

Claimant recreation assistant, who had been warned she would be fired if she continued to complain about a television for residents with dementia, was discharged for deliberate misconduct in wilful disregard of the employer's interest, after she insubordinately directed a resident's family member to complain to management about the television issue.

**Board of Review
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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 January 6, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 12, 2020. 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 July 3, 2020. 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 present 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 was discharged for deliberate misconduct in wilful disregard of the employer's interest after the claimant directed a resident's family member to make a request of the facility administrator after the claimant had been warned to wait, 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 recreation assistant for the employer's rehabilitation and health care center from 8/2/18 until 1/5/20. The claimant worked from 7:30 a.m. until 3:30 p.m. on Monday through Friday and was paid \$15.30 per hour.
2. On 8/15/19, the employer issued the claimant a written disciplinary warning for exhibiting disrespectful behavior toward management. The employer observed that during the term of her employment, the claimant frequently exhibited performance that was unprofessional and that she engaged in arguments with members of the management team.
3. On 9/25/19, the employer issued the claimant a final disciplinary warning for insubordination due to failing to wear a uniform.
4. After the employer replaced an older television with a new set in the day room where the claimant worked, the claimant found that she was unable to access programs or to play music, as she had on the old television. The claimant asked her supervisor and other members of management repeatedly to return the old television to the day room. The supervisor told the claimant that the new television was up. The claimant was aware that the older television had a broken volume button on it. The supervisor told the claimant that the employer would purchase a subscription to Netflix, a premium channel service, for use on the television and this would allow her to play music and access the programs she was seeking. The employer did not previously subscribe to any premium channel services.
5. After being told by her supervisor that the employer would subscribe to Netflix, the claimant spoke with the Human Resources Coordinator about the television and the promise to obtain Netflix. The Human Resources Coordinator told the claimant that she was waiting on a replacement credit card for the facility, which would be used to pay for the subscription, and in the meantime, she would discuss the matter with the claimant's supervisor. The Human Resources Coordinator was awaiting a replacement card because the facility's credit card had been compromised. After being told by the Human Resources Coordinator that she would speak with the claimant's supervisor, the claimant approached the Administrator of the facility about the television and Netflix situation. The Administrator told the claimant that the facility could subscribe to the service; however, she would need to wait until the facility received a new credit card.
6. After the supervisor learned that the claimant went over her head to the Human Resources staff and the Administrator about the television service, the supervisor spoke with the claimant. The supervisor told the claimant that she needed to wait for the employer to obtain the card and subscribe to Netflix, and that she would be fired if she continued talking to others about the television. The supervisor did not specifically tell the claimant to refrain from speaking with family members about the television service.

7. On or about 1/5/20, the Administrator received a note from a resident's family member. The note read: "(Administrator's Name) – Hope you are well. Can you please buy (Claimant's Name) an adapter so she can use the dvd/vcr. I have some tapes for her! Thanks, (Name)...P.S. Don't yell at (Claimant's Name)!" The claimant spoke with the family member about the television and directed the family member to speak with the Administrator about it.
8. The Administrator determined that the claimant's employment would be terminated because her work performance was not up to standards and she was disrespectful to management by involving family members in her request for television services, after being told not to talk about it anymore.
9. On or about 1/6/20, the claimant was notified by her supervisor and the Administrator that her employment was being terminated due to her previous write-ups and for speaking with families about the tv service.
10. The Administrator did not discharge 10 Black residents within 30 days.
11. The claimant filed an initial claim for unemployment insurance benefits, effective 2/9/20.
12. On 4/21/20, the claimant completed a DUA fact finding questionnaire in which she wrote: "I would tell them that I could not speak to them about that because that's what I was told to do." The claimant also wrote that she told family members: "...to discuss with my boss and if they couldn't talk with (Supervisor's Name) to bring that up to the administrator." The claimant also wrote that the Administrator discharged 10 Black residents within 30 days.
13. On 3/12/20, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits under Section 25(e)(2) of the law.
14. On 3/25/20, the employer appealed the Notice of Approval.

Credibility Assessment:

The overall credibility of the claimant's testimony was diminished by inconsistencies and unsupported statements. For example, the claimant informed the DUA that the employer's Administrator discharged 10 African American employees within a 30-day period. The claimant conceded during the hearing that she did not know whether 10 African American employees had been fired. The claimant testified that she had no knowledge of any employees being fired but heard rumors of people being discharged. Thus, the claimant knowingly provided the DUA information that she knew was not truthful.

