

The claimant was discharged after not attending an investigatory meeting in person. The employer had denied her request to participate remotely due to unexpected childcare issues. As the employer failed to present a reasonable justification for expecting the claimant to attend the meeting in person, it did not show that the claimant was discharged for intentionally disregarding a reasonable directive. Even if it had shown it was reasonable, the claimant's lack of childcare presented mitigating circumstances and, thus, her failure to attend was not in wilful disregard of the employer's interest.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

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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 reverse.

The claimant was discharged from her position with the employer on June 23, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 22, 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 March 5, 2022. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 because she disclosed confidential payroll and other business information to another employee, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked part-time as a bookkeeper for the employer's property management business from 10/6/14 until 6/23/20. The claimant was hired to

work a schedule of 9:30 a.m. until 2:00 p.m. on Monday through Friday. At the time of her separation, the claimant was assigned a schedule of 12:30 p.m. until 5:30 p.m. The schedule change was due to the COVID-19 pandemic. The claimant was paid \$21.32 per hour. At the time of her separation, the claimant was being paid an additional \$2 per hour bonus.

2. The employer maintains a Code of Ethics policy that reads in part: “(Employer) strives to maintain a professional organization, and all employees are expected to conduct themselves in the most professional manner possible...Please keep in mind that (Employer) will be forced to take appropriate disciplinary action, including discharge, against any employee who: ...Violates any established Company rule, including safety rules.”
3. The employer maintains a Termination Policy that reads in part: “It is (Employer’s) intent to maintain an organization of reliable, cooperative, and trusted employees, and we will work towards this end in every respect. Termination will not occur until it is determined absolutely that there is ‘just cause’. This will have to be supported by evidence and will be used only as a last resort.” Within the Termination Policy is a section that addresses Unsatisfactory Performance. This section reads in part: “Uncooperative behavior or negative attitude which affects the work or morale of others at (Employer) may result in this probationary period being shortened and the employee’s termination.”
4. The employer maintains an Appropriate Employee Conduct Policy that reads in part: “As a staff member of (Employer), you are expected to observe the highest standards of conduct, professionalism and personal integrity at all times. Each employee should demonstrate sincere respect for the rights and feelings of others, including fellow employees, supervisors, residents, visitors and vendors. In addition, every employee is responsible for protecting the property of the Company. Below you will find some of the rules and regulations which guide conduct of all employees of (Employer). This list is illustrative, not all inclusive. Conduct which could result in discipline up to and including discharge includes, but is not limited to: ...Failing to maintain the confidentiality of company, customer, or client information, and using or applying such personal information as obtained during the course of employment for personal gain and profit without full disclosure to the company...(Employer) will investigate any inappropriate employee’s conduct, promptly, impartially, thoroughly and, to the extent possible, confidentially. The manner and extent of investigation and confidentiality is at the discretion of Human Resources, as it deems necessary. All employees are expected to cooperate in investigations or complains [sic] of conduct by providing truthful information in response to any inquiry...”
5. On 6/12/18, the claimant signed an acknowledgment form, confirming that she read and understood the Appropriate Employee Conduct Policy.

6. The employer maintains a Standards of Conduct Policy that reads in part: “(Employer) strives to maintain a professional organization and all employees are expected to conduct themselves in the most professional manner possible and contribute in a positive manner to the orderly operation of the Company at all times. To function effectively, every organization must develop policies and procedures to protect i[t]s clients and to ensure that co-workers’ and the company’s rights are respected. (Employer) is no exception. Rules are based on common sense and fairness. Generally, conduct that may be disruptive, unproductive, unethical, or illegal will not be tolerated. These rules should not be a hardship on anyone, so we ask your full cooperation in this regard. Violation of this Standards of Conduct Policy may lead to disciplinary action, which, based on the circumstances of the individual case, could result in corrective action up to and including discharge. The following is a non-exhaustive list of conduct that may violate this Policy: ...Making gross misrepresentations or misstatements about the Company, company procedures, employees, residents or clients...It is up to the employee’s supervisor and the company’s management to decide whether corrective action, up to and including dismissal, is appropriate.
7. Decisions about specific disciplinary action are made by the employer’s [sic]
8. On 6/12/18, the claimant signed an acknowledgment form, confirming that she read and understood the Standards of Conduct Policy.
9. On 12/7/18, the claimant signed an acknowledgment form, confirming her receipt of the employer’s Personnel Handbook that contains the employer’s policies.
10. The claimant was aware that the employer expected her to be trustworthy. The claimant was aware that she could be discharged for any breach of confidentiality.
11. During the term of the claimant’s employment, she was sometimes assigned to work at one of the employer’s managed property locations in [Location A]. The claimant was one of two office staff assigned to work outside of the employer’s main office. The other employee worked at a location in [Location B] years earlier, and prior to the maintenance superintendent being hired by the employer. The maintenance superintendent worked at the [Location A] location.
12. On 6/12/20, the claimant worked at the employer’s [Location A] location. During her time there, the maintenance superintendent engaged in conversation with the claimant, complaining that he felt the business owner mistreated him.
13. On 6/15/20, the maintenance superintendent informed his supervisor that during his conversation with the claimant on 6/12/20, she disclosed to him information about payments made to an employee of the business and to the daughter of the

