

Although the employer tolerated occasional use of cell phones during work hours, the claimant's use was excessive. Held the employer terminated her employment for deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0033 8945 82

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 February 14, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 3, 2020. The employer 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 denied benefits in a decision rendered on November 6, 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, 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 make subsidiary findings about the circumstances leading up to the claimant's discharge. 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 deliberately used her cell phone while at work 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 for the instant employer as an Administrative Assistant from November 2018 until her separation on 2/14/2020.
2. The employer has a company policy titled Cell Phone Policy which states employees must restrict personal call to non-working hours such as lunch

breaks and that employees should not send or receive text messages while working.

3. Although the employer has such policy, the employer does not mind occasional use by employees such as once a week.
4. The claimant was provided this policy in writing in the company handbook at the time of hire.
5. The employer knew that other employees in the company used their cell phones during working hours, however prior to the claimant's discharge, he did not enforce the cell phone policy with other employees since there [sic] use was occasional.
6. In 2019, the Company President began observing the claimant on her personal cell phone making calls during work hours for 5 to 30 minutes in duration.
7. The Company President met with the claimant issuing a verbal warning on 3/4/2019, informing her to refrain from cell phone use and to commit to work.
8. The claimant told the Company President that she was using her cell phone to communicate with her family.
9. The Company President then observed the claimant using her cell phone again daily to make phone calls during work and again warned the claimant to refrain from cell phone use and to commit to work.
10. The claimant told the Company President that she had been using the phone to communicate with family members.
11. The Company President warned the claimant several times verbally in person between 2019 and 2020 about excessive cell phone use. The Company President does not [re-]call the exact several dates.
12. During one of the verbal warnings, the Company President told the claimant that she was placing her job in jeopardy.
13. On 1/24/2020, the Company President discovered real estate applications on the claimant's work computer which were not authorized by the employer to be on the computer.
14. The Company President told the claimant in writing that such software distracted her from work and that no cell phones, personal devices or social media was allowed during work.
15. The Company President met with the claimant in-person on 1/30/2020 because [sic] claimant asked to reduce her hours from 40 hours a week to 30 hours a

week with benefits. The Company President denied the request because 30-hour employees do not receive benefits as do 40-hour employees. The claimant wanted to remain employed with benefits.

16. The Company President did not warn her about cell phone use on 1/30/2020.
17. On 2/3/2020, the Company President issued the claimant a final written warning by email which summarized the verbal discussion on 1/24/2020 and stated in writing that no cell phones, personal devices or social media was allowed during work. The warning did not reference the employer's cell phone use policy.
18. The claimant did not receive the email from the Company President until 2/10/2020. The claimant had been out of work on vacation until returning on 2/10/2020.
19. The claimant did not speak with the Company President after receiving the email and the claimant did not make any attempt to speak with the Company President after receiving the email on 2/10/2020[0].
20. The Company President also met with the claimant in-person after sending the written email.
21. In the past, the company president observed the claimant on her personal cell phone for 15-30 minutes at a time while working and that personal cell phone use was prohibited during work hours [sic].
22. The company president was concerned that the claimant's attention was being taken away from work.
23. On 2/13/2020, the company president was at a meeting and intermittently viewed the surveillance video footage for an approximate 1 to 1 ½ hour period.
24. The Company President remotely viewed the surveillance during the meeting multiple times and each [sic] he looked during the 1 ½ hour period, he could view the claimant typing on her cell phone. The Company President does not recall exactly how many times he viewed the surveillance video during the meeting.
25. The company president took a screen shot of the claimant typing in her personal cell phone while at her work computer.
26. The claimant was focused on her personal cell phone and not performing work.
27. The claimant used her cell phone during work hours on 2/13/2020 to send text messages to check in on her husband and daughter who were sick after [sic]. The claimant wanted to know how they were feeling.

