

After a final warning for tardiness and absenteeism, the claimant was absent once more as a result of mitigating circumstances. She was up all night, unable to end a relationship with a boyfriend whom she feared, and which was placing her job in jeopardy. Therefore, the claimant is entitled to benefits.

**Board of Review
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Issue ID: 0031 4269 81

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 reverse.

The claimant was discharged from her position with the employer on June 21, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 31, 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 October 17, 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 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 to clarify the reason for the claimant's continuing tardiness and absenteeism. 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, which concluded that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, where the totality of the evidence in the record after remand establishes that mitigating circumstances prevented the claimant from arriving to work on time.

Findings of Fact

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

1. The claimant worked as a business office worker for the employer, a surgical center. The claimant began work for the employer in November 2018.
2. The claimant worked Monday through Friday from 8:30 a.m. to 5 p.m. She earned \$17 per hour.
3. The employer maintains an employee handbook which includes a Work Schedule section. The section states in part: “you are expected to be in your work area and ready to work at the beginning of your assigned daily work hours...” The section also states: “If your [sic] are unable to report to work or if you arrive late, please call your manager immediately...”
4. When the claimant was hired, she electronically acknowledged receipt of the employee handbook.
5. The claimant often fought with her boyfriend. The claimant’s boyfriend yelled at her and blamed her. He shared with her about his physically assaulting two prior girlfriends. He also shared with her that he used to be a member of a gang and his job was to beat people up. The claimant was afraid her boyfriend would assault her. The claimant’s boyfriend did not assault her.
6. They would often fight late into the night. The claimant drank alcohol to cope with her boyfriend. This caused the claimant to miss sleep and wake-up hungover. Their arguments resulted in her frequent tardiness to work.
7. Over the course of her employment, the claimant was tardy to work 68 times.
8. On May 20, 2019 the claimant’s supervisor, the Business Office Coordinator (Coordinator), verbally counselled her for tardiness. The claimant told her that her tardiness was due to issues with her boyfriend. The claimant told her that her boyfriend had no job and did not drive. She told her that her boyfriend worked at day labor jobs. She did not tell the Coordinator about her fear of her boyfriend. The Coordinator had a poor opinion of the claimant’s boyfriend.
9. The claimant also told a coworker that she had issues with her boyfriend and that she drank to cope with him.
10. The claimant continued to be tardy to work.
11. On June 3, 2019, the Coordinator met with the claimant about her tardiness. She gave her a Verbal Counseling Summary which the claimant signed.
12. On June 6, 2019, the claimant did not show up for work until 11 a.m. She did not call the employer to inform them she was going to be late.

13. On June 7, 2019, the Coordinator met with the claimant and gave her a Written Warning Summary. She told the claimant her tardiness could not continue. The Coordinator also counseled the claimant that she needed to call if she was going to miss work or be tardy. She asked the claimant if there was any accommodation the employer could make such as changing her hours. The claimant did not request an accommodation.
14. The claimant decided she no longer wanted her relationship with her boyfriend to put her job in jeopardy. She decided to ask her boyfriend to leave her home. On June 19, 2019, she left a note for her boyfriend asking him to leave. She left her home at 6:30 p.m. At that time, her boyfriend was not there.
15. The claimant returned to her home at 9:30 p.m. and her boyfriend was there. The claimant and her boyfriend fought. The claimant did not get to bed until approximately 6 a.m. on June 20, 2019. She set two alarms to wake her in time to leave her home by 7:45 a.m. The alarms did not wake her.
16. The Coordinator attempted to reach the claimant by call and text but she did not respond.
17. The claimant woke up at approximately 1 p.m. and called a coworker. She told the coworker she was going to take a sick day. The coworker asked the claimant if she wanted to speak with the Coordinator. The claimant said she did not.
18. The claimant's boyfriend moved out.
19. On June 21, 2019, the Coordinator and the employer Administrator met with the claimant. They discussed her absence and tardiness. The claimant told them she had asked her boyfriend to leave and that it would not happen again. She told them she had gotten rid of the problem. The Administrator told her that he thought there was more to it than that. The Administrator discharged the claimant.
20. In July, 2019, the claimant and her boyfriend reconciled and he moved back into her home. The claimant began seeing a therapist in September, 2019. She and her boyfriend now get along better.
21. The claimant did not contact any advocate or authority during the time she was afraid of her boyfriend.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. However, as discussed more fully below, we reject 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. . . .