business owner. The daughter is not an employee of the business. The maintenance superintendent told the supervisor that the claimant stated the owner's daughter was issued a check in the amount of \$50,000. The business owner and the claimant were the only two employees aware of the check and payment made to the owner's daughter. The check was not issued through the employer's payroll system. The maintenance superintendent also informed his supervisor of other statements made by the claimant, in which she expressed her opinion about her supervisor, coworkers, and the employer's Human Resources Director/President. The claimant's statements were critical of these employees and of how the business was being operated.

14. On 6/15/20, the business owner spoke with the claimant about the information shared by the maintenance superintendent. The claimant denied sharing the check information with the maintenance superintendent; she denied making the statements alleged by the maintenance superintendent. The claimant was told that since the maintenance superintendent was aware of information that was only known in the main office, there must be a source of that information. The claimant was told that the next step would be to hold a meeting with the claimant and the maintenance superintendent. The claimant agreed to the meeting. The maintenance superintendent agreed to attend but did not attend the meeting that was scheduled for 6/18/20. The meeting was rescheduled for 4:00 p.m. on 6/23/20. Prior to the date of the meeting, the maintenance superintendent walked off his job. On 6/23/20, the claimant left work at 3:00 p.m., after sending the employer an email request to participate remotely due to childcare issues. The owner denied the claimant's request to participate remotely.
15. On 6/23/20, the employer notified the claimant that her employment was terminated due to the breach of confidentiality. The employer discharged the claimant for breaching confidentiality by disclosing personal information. The employer concluded that the claimant breached confidentiality because the maintenance superintendent accurately described a check that the only the claimant and the business owner were aware of, and the claimant had the opportunity to disclose such information during her shift at the [Location A] location on 6/12/20.
16. The claimant filed an initial claim for unemployment insurance benefits, effective 6/21/20.
17. On 7/3/20, the employer completed a DUA fact-finding questionnaire, indicating that the claimant was discharged for unprofessional behavior, misrepresentation of fact, and for breach of confidentiality in handling confidential information associated with her job responsibilities as a bookkeeper.
18. On 7/8/20, the claimant completed a DUA fact-finding questionnaire, indicating that she was discharged by the Human Resources Director/President

because she was unable to work assigned shifts, and that she was unable to work assigned shifts because she could not find summer camps for her children. The claimant did not inform the DUA that she was discharged for a breach of confidentiality.

19. On 7/22/20, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits under Section 25(e)(2) of the law.

20. On 8/3/20, the employer appealed the Notice of Approval.

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 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 findings of fact except as follows. We reject the portion of Finding of Fact # 15 that states the claimant was discharged for breach of confidentiality as inconsistent with the evidence of record. We further note that Finding of Fact # 7 appears incomplete. We believe that the review examiner intended to find that decisions about disciplinary actions were made by the employer's owner and president, as that is consistent with the evidence of record. 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 was discharged for deliberate misconduct in wilful disregard of the employing unit's interest.

Because the claimant was discharged 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 provision of the statute, "[T]he 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).

As an initial matter, there is insufficient evidence in the record to demonstrate that the employer discharged other employees for similar behavior. For this reason, we cannot conclude that the claimant took action that violated a *uniformly* enforced policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The review examiner rejected the claimant's testimony that she was discharged for failing to attend a meeting due to childcare issues on the ground that the claimant had not informed the DUA that this was the reason for her discharge prior to the hearing. 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). "The test is whether the finding is supported by "substantial evidence." *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627-628, quoting *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we cannot accept the review examiner's credibility assessment.

As discussed above, the review examiner credited the employer's testimony that it discharged the claimant for unprofessional behavior and breach of confidentiality over the claimant's contention that she was discharged for failing to attend the June 23rd meeting, because the claimant did not make such a contention in her initial fact-finding submissions to the DUA. In her first fact-finding questionnaire, which was admitted into evidence as Exhibit 5, the claimant identified that she was having childcare issues due to the employer's change to her schedule but did not state why she believed that she was discharged. However, when the claimant was asked to clarify her responses in a custom fact-finding questionnaire, which was admitted into evidence as Exhibit 2, she explained that she was discharged after being denied a request to attend a meeting remotely.¹ Therefore, the review examiner's statement that the claimant never made mention of the meeting as the reason for her discharge is facially inconsistent with the documentary evidence of record.

