

A claimant with a history of tardiness arrived late to work and was directed by her male supervisor to meet in his office. Given her history of domestic violence and sexual abuse, the claimant was triggered by what she perceived to be his angry and aggressive tone and body language, and she refused to meet with him. Held the claimant's insubordination was due to mitigating circumstances, not wilful disregard of the employer's interest. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0074 1360 03

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 November 10, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 14, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties¹, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on June 7, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she 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 afford the employer an opportunity to finish presenting its case. 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 claimant's history of domestic violence and sexual abuse constituted mitigating circumstances for the insubordination that triggered her discharge, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

¹ The employer did not participate in the second session of the original hearing.

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

1. The claimant is a survivor of domestic violence and sexual abuse.
2. The claimant can be triggered by males speaking to the claimant in certain ways, such as aggressively or angrily, or displaying certain body language, because of her experiences with domestic violence and sexual abuse.
3. The claimant worked as a full-time Medical Assistant I for the employer, a healthcare company, between December 7, 2020, and November 10, 2021, when she separated.
4. The claimant's immediate supervisor was the employer's Clinical Supervisor (Clinical Supervisor). The Clinical Supervisor is a male.
5. The employer maintains an "Insubordination" policy (the policy) which required all employees to follow the instructions of their supervisors.
6. The written contents of the policy are unknown.
7. The employer expects employees to not display insubordination to their supervisors.
8. The purpose of this expectation is to ensure a respectful work environment and to have employees follow the guidance of their supervisors.
9. A violation of this expectation results in discipline up to and including, termination.
10. The claimant was aware of this expectation as a matter of common sense.
11. The claimant had a history of being late for work for the employer on multiple occasions.
12. On November 10, 2021, the claimant arrived to work late for her scheduled shift for the employer.
13. Upon the claimant arriving to work late, the Clinical Supervisor asked the claimant to go to his office to discuss what had happened with the claimant being late for work that day and to discuss discipline for the claimant's tardiness.
14. The Clinical Supervisor intended to issue the claimant a written warning for being late on November 10, 2021.

15. The claimant felt that the Clinical Supervisor's tone was deep and aggressive when asking her to meet with him.
16. The claimant felt that the Clinical Supervisor's body language was angry.
17. The claimant felt triggered by the Clinical Supervisor asking to meet with her at that moment, given the Clinical Supervisor's tone and body language.
18. The claimant felt nervous and shaken at that moment, and as a result, she did not want to go with the Clinical Supervisor.
19. The claimant said, "no" to the Clinical Supervisor regarding the requested meeting because the claimant was upset and triggered by the situation, given her past experiences.
20. The Clinical Supervisor walked away before the claimant could explain further.
21. The claimant did not expect to be disciplined for refusing to meet with the Clinical Supervisor.
22. The Clinical Supervisor walked back over to the claimant after about a minute and said, "we're done," and instructed the claimant to leave the employer's workplace.
23. On November 10, 2021, the Clinical Supervisor discharged the claimant for refusing to meet with him that day.
24. The claimant was not discharged for her attendance issues.

[Credibility Assessment:]

Although the claimant's attendance issues were discussed at the original hearing and at the remand hearing, the parties agreed that the final incident that led to the claimant's discharge was the claimant's insubordination when she refused to meet with the Clinical Supervisor. The Clinical Supervisor intended to discipline the claimant in the form of a written warning on the day of the final incident for her ongoing attendance issues. As such, it is concluded that the claimant was discharged solely for her insubordination when she refused to meet with the Clinical Supervisor upon arriving at work on the day of the final incident.

While the claimant did not dispute that she refused to meet with the Clinical Supervisor on the date of the final incident, she offered the mitigating circumstance that, as a person with a history of domestic violence and sexual abuse, she is triggered by certain situations, including what she perceives to be aggressive interactions with male individuals. The claimant offered direct and credible testimony that she was triggered by the Clinical Supervisor's body language and his asking to meet with her in what she perceived to be an aggressive and deep tone.

Although the clinical supervisor offered testimony that he did not raise his voice or intend to upset the claimant in any way, this is irrelevant to the impact that his conduct had on the claimant. The employer did not question the claimant about her history as a survivor of domestic violence and sexual abuse or offer any refuting testimony to call into question her assertions or triggered reaction. As such, it is concluded that the claimant's testimony that as a survivor of domestic violence and sexual abuse, she was shaken, nervous and triggered by the Clinical Supervisor, which is why she felt that she could not meet with the Clinical Supervisor in that moment that he asked and [sic] is deemed to be 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 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, except to note as follows. The review examiner's characterization of the claimant's personal history as mitigating circumstances is mixed question of law and fact, which, at this point in the proceedings, is left to the Board of Review. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) (“Application of law to fact has long been a matter entrusted to the informed judgment of the board of review.”). As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is eligible 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 employer discharged the claimant for refusing her supervisor's request to meet with him on November 10, 2021. Consolidated Finding # 23. There is no dispute that her refusal constituted insubordination, a form of misconduct. We do not question the employer's right to discharge the claimant for this incident. The issue before us is whether this behavior rendered her ineligible for unemployment benefits.

Because the employer did not present a written policy or evidence to show that other employees were discharged under similar circumstances, it has not shown that the claimant knowingly violated a reasonable and uniformly enforced policy. Alternatively, we consider whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Consolidated Finding # 7 provides that the employer expected employees not to display insubordination to supervisors. Nothing in the record indicates that the claimant mistakenly declined to meet with her supervisor. In fact, the findings indicate that she deliberately refused to meet because she was upset and triggered by the situation. *See* Consolidated Finding # 19.

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. 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 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). 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 aware of the employer's expectation not to be insubordinate as a matter of common sense. Consolidated Finding # 10. We agree that this expectation was reasonable, so as to achieve a respectful work environment and ensure that employees follow supervisors' instructions. *See* Consolidated Finding # 8.

In her original decision, the review examiner concluded that the claimant established mitigating circumstances. We agree. Consolidated Finding # 1 provides that, because of the claimant's history of domestic violence and sexual abuse, she can become triggered by a male individual's angry or aggressive tone or body language. We form no opinion about whether the tone or body language used by her supervisor was inappropriate for the workplace when he requested that she meet with him on November 10, 2021. Based upon the supervisor's testimony about the claimant's numerous prior attendance issues and the fact that she was again late that day, we can reasonably infer that, when he asked to speak with her so that he could give her a warning, he was not happy. *See* Consolidated Finding # 13.² Because of her personal history, his tone and demeanor caused the claimant to feel nervous, shaken, and upset to the point where she could not meet with him. *See* Consolidated Findings ## 17–19. Under these circumstances, we believe that the claimant's history of domestic violence and sexual abuse was a factor that caused the misconduct and over which she had little or no control.

² Although not explicitly in the consolidated findings, the supervisor's testimony about the claimant's prior attendance and disciplinary problems is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

We, therefore, conclude as a matter of law that the employer did not sustain its burden to show that it discharged the claimant for a knowing violation of a reasonable and uniformly enforced policy or for deliberate misconduct in wilful disregard of the employer's interest pursuant to 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 November 7, 2021, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 15, 2023



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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