The employer gave the claimant permission to move out-of-state and continue working remotely without any indication that she would soon be required to return to the workplace on a hybrid basis. When the hybrid policy was announced, she had already relocated, signed a lease, and it was too far to commute. Because the employer refused to allow her to continue working exclusively remotely, this was a discharge from employment. Held her refusal to comply with the hybrid work expectation was not done in wilful disregard of the employer's interest, but due to mitigating circumstances. The claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0073 8036 28

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 separated from her position with the employer on November 4, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 21, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant,[1] the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 3, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, and, thus, she was disqualified under G.L. c. 151A, § 25(e)(1). 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's separation was voluntary, is supported by substantial and credible evidence and is free from error of law, where the record shows that she was terminated after moving out-of-state and unable to comply with the employer's subsequent expectation that she work on a hybrid basis.

Findings of Fact

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

[1] The claimant's former employer was invited to participate in the hearing as a witness but did not attend.

1. The employer is a law firm. The claimant worked as a full-time production designer for the employer. The claimant worked for the employer from 6/05/2017 to 11/04/2021.

2. The employer's visual communications manager ([X]) was the claimant's direct supervisor.

3. The employer maintains an office in Massachusetts.

4. The claimant was initially hired to work for the employer in-person in 2017. In March 2020, all the employer's employees, including the claimant, began working remotely due to government regulations put in place in response to the onset of the COVID-19 pandemic.

5. At the time they began working remotely, the employer did not tell employees, including the claimant, that they would be allowed to work remotely on a full-time basis permanently.

6. In June 2021, the claimant lived in [Location], Massachusetts. The claimant made the decision to move to Tennessee.

7. In July 2021, the claimant moved to Tennessee.

8. In approximately August 2021, the employer informed all employees, including the claimant, that it would be requiring all employees to return to working in office multiple days per week, on a hybrid basis.

9. In approximately August 2021, the employer informed the claimant that her position would not be excepted from the return to in office work on a hybrid basis. The claimant was told that she would be required to be in [sic] office in Massachusetts multiple days per week. The claimant was told she would be allowed to continue to work remotely from Tennessee on a full-time basis until the employer set a return to in office deadline.

10. After August 2021, the employer set a return to in office work deadline of 11/04/2021.

11. On 11/04/2021, the claimant had a telephone conversation with the employer's human resources generalist and senior staff recruiter ([Y]). [Y] asked the claimant if she would be returning to work in office on a hybrid basis. The claimant told [Y] that she would not be returning to work in office on a hybrid basis.

12. The claimant determined she was unwilling to move back to Massachusetts or to commute to work from her home in Tennessee.

13. The employer did not have any offices in Tennessee.

14. Had the claimant been able to move back to Massachusetts and return to work in person on a hybrid basis, the employer would have allowed her to continue working.

15. On 11/04/2021, the claimant quit her employment because she moved out of state and could not meet all the requirements of her job, which included being in [sic] office on a hybrid basis.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. In Finding of Fact # 12, we believe that the review examiner's statement that the claimant was "unwilling" to move back to Massachusetts fails to accurately reflect the claimant's testimony about why she did not return, as discussed below. We further reject the portion of Finding of Fact # 15, which states that the claimant quit her employment. On appeal, this is a mixed question of law and fact. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question is whether the claimant's separation is treated as a resignation or a discharge for purposes of unemployment benefit eligibility. In Finding of Fact # 15, the review examiner states that the claimant quit her employment on November 4, 2021. We disagree.

In this case, the employer failed to answer any DUA fact-finding questionnaires in connection with the claimant's separation, and it did not participate in the hearing. The only evidence in the record has been presented by the claimant. She testified that, in August, after the employer announced that everyone would have to return to working in the office on a hybrid basis, she told her director that she could not commute from Tennessee to Massachusetts. She also testified that he then asked for her resignation, but she refused because she did not want to resign, and that she was allowed to work until November when all employees had to report to the office. *See* Finding of Fact # 9.[2] In our view, this evidence shows that the employer made the decision to end the claimant's employment, when the claimant failed to comply with the employer's expectation to return to the office. In other words, she was discharged.

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:

[2] While not explicitly incorporated into the review examiner's findings, the claimant's testimony in this regard, as well as the portions of her testimony referenced below, are part of the unchallenged evidence introduced at the hearing and placed in the record. As such, they are 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).

> [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).

As the employer presented no evidence that the claimant violated a particular policy, or that its rule about a return to hybrid work was uniformly enforced, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2). Alternatively, we consider whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

There is no question that the claimant was aware that the employer expected her to come back to the office on November 4, 2021. There is also nothing inherently unreasonable about an employer expecting its employees to report to the workplace, and we see nothing in this record to suggest otherwise. Moreover, the findings show that the claimant acted deliberately in not returning to her employer's physical location on November 4, 2021. *See* Finding of Fact # 11. However, the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. A person's intent may be adduced from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

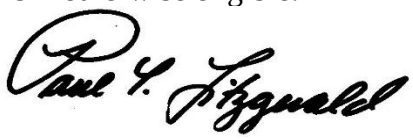
In this case, the review examiner found that, when the employer's workforce transitioned to remote work in March, 2020, due to the COVID-19 public health emergency, it did not tell employees that they would be working remotely on a permanent basis. Finding of Fact # 5. This is true. However, according to the claimant, the employer did not say anything about the length of time. Similarly, in July, when the claimant told the employer that she was moving to Tennessee, she testified that her supervisor did not say anything about the remote work arrangement ending. He told the claimant that her moving was okay and merely advised her to ensure that her remote work equipment was in working order before she left. This indicates that, in July, 2021, the employer gave the claimant permission to relocate and perform her work from Tennessee.

It was not until after she moved that the employer announced a return to the office. *See* Findings of Fact ## 7 and 8. At this point, the record shows that it was not so much that the claimant was "unwilling" to return, as stated in Finding of Fact # 12, as that she could not just pick up and move. During the hearing, the claimant explained that, when told she would have to return, she did not see any options, as they had already relocated and signed a lease.

Under these circumstances, where the claimant had the employer's permission to move and work remotely from Tennessee, and she could not commute or return to Massachusetts after the employer later rescinded that permission, we believe that her failure to comply with the employer's hybrid work expectation was not done in wilful disregard of the employer's interest. It was due to mitigating circumstances. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control).

We, therefore, conclude as a matter of law that the claimant was discharged from her employment. We further conclude that she did not knowingly violate a uniformly enforced policy or engage in 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 beginning November 7, 2021, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - April 27, 2023

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.

AB/rh