examiner did not find credible her testimony that she was tardy, in large part, due to anxiety.**

**Board of Review  
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**Issue ID: 0030 6520 87**

## **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 April 17, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 14, 2019. 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 June 19, 2019.

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 regarding her separation. 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 to deny benefits 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 claimant was late to work for four days prior to her termination and the review examiner did not find that the tardiness was due to the claimant's anxiety.

### **Findings of Fact**

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

1. The employer is an automobile dealer. The claimant worked as a full-time service advisor for the employer. The claimant worked for the employer from 10/03/18 to 4/17/19.
2. The employer's service director supervised the claimant.
3. The employer initially assigned the claimant to start work at 7:00 a.m. The claimant arrived late for work on multiple occasions in the first two weeks of her employment. After these late arrivals in the first two weeks of employment, the service director offered a later start time to the claimant to dampen her tardiness. The service director told the claimant that she could start work at 7:30 a.m. or 8:00 a.m. The claimant chose to start work at 7:30 a.m. Thereafter, the claimant worked 7:30 a.m. to 6:00 p.m. shifts. The claimant never requested another change to her start time.
4. On several occasions, the claimant told her supervisor that she experienced anxiety.
5. The employer created a handbook. The handbook features a policy titled "General Expectations." The policy features a preface that reads, "The Company believes that the following policies will result in a more efficient, productive, and pleasant atmosphere for the employee, co-workers and clients. It is impossible to list all of the rules of conduct and expectations applicable to employees and, therefore, this list is not meant to be exhaustive. Any violation of this policy or any other work rules or expectations may result in disciplinary action up to and including immediate termination."
6. The General Expectations policy features a section titled "Absenteeism and Tardiness." The section reads, in part, "Unless permitted by a Company leave policy employees are expected to report to work on time as scheduled, to limit their breaks to the time allowed, and to stay on the job until the end of their scheduled work day. An employee is required to call his/her supervisor to report absences or tardiness at least thirty (30) minutes before or, if an emergency, as soon as possible after the scheduled start time."
7. The claimant signed a handbook acknowledgement on 10/01/18. The acknowledgment reads, in part, "I acknowledge that I have received a copy of [the employer's handbook] and that I am responsible for reading and complying with it."
8. The claimant arrived late for work on 1/09/19.
9. The employer gave a written warning to the claimant. The warning is dated 1/09/19. The warning indicates that the claimant was late for work on 1/09/19 and that her late arrival was not excused. The document reads, "If there are future incidents involving the work performance of this employee, further

disciplinary action will be taken, up to and including termination.” The claimant signed the warning.

10. Prior to 4/10/19, the employer told the claimant on multiple occasions that she must arrive on time for scheduled shifts.
11. The service director never verbally told the claimant that she faced discharge for tardiness.
12. The claimant arrived late for work on 4/10/19. She arrived at work at 7:41 a.m. The claimant arrived late on 4/10/19 due to traffic.
13. The claimant arrived late for work on 4/11/19. She arrived at work at 7:33 a.m. The claimant arrived late on 4/11/19 because she could not find an available parking spot.
14. The claimant arrived late for work on 4/12/19. She arrived at work at 7:33 a.m. It is unknown why the claimant arrived late for work on 4/12/19.
15. The claimant arrived late for work on 4/15/19. She arrived at work at 8:12 a.m. It is unknown why the claimant arrived late for work on 4/15/19.
16. The claimant never told the employer why she arrived late for work on 4/10/19, 4/11/19, 4/12/19, and 4/15/19.
17. The employer discharged the claimant because she arrived late for work on 4/10/19, 4/11/19, 4/12/19, and 4/15/19.

#### Credibility Assessment:

In the hearing, the claimant testified that her anxiety contributed to late arrivals on and after 4/10/19. Given the totality of the testimony and evidence presented, the claimant’s testimony is rejected as not credible and it is concluded that anxiety did not cause or contribute to the claimant’s late arrivals on 4/10/19, 4/11/19, 4/12/19, and 4/15/19. In the hearing, the claimant was asked why she arrived late for work on 4/10/19, 4/11/19, 4/12/19, and 4/15/19. In her initial responses to these questions, the claimant did not testify that she arrived late due to anxiety. Instead, she testified that she arrived late on 4/10/19 due to traffic; that she arrived late on 4/11/19 because she could not find a parking spot; she did not remember why she arrived late on 4/12/19; and she did not remember why she arrived late on 4/15/19. She did not mention anxiety. The claimant testified that anxiety contributed to her late arrivals only later in the hearing. Furthermore, the claimant did not submit any evidence to show that her alleged anxiety caused her to arrive late for work or that she could not arrive on time due to anxiety. Specifically, the claimant did not submit any medical documentation.

#### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 agree with the review examiner's decision to deny benefits.

There is no dispute that the employer discharged the claimant following her tardiness on April 10, April 11, April 12, and April 15, 2019. 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. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In discharge cases, the employer must first show that the claimant engaged in misconduct. A claimant engages in misconduct if she violates a reasonable employer expectation. We think that the review examiner's conclusion on page 3 of his decision accurately and succinctly describes the evidence regarding the claimant's misconduct. He wrote:

The employer reasonably expected the claimant to arrive on time for scheduled shifts. The record compels a conclusion that the claimant understood this expectation because she signed the policy acknowledgement and because she received the attendance warning. The claimant understood the employer's expectation yet she nevertheless arrived late for work on 4/10/19, 4/11/19, 4/12/19, and 4/15/19.

This conclusion remains supported by the record. There is no dispute that the claimant had been warned several times about being late to work. Consolidated Findings of Fact ## 8 and 9; Exhibit 2, p. 2. She was late again from April 10 through April 15, 2019. The employer submitted a timecard report to show the claimant's tardiness on the four days in question. *See* Exhibit 3, pp. 3–6. Thus, the employer established a violation of its expectation that the claimant report to work on time.

However, a showing of misconduct alone is insufficient for the employer to carry its burden. In order to determine whether an employee's actions are disqualifying, 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 examine "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).

The claimant's knowledge of the employer's expectation and the reasonableness of that expectation are apparent from our prior discussion of the claimant's misconduct. The dispositive question here is whether any circumstances beyond the claimant's control mitigated her failure to arrive at work on time. See Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). The review examiner concluded that no mitigating circumstances were apparent from the record. The claimant's appeal to the Board specifically mentioned that she was "dealing with family issues" and that she "suffer[s] from anxiety." Our remand order in this matter requested that the review examiner take further evidence as to these potentially mitigating circumstances.

The review examiner found that the claimant was late to work on April 10 due to traffic and on April 11 due to her inability to find a parking space. Thus, her tardiness on those days may have been due to circumstances beyond her control. However, the final incident of tardiness on April 15, 2019, consisted of the claimant being almost forty-five minutes late to work. She offered no explanation or valid excuse for being so late. Consolidated Finding of Fact # 15. Although the claimant may have had understandable excuses for why she was late on April 10 and April 11, we may properly focus on the very last day of tardiness. After all, the employer did not discharge her following her tardiness on April 10 or April 11. It did so only after she was tardy on April 15. See Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627–629 (1984); Moore v. Dir. of Division of Employment Security, 390 Mass. 1004, 1005–1006 (1983) (rescript opinion).

In his credibility assessment, the review examiner specifically rejected the claimant's testimony that she was late to work due to her anxiety. His reasons for doing so are understandable and reasonable in relation to the evidence presented. Therefore, we decline to disturb his consolidated findings of fact. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Moreover, we note that it is unclear why the claimant, who testified that she had been diagnosed with anxiety prior to the start of her employment, was able to get to work some days on time and other days not on time. See Exhibit ##3, pp. 3–5.<sup>1</sup> The claimant did not present substantial and credible evidence to explain why April 15, 2019, was a particularly bad day for her. She also could not offer a reasonable explanation for why she did not request an adjustment to her schedule if it was so difficult for her to arrive at work by 7:30 a.m. The conclusion to be drawn from this evidence is that the claimant knew that she needed to report to work on time, but she failed to take reasonable steps to ensure that she could meet the employer's expectations. See Lycurgus, 391 Mass. at 628 (disqualifying a claimant who had "intentionally adopted a routine that inevitably would result in tardiness from time to time"). The record does not support a conclusion that something beyond her control prevented her from reporting to work on time on April 15, 2019.<sup>2</sup>

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<sup>1</sup> We do note, however, that the timecard records show that the claimant often arrived at work after 7:30 a.m., her scheduled start time.

<sup>2</sup> The claimant testified that her sister was nine months pregnant and her father was ill during her employment. These issues allegedly contributed to her anxiety. The review examiner did not make findings of fact about these

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 the employer carried its burden to show that the claimant was late to work repeatedly after she had been warned about this conduct and no mitigating circumstances prevented the claimant from fulfilling the employer's reasonable expectations.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning April 14, 2019, 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 – August 29, 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](http://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.

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family issues. However, because the review examiner concluded that anxiety was not a factor in the final instances of tardiness, it is clear that the review examiner also believed that the family issues did not affect the claimant's anxiety so much that it constituted a mitigating factor.