28. No other circumstances prompted the claimant to send the text messages.
29. The claimant does not recall how much time she spent texting on 2/13/2020. The claimant does not recall how many text messages she sent.
30. The Company President decided to terminate the claimant for her continued cell phone during work hours [sic]. He did not terminate the claimant for any other reason.
31. The Company President waited until the next day, 2/14/2020, to terminate the claimant because he was out of state during the meeting from the prior day.
32. On 2/14/2020, the company president called the claimant into his office and informed her that she was terminated for using her personal cell phone during work hours while for an hour period while he was in a meeting [sic].
33. The claimant did not consider her actions to be using her cell phone since she did not actually talk and only used it to send text messages and listen to music while working.
34. The claimant did not tell the Company President that she had not used her cell phone.
35. The claimant did not tell the owner that she used her cell phone to listen to music or text her husband and daughter.
36. The claimant did not dispute her termination in any manner.
37. The claimant provided a fact funding statement to the DUA stating that her cell phone use was listening to music. The claimant did not inform the DUA that her cell phone use was texting husband and daughter.

Credibility Assessments:

The claimant testimony at the initial hearing and her statement on appeal, that everyone else who worked for the company, including the company president, used their cell phones during working hours without consequence, is accepted as credible since the Company President testified that he did not mind occasional cell phone use.

The Company President's testimony that he observed the claimant using her personal cell phone making calls during work hours for 5 to 30 minutes in duration is accepted as credible since the claimant testified that she and other [sic] used her cell phone during work hours in the past.

The Company President's testimony, that the consequences of violating the company's written cell phone policy usually involved a couple of verbal warnings,

followed by a meeting, another warning, and termination, but also testified that he did not mind occasional cell phone usage, is accepted as credible since the claimant was issued prior verbal warnings in 2019 for cell phone use.

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. Consolidated Findings ## 19 and 20 are inconsistent with respect to whether or not the claimant and Company President met or spoke after the Company President sent the February 3, 2020, email. However, this inconsistency is not material to our decision. In adopting the remaining findings, we deem 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 believe the consolidated findings support the review examiner's 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

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

In this case, the claimant was fired for using her cell phone during work hours. *See* Consolidated Finding # 32. The employer's stated policy is to restrict personal cell phone calls to non-working hours and not to send or receive text messages while working. *See* Consolidated Finding # 2. However, the review examiner found that the employer tolerates occasional use by employees, *e.g.*, once a week, and that the employer did not enforce this cell phone policy with other employees. *See* Consolidated Findings ## 3 and 5. Based upon these findings, we cannot conclude that the claimant knowingly violated a reasonable and *uniformly* enforced rule or policy of the employer. Alternatively, we consider whether, pursuant to G.L. c. 151A, § 25(e)(2), the employer has established that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As stated, the Company President tolerated occasional use of cell phones during work hours. He terminated the claimant's employment because he felt her use was excessive. *See Consolidated Finding # 11*. Specifically, he had observed the claimant using her phone for up to 30 minutes at a time on numerous occasions. *See Consolidated Findings ## 6, 21, and 23-24*. 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).

There is no question that the claimant was well aware that the employer expected her not to spend working time using her cell phone, as he had verbally warned her not to on multiple occasions between March 4, 2019 and early 2020, and he told her that continuing to do so would place her job in jeopardy. *See Consolidated Findings ## 6-12*. This was communicated in writing in late January, 2020, and again in a final written warning, which the claimant received on February 10, 2020. *See Consolidated Findings ## 13-14, and 17-18*. These warnings were motivated by a concern that her cell phone use was interfering with work. *See Consolidated Finding # 22*. The employer's business concern and expectation to refrain from excessive cell phone use during work hours are reasonable.

Yet, three days after receiving her final written warning, the claimant was observed using her cell phone to send text messages multiple times over a period of an hour or hour and a half, rather than focusing on her work. *See Consolidated Findings ## 23-27*. Since the claimant admits that she did so, we are satisfied that her conduct was deliberate. She seems to suggest that because she was texting to check on family members who were ill, there was nothing wrong with her behavior, or that it was somehow excusable. *See Consolidated Finding # 27*. We disagree.

Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987). The claimant was on warning that her job was in jeopardy for *excessively* using her cell phone during work time. On February 13, 2020, she did not simply check in on her husband and daughter. She was observed repeatedly texting over a 1-1 ½ hour period. Nothing in the record demonstrates circumstances beyond the claimant's control that prevented her from postponing these communications until her break. The only reasonable inference is that, with the Company President away at a meeting, she felt she could freely text on her cell phone in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has met its burden to show that it discharged the claimant 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 beginning February 23, 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 - May 21, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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.

AB/rh