Claimant's failure to directly contact her supervisor when she became ill in the employer's parking lot and unable to work her shift was, at most, an exercise of poor judgment. Under the circumstances, she believed having her friend go inside to notify the manager met the employer's expectations regarding attendance. Therefore, she is not disqualified under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0066 8290 72

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 10, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 23, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 22, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in willful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional information about the circumstances surrounding the claimant's discharge. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 employer failed to show that the claimant had committed a knowing rule violation or deliberate misconduct when she did not directly contact her supervisor about her absence from work due to illness, 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. On December 20, 2020, the claimant began working for the employer, a fast-food chain, as a fulltime sales clerk/team member. She was supervised by the store manager. She earned $14.00 per hour.

2. The claimant was expected to work at least 30 hours per week.

3. The claimant was not meeting the 30 hours per week requirement.

4. The claimant was often scheduled to work the opening shift.

5. The employer maintains an attendance policy. According to the policy, if an employee cannot arrive on time to their shift, they need to be in direct contact with their supervisor either by phone or in person. Text messages or communication through other individuals such as family or friends, are not considered a notification of tardiness.

6. The attendance policy also prohibits excessive absenteeism, which is considered to be more than two times in a seven day or consecutive shift periods.

7. According to the policy, excessive absenteeism and tardiness can be disciplined up to and including termination.

8. If an employee is going to be late, then they needed to inform the employer 3-4 hours in advance. If a claimant is going to be late to a morning shift, they must inform the employer as soon as possible to give them time to find a replacement.

9. If an employee is not going to be able to attend their shift for medical reasons, they are required to submit a change of availability form and a doctor's note.

10. The purpose of the policy is to maintain production standards, ensure that the store can open and close on time, and adhere to the hours of operation laid out in the franchise agreement.

11. The employer also maintains a food employee handling agreement as required by the local board of health. If an employee misses two consecutive shifts for medical reasons, they must submit medical documentation to the employer.

12. The attendance policy is contained in an employee handbook.

13. The claimant signed an acknowledgement and receipt of the policy on December 20, 2020.

14. The food employee handling agreement was reviewed verbally upon the claimant's date of hire.

15. The claimant understood the policy.

16. The claimant never raised any questions or concerns about the employer's policies.

17. The employer expects that employees arrive to work on time and in uniform.

18. The employer maintains this expectation to ensure that employees are at work for their scheduled hours and to maintain the operation and profitability of the store.

19. The claimant was aware of the employer's expectation.

20. The claimant did not raise any concerns or questions about the employer's expectations.

21. On January 10, 2021, the claimant was not able to show up for her scheduled shift because she was sick.

22. The claimant informed her employer that she was not able to work her scheduled shift because she was sick. The claimant offered to provide a doctor's note, but her supervisor stated that she should not worry about it and to come back into work when she could.

23. On January 10, 2021, the claimant asked her doctor about the sickness. The doctor told the claimant that she should stay hydrated and that if she got worse, she should call him.

24. The claimant was absent from her shifts on January 10, 2021, January 11, 2021, January 14, 2021, January 24, 2021, January 25, 2021, and January 26, 2021.

25. The claimant was tardy on at least 3 occasions in a 30-day period.

26. The claimant received multiple verbal warnings about her attendance by the shop manager and the regional manager.

27. The claimant received a final written warning and a 1-day suspension for working under 30 hours, excessive absenteeism, and for failing to contact supervisor 3 hours prior to the start of the shift. This warning was signed by the supervisor on January 28, 2021 and by the claimant on January 29, 2021.

28. The claimant was informed that further violations of the attendance policy could result in discipline up to and including termination.

29. The claimant was suspended for the workday of January 27, 2021 for excessive absenteeism.

30. The claimant returned to work on January 28, 2021.

31. The claimant attended her scheduled shifts on January 29, 2021 and February 4, 2021.

32. On February 7, 2021, the claimant began to feel sick and experienced vomiting, diarrhea, and fever. Her symptoms would last for an hour or two and then subside.

33. On February 7, 2021, the claimant experienced these symptoms 2-3 times.

34. By the morning of February 28, 2021 [sic], the claimant's symptoms had subsided.

35. The claimant believe that she was well enough to attend work on February 8, 2021.

36. On February 8, 2021, the claimant was scheduled for the opening shift.

37. On February 8, 2021, the claimant was feeling sick, but attempted to go to work for her scheduled shift. The claimant dressed for work. A friend drove her to her employer's establishment. Before she could enter the building, she began vomiting and experiencing diarrhea. She sent her friend into the employer's establishment to explain the situation to her manager.

38. The claimant's friend spoke to the store manager and explained that she was not coming to work that day.

39. The store manager asked the claimant's friend for the claimant to notify the manager herself.

40. The claimant did not enter the store because she did not want to go into the restaurant in her condition, specifically that she had diarrhea. She was distressed and humiliated.

41. The store manager and other store employers saw the claimant in the car in the parking lot.

42. Neither the store manager nor any other employee went to the claimant while she was in the car in the parking lot.

43. The claimant returned home. She was sick the entire day.

44. When the claimant returned home, she did not go to the hospital because she was concerned about exposing herself to COVID-19. The claimant spoke to her doctor on the phone.

45. The claimant did not request any medical documentation from her doctor.

46. On February 8, 2021, the claimant did not attend her shift.

47. The claimant did not contact the store manager either in person or over the phone to inform her that she could not come to work on February 8, 2021.