Upon learning that the claimant may have disclosed confidential information to one of the employer's maintenance supervisors, the employer initiated an investigation. *See* Finding of Fact # 14. An initial investigatory meeting was scheduled for June 18, 2020, however, the meeting had to be rescheduled to 4:00 p.m. on June 23, 2020, because the maintenance supervisor unexpectedly walked off the job and refused to attend the meeting. Finding of Fact # 14. When the claimant encountered childcare issues that necessitated that she leave work around 3:00 p.m. on June 23, 2020, she informed the employer that she needed to depart early and requested to attend the meeting remotely. *Id.* The employer denied this request, held the meeting in the claimant's absence, and issued the claimant a termination notice on the night of June 23, 2020. Findings of Fact ## 14 and 15.

We can reasonably infer that the employer would not have scheduled the investigatory meeting, if it had already determined that the claimant had disclosed confidential information. It is, therefore, clear from the record that the final incident that led to the claimant's termination was her failure to attend the meeting.

¹ Exhibits 2 and 5, while not explicitly incorporated into the review examiner's Findings of Fact, are part of the unchallenged evidence introduced at the hearing and placed in the record and are 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).

When an employee is discharged for refusal to comply with a directive, the claimant's entitlement to unemployment benefits will depend on whether the directive was reasonable under the circumstances.

We note at the outset that an employer's directive that an employee participate in a meeting regarding that employee's alleged misconduct is not necessarily unreasonable. However, the directive that the claimant breached in this case was that the claimant had to physically be present at the investigatory meeting. Therefore, in an unemployment law context, the employer must demonstrate that the circumstances necessitated that the meeting be held face-to-face.

When asked, the employer's owner stated that he denied the request to conduct the meeting remotely because he did not know how to set up a Zoom meeting and did not think of the possibility of conducting the meeting by telephone conference.² There was no suggestion from either the employer's testimony or the record that having the claimant attend the meeting remotely would have impeded the employer's ability to conduct a complete and thorough investigation. As such, the employer's stated preference and apparent disinterest in attempting to seek an accommodation for the claimant to attend the meeting remotely is insufficient justification to render reasonable its expectation that the claimant be physically present at the meeting. Moreover, the employer's apparent disinclination to take steps to ensure the claimant's attendance at this meeting appears facially inconsistent with its policy to "investigate any inappropriate employee's conduct, promptly, impartially, [and] thoroughly. . . ." Finding of Fact # 4. Consequently, the employer did not meet its burden to prove that the claimant was discharged for refusing a reasonable directive.

Even assuming, *arguendo*, that the employer's requirement that the claimant attend the meeting in person was reasonable, we do not believe that alters the outcome of this case. As the claimant requested to attend the meeting remotely, she knew that her employer expected her to attend this meeting and further understood that her failure to attend in-person was contrary to the employer's expectation. *See* Finding of Fact # 14. However, mere violation of an employer's rule or expectation does not automatically disqualify a claimant from unemployment benefits. Torres v. Dir. of Division of Employment Security, 387 Mass 776 (1982). In determining whether a claimant should be disqualified for deliberate misconduct in wilful disregard of the employer's interest, a critical factor is the claimant's state of mind, taking into account her knowledge of the employer's expectation, the reasonableness of the expectation, and whether there were any mitigating factors. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). Mitigating factors are those factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepard v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

The claimant encountered childcare issues that precluded her from attending the meeting in person. Finding of Fact # 14. When she proposed a compromise that would allow her to attend the meeting virtually while also addressing her unexpected childcare needs, the employer rejected this request. *Id.* The employer's decision created a dilemma for the claimant: she could attend the meeting and leave her minor children unattended or miss the meeting and risk disciplinary action. Given the particular facts of this case, we conclude that the claimant's personal circumstances, over which

² The employer's uncontested testimony in this regard is also part of the unchallenged evidence of record.

she had no control, constituted mitigating circumstances. *See* Board of Review Decision 0023 8326 01 (Sept. 27, 2018) (the claimant established mitigating circumstances where she had no choice but to bring her grandchildren to work despite the employer's expectation to the contrary). Therefore, in this context, the claimant's absence at the meeting did not constitute conduct in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to either a knowing violation of a reasonable and uniformly enforced policy or 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 reversed. The claimant is entitled to receive benefits for the week of June 21, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 6, 2022



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
(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