

While the workforce was still temporarily working remotely due to COVID-19, the claimant moved to South Carolina to be near family and live in a less expensive area, knowing the employer would not allow her to work remotely permanently. Although accommodating her for a couple of months, the claimant was terminated when the employer rescinded its permission to work remotely. Held the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0075 4961 02

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 affirm.

The claimant separated from her position with the employer on January 31, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 6, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 28, 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, was disqualified under G.L. c. 151A, § 25(e)(1). 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 voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where the record shows that the employer did not allow the claimant to continue working from South Carolina after January 2022.

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 customer service analyst for the employer, a life insurance company, between March 25, 2013, and January 31, 2022, when she separated.
2. The claimant's immediate supervisor was the employer's customer service and imaging manager (supervisor).
3. The claimant was hired to work in-person.
4. In the regular course of the employer's business, employees were generally required to work in-person.
5. The employer maintained a "Telecommuting Policy" which stated, "It is the Company philosophy that core to our success is having all employees working together in the office for a collaborative environment. In rare instances, we understand telecommuting may be necessary... Telecommuting is not an entitlement and is restricted to jobs with clearly defined goals, tasks, and deadlines... [Employer] has the right to refuse or revoke telecommuting arrangements at any time...."
6. The claimant commuted from her home in New Hampshire to the employer's location in Massachusetts.
7. The claimant worked in-person for the employer until March, 2020, when the employer allowed employees to begin working remotely on a large scale due to the [COVID]-19 pandemic.
8. The claimant was not considered to be a remote employee, despite the employer temporarily allowing employees to work remotely due to the pandemic.
9. The claimant knew that working remotely due to the pandemic was temporary.
10. In June, 2021, the claimant spoke to her supervisor about possibly transitioning to working remotely permanently, given that she was considering moving out of the area.
11. The supervisor did not approve the claimant to work remotely from South Carolina or anywhere else on a permanent basis at that point.
12. The employer approved one employee to work from South Carolina for a limited period of time. The employee later returned to in-person work for the employer at their assigned office after the approved time period.
13. On September 28, 2021, the claimant purchased a home in South Carolina.

14. In early October, 2021, the claimant told the supervisor that she had purchased the home in South Carolina and asked if it would be possible for the claimant to keep her job after moving to South Carolina.
15. The supervisor said she would get back to the claimant.
16. The claimant did not receive permission from the employer to work from South Carolina prior to moving to South Carolina.
17. On November 28, 2021, the claimant permanently moved to South Carolina because the claimant wanted to be closer to family, prepare for retirement, and live in a less expensive area.
18. The claimant told the employer that she moved to South Carolina shortly after she moved. The claimant could not commute to the employer's location in Massachusetts from South Carolina.
19. The employer needed time to setup the administrative requirements to have the claimant work from South Carolina.
20. The claimant started working from South Carolina the first week in December, after the employer set up the payroll and taxes for the claimant to work from there.
21. The supervisor expressed to the claimant that she would not be permitted to work remotely from South Carolina indefinitely.
22. On December 31, 2021, the employer told the claimant that her permission to work remotely was extended to January 31, 2022, at which time the claimant would separate if she was unable to return to work in-person.
23. The employer anticipated that they were going to bring back employees in-person on or about January 31, 2022.
24. The supervisor told the claimant that she would not be permitted to work remotely from South Carolina after January 31, 2022.
25. The employer wanted to give the claimant time to locate a new job in South Carolina.
26. The employer ultimately pushed back the January 31, 2022, deadline for employees to return to work in-person due to [COVID]-19 pandemic concerns.
27. The claimant separated from employment because she did not obtain preapproval to work from South Carolina and because the claimant would be unable to return to work in-person, because she had relocated to South Carolina.

28. On January 31, 2022, the claimant quit her employment because she moved to South Carolina without permission, was still living in South Carolina, and would be unable to return to work in-person for the employer in Massachusetts.

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 # 28, which states that the claimant quit on January 31, 2022, as this is a mixed question of law and fact, which at this point of the proceedings, is for the Board of Review. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463–464 (1979). As discussed below, the record supports the conclusion that the employer discharged the claimant on this date. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Further, we agree with the review examiner's legal conclusion that the claimant's separation was disqualifying but on different grounds.

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 # 28, the review examiner states that the claimant quit her employment on January 31, 2022. We disagree.

In this case, employees, including the claimant, had been working remotely since March, 2020, due to the COVID-19 pandemic. *See* Finding of Fact # 7. The claimant moved to South Carolina on November 28, 2021, and the employer approved her to temporarily work remotely from South Carolina beginning the first week of December, 2021. *See* Findings of Fact ## 11, 17, and 19–20. The employer initially informed the claimant that she would be required to commence in-person work on January 1, 2022, and, therefore, her last day would be December 31, 2021, as the claimant was unable to commute to work from South Carolina.¹

However, the in-person work return date was delayed until January 31, 2022, and the claimant was allowed to continue working remotely until that date. *See* Finding of Fact # 22. Although the in-person return to work date was ultimately pushed beyond January 31, 2022, due to the pandemic, the employer did not allow the claimant to continue working remotely from South Carolina after January 31, 2022. *See* Findings of Fact ## 24 and 26. Inasmuch as the claimant was willing to continue working for the employer, but the employer would not allow it, we view this separation as a discharge.

Because the claimant was terminated from employment on January 31, 2022, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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

“[The] 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).

The employer's telecommuting policy essentially states that employees are to work in the office, and telecommuting will be allowed in rare instances, but it may be revoked at any time. *See* Finding of Fact # 5. There is no question that the claimant moved to South Carolina while everyone was temporarily working remotely due to the COVID-19 pandemic, knowing that her supervisor would not allow her to work remotely on a permanent basis. *See* Findings of Fact ## 7–11. She also knew that the employer gave her permission to work from South Carolina only temporarily. *See* Findings of Fact ## 21, 22, and 24. Nonetheless, she bought a house and moved to South Carolina, where she would not be able to return to work in person. *See* Findings of Fact ## 14, 17, and 18. We can reasonably infer that the claimant's move was a knowing and deliberate act in the sense that she chose to make this move. For purposes of work, it was misconduct as of January 31st, when she could no longer comply with the employer's terms of employment.

Since there is nothing in the record to indicate whether the employer treated other employees who violated its telecommuting policy in the same way, the employer has not met its burden to establish a knowing violation of a reasonable and *uniformly enforced* policy. Alternatively, the employer may show that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest.

The Supreme Judicial Court has stated, “[the] issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer's interest.” Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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) (citation omitted).

As stated, the claimant knew that she had permission to work from South Carolina only through January, 31, 2022. We cannot say that the employer's expectation or this deadline was unreasonable, where the claimant permanently moved out of state and would not be able to adhere

to the employer's business model of employees working together in the office for a collaborative environment. Even if the final date for everyone to return to the workplace was ultimately moved back, we can reasonably infer that the employer needed time to hire a replacement to ensure that it had a full workforce.

As for mitigating circumstances, we see none. 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 moved because she wanted to be closer to family, prepare for retirement, and live in a less expensive area. Finding of Fact # 17. While this may have been the best personal decision, such reasons do not rise to mitigating circumstances.

We, therefore, conclude as a matter of law that the employer discharged the claimant on January 31, 2022. We further conclude that the discharge was attributable to 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 affirmed. The claimant is denied benefits as of the week beginning January 30, 2022, and for subsequent weeks, until such time as she has had eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 20, 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.

SVL/AB/rh