The employer's expectation that employees sign disciplinary warnings was reasonable. The claimant's refusal to do so was deliberate misconduct, where the warning provided a space for her to protest the merits of the discipline.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated from her position with the employer on May 6, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 30, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 17, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant quit her position after being unreasonably reprimanded by her employer for a no-call/no-show from work on April 30, 2019, and, therefore, left work voluntarily with good cause attributable to the employer pursuant to 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 make subsidiary findings from the record. 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 to award benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant refused to sign a written warning even after the employer told her she would be removed from the schedule until she signed it.

Findings of Fact

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

1. The claimant worked as a Security Guard for the employer, a Security Company, from May 1, 2018, through May 6, 2019, when she was separated from her employment.

2. The claimant worked a full-time schedule of hours for the employer.

3. The employer expects that if an employee is unable to work a scheduled shift that the employer [sic] directly contacts her direct supervisor by telephone to inform the supervisor of the absence.

4. During the claimant's tenure with the employer, the claimant had sent text messages to the account manager (her supervisor's supervisor) and had asked for days off work. The claimant was never told she could not do this nor was she disciplined for doing so.

5. On October 31, 2018, the claimant signed a verbal warning for absenteeism and tardiness. Under employee comments the claimant attached notes from her doctors.

6. On November 8, 2018, the employer gave the claimant a written warning. The employer informed the claimant that she was required to sign the warning even if she did not agree with it. The claimant refused to sign the warning.

7. Although the claimant refused to sign the warning, she was allowed to continue to work for the employer.

8. The claimant spoke with the account manager's supervisor about not wanting to sign the warning. The claimant was told that she did not have to sign the warning and he wrote on the warning "officer refused to sign".

9. When the account manager asked his superior why the claimant did not have to sign the warning, he was told to "drop it".

10. During the spring of 2019, the claimant was experiencing a high-risk pregnancy.

11. The employer was aware of the claimant's pregnancy.

12. The claimant was scheduled to work on April 30, 2019, at 7 a.m.

13. During the early morning hours of April 30, 2019, the claimant began experiencing severe abdominal pain and spotting.

14. The claimant's family called 911 and the claimant was taken to the hospital by ambulance.

15. At approximately 8 a.m., the claimant asked her boyfriend to send the account manager a text message from her phone, letting him know that she would not be at work that day because she was in the hospital and that she would try to call him when she got out of the hospital.

16. At some point on April 30, 2019, the account manager read the text message and thereafter was aware that the claimant had not reported to work because she was taken by ambulance to the hospital.

17. The claimant was very distraught during her time at the hospital because she was very worried about her unborn baby.

18. The claimant was discharged at approximately 11 a.m. with instructions to go rest and follow up with her gynecologist immediately.

19. As soon as the claimant was discharged, she called the account manager's cell phone. There was no answer. The claimant did not leave a message.

20. After leaving the hospital, the claimant went right home to rest because she was still in a lot of pain.

21. The claimant was scheduled to work on May 1, 2019, May 2, 2019, and May 3, 2019.

22. The claimant called her direct supervisor on May 1, 2019 and informed him that due to last-minute emergency medical appointments that she would not be able to work her shifts on May 1, 2019, May 2, 2019, and May 3, 2019.

23. The claimant was next scheduled to work on May 6, 2019.

24. The claimant reported to work on May 6, 2019.

25. On May 6, 2019, the claimant's direct supervisor presented the claimant with a written warning for being a no-call/no-show on April 30, 2019. The claimant was told that she was required to sign the warning. The claimant refused to sign the warning because she thought it was unreasonable to be written up for a no-call/no-show when she had a medical emergency and she actually had attempted to contact the employer to inform the employer she would not be able to work her shift that day.

26. Later on May 6, 2019, the account manager met with the claimant. The account manager told the claimant that she had to sign the warning. The claimant informed him that she was not going to sign the warning. The claimant was told that until she signed the warning, she would be taken off the schedule. The claimant continued to refuse to sign the warning because she felt it was an unreasonable warning.

27. I do not credit the employer witness's testimony at 54:49 during the second hearing that the purpose of the Counseling and Corrective Action Report was to show that there was a discussion with the employee about whatever the issue is. I do not credit this because this testimony is referring to exhibit #9 and the document has that heading, but there is much more to the document and the document speaks for itself. The document indicates that exhibit #9 is a second written warning. It also states twice that if another offense of this kind or others occur, she is subject to further disciplinary action, up to and including termination. The document also states "[i]f he/she refuses to sign, document the refusal and consult Human Resources."

28. I do credit the employer witness's testimony at 40 and 55:42 during the second hearing that the employee's signature on the Counseling and Corrective Action Report only signifies that the information was given to the employee. Again, exhibit # 9 speaks for itself. Under part D "employee comments" it states "the absence of any statement on the part of the employee indicates his/her agreement with the report as stated." The document explicitly states that without anything written in further comments that such a document will be interpreted by the employer as the claimant agreeing with its contents.