48. The claimant did not contact the store manager because she believed that she had already done so when her friend spoke to the store manager while the claimant remained in the car.

49. The claimant did not think she would be terminated because she could not help being too sick to attend work.

50. The claimant never provided medical documentation regarding her issues.

51. The claimant never filed a request for a medical leave.

52. The claimant was not granted a medical leave.

53. On February 9, 2021, the employer made the decision to terminate the claimant.

54. On February 10, 2021, the claimant was terminated.

55. The claimant was terminated over the phone by a representative from human resources.

56. The claimant received a termination notice in the mail along with a final paycheck.

57. The claimant was terminated for violating the employer's attendance policy and excessive absenteeism.

58. If the claimant had spoken in person or over the phone to her manager on February 8, 2021, she would not have been terminated. She would have been issued a corrective action.

59. If the claimant had provided medical documentation of her illness, the claimant would not have been terminated. She would have been issued a corrective action.

60. The claimant was surprised that she was fired.

61. The claimant did not quit her job.

62. On February 11, 2021, the claimant was brought to the hospital and diagnosed with a blood disorder. The claimant remained in the hospital for 8 days.

63. On June 23, 2021, the DUA issued a Notice of Disqualification denying the claimant benefits under Section 25(e)(1) of the Law commencing the week beginning March 28, 2021 and until she had had 8 weeks of work and had earned an amount equivalent to or in excess of 8 times her weekly benefit amount.

Credibility Assessment:

Only the claimant attended the initial hearing. The employer and the claimant both attended the remand hearing.

The employer and the claimant's testimonies were consistent with each other in most respects. Both parties' testimony regarding the events of February 8, 2021, which resulted in the claimant's termination, were consistent.

During both hearings, the claimant was confused about the dates of certain events surrounding her suspensions and termination. The claimant appeared to confuse her suspension from work and her termination. The employer was able to provide a clear timeline which was confirmed by the documents submitted, specifically the final written warning and the termination notice. The employer's sequence of dates is considered to be more credible where the employer's testimony and exhibits was more specific and internally consistent.

Although the claimant testified previously that she did not expect to be fired for not calling out of work personally on February 8, 2021, she also acknowledged receiving the employer's policy and the final warning, both of which stated that violations of the attendance policy could result in termination.

The claimant's unrefuted testimony regarding her state of mind on February 8, 2021, specifically her humiliation and distress, is considered credible.

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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant separated from employment for non-disqualifying reasons.

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 willful 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).

The employer maintains a policy requiring employees to contact their supervisor directly if they are going to be tardy or absent. This policy specifies that communication through other individuals such as family or friends are not considered sufficient notification of an employee's tardiness or absence. Consolidated Finding # 5. Additionally, the employer maintained a policy requiring employees to provide the employer with notice of a change of availability and a doctor's note if they are unable to attend their shift for medical reasons. Consolidated Finding # 9. While the claimant acknowledged that she was aware of these policies, there is insufficient evidence in the record for us to determine whether the policy is uniformly enforced. Therefore, the Board cannot conclude that the claimant knowingly violated a uniformly enforced policy under G.L. c. 151A, § 25(e)(2). Alternatively, the employer may show that it discharged the claimant for deliberate misconduct in willful disregard of the employer's interest.

In this case, the claimant was discharged solely because she failed to directly inform her supervisor that she was too sick to work her shift on February 8, 2021. Consolidated Finding # 58. The claimant confirmed that she understood she was required to contact her employer if she would be unable work a shift and acknowledged that she did not text or call her manager directly about her inability to work on February 8, 2020. But our analysis does not end there. The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979). "When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Id. at 97.

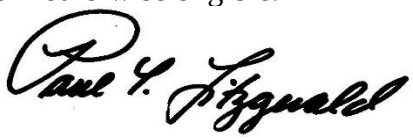
When the claimant attempted to work her shift on February 8, 2021, she became ill in the parking lot. Consolidated Finding # 37. Under the circumstances, the claimant was understandably reluctant to enter the employer's restaurant and requested that her friend go into the restaurant to speak to her supervisor. The friend showed the claimant's supervisor that the claimant had tried to come in to work and explained why the claimant was unable to work her shift. *See* Consolidated Findings ## 37–40. While the claimant's friend was asked to instruct the claimant to contact her supervisor directly, nothing in the record indicates that message was subsequently conveyed to the claimant. *See* Consolidated Finding # 39.

The claimant knew that her supervisor had seen her in the parking lot and had been told that the claimant had gotten sick on the way to work. She assumed that she had provided her supervisor with sufficient notice of her absence under the circumstances. *See* Consolidated Finding # 48.

Additionally, the claimant may have reasonably believed that it was not necessary to provide a doctor's note for her absence, because her supervisor had previously told her that a note was not required. *See* Consolidated Finding # 22. Although the claimant may have used poor judgment in failing to follow-up with her supervisor via text or phone call on February 8th, we do not believe that the record supports a conclusion that she acted in willful disregard of the employer's interest. Garfield, 377 Mass. at 97 ("When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits."). As such, the circumstances of this case do not warrant denying benefits.

We, therefore, conclude as a matter of law that the employer has failed to show that it discharged the claimant for either deliberate misconduct in willful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced employment policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning February 7, 2021, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - February 1, 2022

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

LSW/rh