The claimant testified during the hearing that she did not request the employer subscribe to Netflix. The claimant testified that she requested "every day for six months" that the employer bring back an old television to the room where she

worked. The claimant testified that the word Netflix would never come out of her mouth. Yet, the claimant contradicted this testimony by confirming that the employer told her it intended to subscribe to the service and that it would allow her to play music. The claimant's testimony on this point supports the employer's version of events. Further, it is more likely than not that the claimant would have pursued the subscription to Netflix, given that she was informed that having the service would allow her to access the services she desired. Further, the claimant confirmed in her direct testimony that she repeatedly discussed the replacement of the old television with people throughout the facility. This supports the employer's position that the claimant's behavior necessitated her being told to stop talking about it or risk losing her job.

It is also worth noting that the claimant testified to having told a family member that she could not discuss the situation with the television and that the family member should speak with her supervisor. The claimant denied communicating to the family member that the employer would be dissatisfied with the claimant, if it learned that she was involved with the family member's request. The claimant's testimony was contradicted by her witness, who testified to having heard the claimant tell the family member to go to the Administrator, not to the claimant's immediate supervisor. The witness steadfastly denied that the claimant told the family member to go to the supervisor. In light of this, and the statement written by the family member, the weight the evidence supports a conclusion that the claimant persisted in seeking additional television services by having a family member pursue the issue with the Administrator because she was aware that doing so herself would result in termination.

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.

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 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 either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Solely on the basis of the employer's testimony at the initial hearing, the review examiner concluded the employer had met its burden. After remanding the case in order to take the claimant's testimony, we also conclude that the employer has met its burden.

The review examiner found that the employer had observed that the claimant frequently exhibited conduct that was unprofessional, and that she engaged in arguments with management. On August 15, 2019, the claimant had been issued a written warning for being disrespectful toward management. *See Consolidated Finding # 2*. On September 25, 2019, the claimant received a final warning for insubordination after she failed to wear a uniform. *See Consolidated Finding # 3*.

At some point in 2019, the employer replaced an older television set with a new one in the day room where the claimant worked. The claimant was no longer able to access programs or music as she previously had with the old television and asked her supervisor and other members of the management team to return the old television to the day room. The supervisor told the claimant that the employer would purchase a Netflix subscription that would allow her to play the music and programs she was seeking. The employer had not previously subscribed to any premium television services. *See Consolidated Finding # 4*.

After the supervisor told the claimant they would subscribe to Netflix, the claimant approached the human resources coordinator (HRC) about her issues with the television. The HRC told the claimant that she was waiting for a replacement credit card to be issued before she could subscribe to Netflix and would discuss the matter further with the claimant's supervisor. After being told the HRC would talk to her supervisor, the claimant complained to the facility's administrator about the television and Netflix. *See Consolidated Finding # 5*.

When the supervisor learned the claimant had gone to human resources and to the administrator about the television, she told the claimant that she needed to wait for the employer to secure the new credit card and subscribe to Netflix, and she cautioned the claimant that she would be fired if she continued to talk to others about the television. *See Consolidated Finding # 6*.

On or about January 5, 2020, a resident's family member left a note for the administrator, asking that she provide the claimant with an adapter to enable her to use a DVD/VCR machine, adding at the end, "P.S. Don't yell at [claimant's name]!" *See Hearings Exhibit # 3*. The review examiner found that the claimant had directed the family member to go to the administrator about the television. *See Consolidated Finding # 7*.

On January 6, 2020, the employer discharged the claimant for enlisting a resident's family member to help with her request for television services, after being told not to raise the subject any further.

In order to determine whether the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest, we must consider her 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).

Here, the review examiner found that the claimant had received warnings for insubordination, including a final warning. After the claimant made numerous complaints to the employer's management about the new television in the day room, her supervisor explicitly cautioned her that she would be fired if she continued to talk to others about the television. Under these circumstances, the expectation is reasonable.

In spite of this clear warning that further discussion about the television would lead to her discharge, the claimant nevertheless spoke to a resident's family member about the television and directed her to approach the administrator about the issue. The claimant's directive and her unwillingness to wait for the employer to process the request through its channels were, in themselves, insubordinate.

The review examiner provided a detailed credibility assessment citing her reasons for finding the claimant's testimony "diminished by inconsistencies and unsupported statements." Most notably, where the claimant claimed she told the resident's family member that she could not discuss television issues with her and that she directed the family member to her supervisor, the review examiner rejected this testimony after the claimant's witness testified that she heard the claimant tell the family member to go to the administrator. The review examiner also noted that the note from the family member (imploping the administrator not to "yell" at the claimant) further supported the conclusion that the claimant persisted in seeking additional television services by using the family member as a proxy, knowing that openly doing so herself would result in termination. 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). In light of the evidence presented, we believe her assessment is reasonable.

Since the claimant denied raising the matter of televisions with the family member and instructing the family member to bring the issue to the administrator, she has not offered any mitigating circumstances for her conduct. Thus, the employer has met its burden to demonstrate 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 January 11, 2020, 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 25, 2020

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
(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.

JPCA/rh