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). Following the initial hearing, the review examiner concluded that the employer had carried its burden. On review of the record following appeal, the Board remanded the matter back to the review examiner to take additional evidence concerning the claimant's separation from employment and, specifically, her reasons for being absent on her last day of employment.

Although the review examiner found that the employer had a policy prohibiting tardiness, and that the claimant was aware of it, there are no findings about the uniform enforcement of this policy. Thus, there are no findings sufficient to conclude that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer.

Our analysis, therefore, shifts to whether the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. From the consolidated findings, there appears to be no question that the claimant had recurrent issues with tardiness and calling in throughout her time working for the employer. *See* Consolidated Findings of Fact ## 7, 8, 10, 12. On June 7, 2019, the Business Office Coordinator issued the claimant a final written warning for attendance issues, reminded the claimant that she was required to contact her supervisor if she was going to be tardy or absent, and informed the claimant that her attendance issues could not continue. Consolidated Finding of Fact # 13. On June 20, 2019, the claimant missed work, and failed to notify her supervisor that she would be absent. Consolidated Finding of Fact # 15. The employer, therefore, has established that the claimant engaged in misconduct on June 20, 2019.

A showing of misconduct alone, however, will not disqualify the claimant from receiving unemployment benefits. In order for the claimant to be denied benefits, the employer must also show that the misconduct was deliberate and in wilful disregard of the employer's interest. Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 779 (1982) (citations omitted). 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). 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.” Id.

The claimant’s unexcused absence on June 20, 2019, cannot be considered deliberate misconduct in wilful disregard of the employer’s interest if it was due to factors over which the claimant had little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control). Since it was the June 20, 2019, absence that triggered the claimant’s discharge, we consider whether this absence was due to circumstances over which the claimant had little control. *See Nantucket College Hospital v. Dir. of Division of Employment Security*, 388 Mass. 1006 (1993) (rescript opinion) (where discharge was for cumulative deficiencies in the claimant’s work performance, but the final incident was attributable to her uncontrollable emotional and physical illness, the claimant may not be disqualified for deliberate misconduct in wilful disregard of the employer’s interest).

On June 19, 2019, the claimant wrote her boyfriend a note instructing him to move out and then left her home at 6:30 p.m. Consolidated Finding # 14. She thought that he would find the note and leave before she returned.¹ However, he was still there when she returned at 9:30 p.m. Consolidated Findings of Fact # 15. They fought for much of the night, and the claimant did not get to bed until approximately 6:00 a.m. Id. As a result, she slept through the two alarms she had set. Id. It is evident that the claimant’s absence was not due to her decision to disregard the employer’s attendance expectations, but rather because she was trying to end a relationship with a boyfriend whom she feared, and which was placing her job in jeopardy. That he refused to leave and kept her up all night was apparently something over which she had little control. Under these circumstances, we believe the claimant’s unexcused absence on June 20, 2019, was due to mitigating circumstances and not a deliberate act in wilful disregard of the employer’s interest.

We note that the record also suggests that the claimant’s tardiness and absenteeism during the time she worked for the employer was due to circumstances resulting from domestic violence. *See G.L. c. 151A § 25(e)*, paragraph 2. However, we need not decide this issue, as the record shows the claimant’s absence on June 20, 2019, was due to mitigating circumstances.

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to show that the claimant knowingly violated a uniformly enforced policy or engaged in deliberate misconduct in wilful disregard of the employer’s interest within the meaning of G.L. c. 151A, § 25(e)(2).

¹ This portion of the claimant’s testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); *Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training*, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 23, 2019 and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – February 19, 2020



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

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.

LSW/rh