29. I do not credit the employer witness's testimony at 40 during the second hearing that he met with the claimant around 3 p.m. on May 6, 2019, but I do not credit him testifying that the Counseling and Corrective Action Report was a counseling form that she needed to sign but could disagree with. Again, the document itself (exhibit # 9) was a *second written warning*. I do think that the witness told the claimant that she had to sign the document, even though the document itself states that if there is a refusal to sign, the employer should consult Human Resources. I also do not credit the testimony because the claimant testified that he did not say that and he merely kept telling her that she *had* to sign it, even though the document and her history with the employer indicated otherwise.

30. The claimant was instructed by her Account Manager to leave her shift early on May 6, 2019, at approximately 3:30 p.m. The claimant was told to leave her shift directly by the Account Manager.

31. The claimant never signed the warning.

32. The claimant did not think that she had done anything wrong and did not think she deserved to be disciplined.

33. The claimant never worked for the employer again.

34. Had the employer not given the claimant the warning for allegedly being a no-call/no-show on April 30, 2019, the claimant would have continued to work for the employer.

35. The claimant filed for unemployment benefits and received an effective date of May 5, 2019.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding of Fact # 29 in its entirety, as the first sentence is inconsistent with Consolidated Finding of Fact # 26 and not supported by the record, and the remaining finding does not make logical sense. We further reject Consolidated Finding of Fact # 32 in its entirety, as it is unsupported by substantial evidence. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant voluntarily left her employment with good cause attributable to the employer. Rather, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant was discharged from her employment for refusing to sign a written warning.

In deciding whether the claimant voluntarily quit employment or was discharged, we rely specifically on Consolidated Findings of Fact ## 26, 30, 31, and 33. The review examiner found that, on May 6, 2019, the employer gave the claimant a clear directive to sign a written warning regarding a prior attendance infraction. The claimant refused to sign the written warning and was taken off the schedule until she complied, and she never returned to work. In short, the claimant stopped working when the employer took her off the schedule. In our view, this is a discharge.

In concluding that the claimant was discharged, her qualification for benefits is appropriately analyzed under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part:

> [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 the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. *See* Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

While the Corrective Active Action Report (Exhibit 9) shows that the claimant was being disciplined for a no-call/no-show on April 30, 2019, we need not decide whether she did or did not engage in the behavior described, because she was not terminated for that conduct. She was ultimately discharged for refusing to sign the warning. In order to meet its burden under G.L. c. 151A, § 25(e)(2), the employer must show that the claimant's refusal to sign the warning constituted a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest.

With respect to a knowing violation, the record suggests that the employer maintains an employee handbook.[1] However, the employer failed to produce a copy of the handbook or any relevant policies outlining their reasons for terminating the claimant. Without that evidence, we cannot conclude that the employer discharged the claimant for a knowing violation of a reasonable and uniformly enforced policy.

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 met with her direct supervisor on May 6, 2019, she was presented with the written warning and was told that she was required to sign it. Because the claimant disputed the underlying infraction and thought it unreasonable, she refused. Her supervisor further instructed her that, until she signed the warning, she would be removed from the schedule. *See* Consolidated Finding # 26. It is evident from this finding that the claimant was aware that the employer expected her to sign the warning or she would not be able to work.

There is no suggestion that she misconstrued the directive, or that her refusal was due to accident or a lapse in memory. Thus, by her refusal to sign the warning, we believe the claimant acted deliberately.

While it remains undisputed that the claimant refused to comply with a directive to sign her disciplinary warning, a principle question here is whether that directive or expectation was reasonable. In prior cases, we have held that an employer's policy which requires employees to acknowledge receipt of disciplinary warnings, with a signature, is reasonable. *See* Board of Review Decisions 0025 5481 67 (Feb. 27, 2019) and 0016 2072 25 (Nov. 25, 2015)[2]. The business purpose for the policy is obvious; in various circumstances including proceedings before the DUA, an employer may be called upon to prove that a discharged employee was apprised of an expectation or afforded rights under a progressive discipline policy. Written acknowledgement by the employee is often the best evidence of that critical point. In addition, we note here that the Counseling and Corrective Action Report issued by the employer had an "employee comments" section for the claimant to add remarks. Thus, the claimant had a means

[1] *See* Exhibit 17.

[2] Board of Review Decision 0016 2072 25 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

to dispute the issued warning. The employer's directive for the claimant to sign the written warning was reasonable.

Although it is undisputed that the claimant disagreed with the factual allegations contained in the form and may have had a legitimate defense to the underlying infraction, it does not mitigate her refusal to sign the document, especially where the form provided a space for her response. Absent any mitigating circumstances, and we find none, we believe she acted in wilful disregard of the employer's interest, which was to document her receipt of a disciplinary warning.

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 original decision is reversed. The claimant is denied benefits for the week beginning May 5, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION – January 23, 2020

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. declines to sign the majority opinion.

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