

**The claimant was on final warning and the review examiner credited the employer's testimony that she had instructed the claimant not to leave the store unattended. Held the discharge for going outside to smoke a cigarette when she was the only manager on duty was for deliberate misconduct in wilful disregard of the employer's interest.**

**Board of Review  
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**Issue ID: 0030 2954 92**

## **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 March 28, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 25, 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 29, 2019. 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 allow the claimant to provide testimony and evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 leaving the store she managed unattended to smoke a cigarette outside, constituted 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 consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant worked full-time as an assistant manager for the employer, a retail store, from October 31, 2018 through March 28, 2019.
2. The employer has a number of written policies that govern employee behavior. The exact language of the policies is unknown.
3. When only one manager is working, the employer expects that the manager will not leave the store unattended for any reason.
4. The employer has this expectation for loss prevention purposes, and to ensure that associates are not left without a manager to assist them.
5. The claimant was aware of the employer's policies and expectations as she received a binder of all policies at hire, and had had discussions with, and received warnings from, her manager.
6. Discipline for violations of the employer's various policies and expectations was up to, and including, termination.
7. On a number of occasions, the claimant's manager (the store manager – "SM") told the claimant that she was not to leave the building unattended while she went outside to smoke. The claimant was informed that she needed to make sure that she took any smoking breaks when another manager was still on duty.
8. On January 31, 2019, the claimant received a verbal warning about her performance.
9. On March 6, 2019, the claimant received a written warning about her attendance and performance.
10. On March 19, 2019, the claimant received a written "termination warning" for her continued failure to abide by attendance policies and work her scheduled shifts, and her failure to complete her assigned tasks. The claimant was informed that future violations would result in termination.
11. On March 27, 2019, the SM came to the store and saw the claimant come in through a side door. The claimant was the only manager on duty at the time.
12. The SM pulled the surveillance footage and saw the claimant leave the building through the side door at 18:45:47 and return at 18:48:27.
13. The SM questioned the claimant about why she had left the building despite having been told multiple times that when she is the only manager on duty she is never to leave the store.

14. The claimant initially said she was gathering carriages. The SM told the claimant that was a task that she should send an associate for because she was not supposed to leave the building unattended. When the SM informed the claimant that she had just viewed the surveillance footage, the claimant admitted she had gone outside to have a cigarette.
15. The SM then reached out to the human resources team and informed them of the situation and that she wanted to terminate the employee.
16. The claimant was terminated on March 28, 2019 for leaving the store unattended when she was the only manager, in violation of the employer policies and expectations.
17. The claimant filed a claim for unemployment benefits on April 18, 2019 with an effective date of March 31, 2019.
18. On April 25, 2019 the Department of Unemployment Assistance (DUA) issued a Notice of Approval. The employer appealed that determination.

#### Credibility Assessment:

During the remand telephone hearing, the claimant appeared and testified for the first time in this matter. The employer also appeared and testified. During the remand hearing, the claimant acknowledged that she had left the store in order to check for carriages, and that, while outside she also smoked a quick cigarette. The claimant further testified that she had been told by her manager to “be careful” when going out for cigarettes because it didn’t look good to the associates, and as a manager, she needed to set an example. The claimant testified that she had never been told not to go outside when she was the only manager on duty. The employer acknowledged that during her conversations with the claimant about smoking, she did tell her it was bad for morale when she took multiple smoking breaks, but that she also had told the claimant that she was not to go outside for smoking breaks when she was the only manager on duty because she was solely responsible for the building. The only disagreement the parties had was as to whether the employer told the claimant not to go outside when she was the only manager on duty. I find it more likely that the manager did, in fact, tell the claimant not to go outside to smoke when she was the only manager working. Thus, on the whole, I find the employer’s testimony more credible than the claimant’s. The Consolidated Findings of Facts [sic], therefore, remain the same as in the initial decision.

#### 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 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.

The review examiner denied benefits after analyzing the claimant's separation under 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, . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Solely on the basis of the employer's testimony at the initial hearing, the review examiner concluded the employer had met its burden. We remanded the case to take the claimant's testimony. After remand, we also conclude that the employer has met its burden.

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 "[T]ake 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).

Following remand, the review examiner's findings of fact remained unchanged, adding only a credibility assessment after hearing both parties' testimony. She found that the employer had an expectation that a manager will not leave the store unattended for any reason. This expectation is reasonable, since having a manager present in the store at all times helps loss prevention and ensures that staff are not left without a manager to assist them.

The review examiner also found that the claimant was aware of the expectation, having received copies of the employer's policies at hire and having had discussions with (and warnings from) her store manager. Specifically, the review examiner found that the store manager told the claimant that she was not to leave the building unattended while she went outside to smoke, and that she was to make sure she took any smoking breaks while another manager was on duty.

The claimant received a verbal warning for her performance on January 31, 2019, a written warning for her attendance and performance on March 6, 2019, and a final "termination warning" for attendance issues and failure to complete assigned tasks. The final warning cautioned that any future violations would result in termination.

The review examiner found that the store manager came to the store on March 27, 2019, and saw the claimant coming in through a side door. The claimant was the only manager on duty at the

time. The manager reviewed surveillance footage and saw the claimant had left the building at 18:45:47 and returned at 18:48:27.

The store manager asked the claimant why she had left the building, despite having been told multiple times that she was never to leave the store when she was the only manager on duty. The claimant initially claimed that she was gathering carriages from the parking lot, but when the store manager said she had just reviewed the surveillance video, the claimant admitted she had gone outside to smoke a cigarette. The employer discharged the claimant on March 28, 2019, for leaving the store unattended while she was the only manager on duty, in violation of the employer's expectation.

The claimant claimed on remand that the store manager had never told her she could not leave the store unattended, only to "be careful" because it did not look good to her subordinates, and she needed to set a good example as a manager. The review examiner provided a credibility assessment, noting that the claimant's and the store manager's testimony only differed on one point: whether the store manager told the claimant not to go outside for smoking breaks when she was the only manager on duty. The review examiner found that it was more likely that the manager had told the claimant not to go outside when she was the only manager on duty, and accepted her testimony as more credible than the claimant's. Such 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 believe the assessment is reasonable in relation to the evidence presented.

The review examiner found that the claimant knew the employer expected her to remain in the store when she was the only manager on duty, and that she was on final warning, which meant that any further infractions would result in discharge. It is undisputed that she had left the store unattended when the store manager came to the store and the claimant has not presented any mitigating circumstances for doing so. The claimant's conscious decision to leave the store to smoke a cigarette evinces the requisite state of mind to support disqualification from benefits.

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).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending March 30, 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 - September 25, 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](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.

JPC/rh