The claimant was fired for submitting a false timecard. Because she did not present any mitigating circumstances, Board held that her actions were deliberate misconduct in wilful disregard of the employer's interest, and she is subject to disqualification under G.L. c. 151A, § 25(e)(2). However, because the claimant separated from this part-time job during the benefit year, she is only subject to a constructive deduction pursuant to 430 CMR 4.76(1)(a)(2), not a total disqualification from receiving benefits.

Board of Review
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Member

Issue ID: 0059 8528 75

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 we affirm in part and reverse in part.

The claimant previously filed a claim for unemployment benefits with the DUA, effective May 10, 2020. She was discharged from her position with the employer on November 30, 2020, and filed a continued claim for benefits which was approved in a determination issued on March 23, 2021. 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 determination and denied benefits in a decision rendered on November 25, 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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, as well as the DUA's electronic record-keeping system, UI Online.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2), because she falsified her time records, 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 full time as a case manager for the employer, a state-licensed home care provider, from 2/1/2020 to 11/21/2020.

2. The claimant worked as a per diem worker. Her schedule varied depending on the number of clients she had and when she conducted in-person or virtual home visits. She earned $20.00 per hour.

3. The claimant's supervisor was the owner.

4. The employer has a written policy (the policy) which prohibits employees from falsifying timekeeping records or reports.

5. The policy is contained in the employee handbook.

6. The claimant signed off on receipt of the employee handbook upon hire.

7. The purpose of the policy is to ensure the accuracy of employee payroll and the integrity of billing records required by state agencies.

8. The employer determines discipline for violations of the policy depending on the severity of the incident.

9. The employer expects that employees will report to payroll only the hours they actually work.

10. The employer expects employees to honestly and accurately record their hours and work activities.

11. The employer's expectations are written in the employee handbook and discussed at meetings and during on-line time reporting training classes.

12. Employees are required to submit corrected weekly timecards no later than Sunday evening for review and in time for the payroll company to process the timesheets on Monday morning. The days covered are Monday through Saturday of the prior week.

13. The timesheet states, "Please submit your hours no later than 6 PM every Saturday to: (owner's email address)."

14. For the week ending 11/21/2020, the claimant worked 14 hours.

15. For the week ending 11/21/2020, the claimant submitted a timesheet for 300 hours, then sent a corrected one for 30 and finally one for 14 hours. The last one was submitted on Tuesday, after the deadline, which resulted in increased payroll costs for the employer.

16. On 11/30/2020, the employer discharged the claimant for falsifying company records on 11/21/2020.

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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portion of Finding of Fact # 1, which states the claimant worked "full-time" as the employer-owner testified that the claimant worked part-time.[1] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, while we believe that the review examiner's findings of fact support the conclusion that the claimant's separation from the employer was disqualifying, she is subject only to a constructive deduction rather than a complete disqualification of all 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 relevant 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 . . . .

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

The employer discharged the claimant because she falsified company records on November 21, 2020. *See* Finding of Fact # 16. The claimant failed to submit accurate time records for week ending November 21, 2020. *See* Findings of Fact ## 14 and 15. These findings establish that the claimant engaged in misconduct.

We next consider whether the claimant's actions were deliberate and in wilful disregard of the employing unit's interest. Finding of Fact # 15 shows that the claimant filed three timecards, with varying hours, for the week ending November 21, 2020. To determine whether the timecard submissions were typographical errors, the employer-owner testified that she asked the claimant three times for her work activity reports to corroborate her time sheets, but the claimant failed to submit them. We can reasonably infer from this and the absence of any other evidence indicating that the claimant simply made a mistake that her actions were deliberate.

In order to determine whether an employee's actions were in wilful disregard of the employer's interest, 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

[1] Although the employer-owner's testimony in this regard and as referenced below are not explicitly incorporated into the review examiner's findings, they are part of the unchallenged evidence introduced at the hearing and placed in the record, and they 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).

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 record shows that the claimant was aware of the employer's expectation that she accurately report her hours and work activities on her timecards. Upon the commencement of her employment, the claimant received the employee handbook which prohibits employees from falsifying their timekeeping records. *See* Findings of Fact ## 4, 5, and 6. The employer reinforced its expectation during company meetings and during online time entry training courses. *See* Finding of Fact # 11. Thus, the claimant was aware of the employer's expectation that she accurately reports her hours worked. The expectation is reasonable in light of the employer's need for an accurate payroll and records for government agencies. *See* Finding of Fact # 7.

Next, we consider whether the claimant's failure to properly reflect the actual hours worked on her timecard was due to mitigating circumstances. 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 absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

The claimant did not attend the hearing. Because the claimant did not provide any evidence of circumstances which may have justified her misconduct, her actions are deemed to have been done in wilful disregard of the employer's interest.

However, when a claimant separates from part-time employment, we must consider whether a constructive deduction, rather a full disqualification of benefits, should apply. The DUA regulation at 430 CMR 4.76 provides, in relevant part, the following:

> (1) A constructive deduction, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under M.G.L. c. 151A, § 25(e), in any of the following circumstances:
>
> (a) if the separation is:
>
> 1. from subsidiary, part-time work during the base period and, at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work; or
>
> 2. if the separation from part-time work occurs during the benefit year. . . .

The DUA's electronic record-keeping system, UI Online, shows that the claimant's benefit year ran from May 10, 2020, through May 8, 2021. She separated from her part-time job with the employer on November 21, 2020, within her benefit year. *See* Finding of Fact # 1. Because she separated from this part-time work during the benefit year, she is subject to a constructive deduction under 430 CMR 4.76(1)(a)(2).

A constructive deduction is defined as "the amount of remuneration that would have been deducted from the claimant's weekly benefit amount . . . if the claimant had continued to be employed on a part-time basis." 430 CMR 4.73.

The amount of the constructive deduction each week is determined by the claimant's earnings from the part-time employer. 430 CMR 4.78(1)(c) provides as follows:

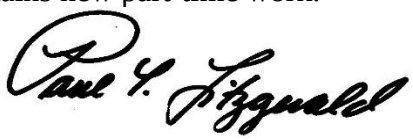
> On any separation from part-time work which is obtained after the establishment of a benefit year claim, the average part-time earnings will be computed by dividing the gross wages paid by the number of weeks worked.

Pursuant to 430 CMR 4.78(2), to calculate the amount of the constructive deduction, the earnings disregard is applied to the average part-time earnings as calculated under 430 CMR 4.78(1)(c).

UI Online shows that during the benefit year, the claimant's total gross wages for the employer were $4700.00, and she worked for approximately 28 weeks. Thus, her average weekly wage was $167.86. UI Online further shows that the claimant's weekly benefit amount was $395.00, and her earnings disregard was $131.67. Given that her average weekly wage is greater than her earnings disregard, the constructive deduction is the difference. Therefore, the claimant is subject to a constructive deduction in the amount of $36.19 to be applied to her weekly benefit amount.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2). We further conclude that the claimant's weekly benefits are subject only to a constructive deduction pursuant to 430 CMR 4.76.

The review examiner's decision is affirmed in part and reversed in part. If otherwise eligible, the claimant is entitled to receive benefits subject to a constructive deduction in the amount of $36.19 from her weekly benefits amount, beginning November 29, 2020, and for subsequent weeks, until she has earned an amount equivalent to or in excess of eight times her weekly benefit amount or the claimant either returns to her former part-time job or obtains new part-time work.



BOSTON, MASSACHUSETTS
DATE OF DECISION - August 15, 2023

Paul T. Fitzgerald, Esq.
Chairman

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.

DY/rh