The employer failed to prove that the claimant engaged in the alleged misconduct of requiring an employee to work while ill, for which it discharged her. Thus, the claimant may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0076 0840 73

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 March 4, 2022. She filed a claim for unemployment benefits with the DUA, effective March 6, 2022, which was denied in a determination issued on April 8, 2022. 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 26, 2022. 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 wilful 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 provide the employer with an opportunity to testify and present evidence. 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer by allowing an employee to work while ill, 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. The claimant worked full-time as a general manager for the employer, a sandwich shop, from August 2019 through March 4, 2022.

2. The claimant's immediate supervisor was the district manager (DM1).

3. The employer had a sick policy prohibiting employees from working while ill. This policy applies to all employees. The specific written language of the policy is unknown.

4. The employer had an expectation prohibiting employees from working ill.

5. The employer maintains the expectation to keep customers and other employees from becoming ill.

6. The claimant was aware of this expectation as a matter of common sense and as a certified food protection manager. They also had a history of closing the restaurant when there were insufficient personnel to properly service customers.

7. DM1 was on vacation from February 18, 2022, through February 27, 2022.

8. Prior to DM1 leaving for vacation, an email was sent to all members of the management team informing them who was covering for DM1. Although the email was sent, it was common knowledge the covering supervisor would be the district manager (DM2) from a neighboring district.

9. The employer's assistant manager (AM) reported to the claimant.

10. On February 21, 2022, AM contacted the claimant informing them they were ill. AM fell back asleep and did not report to work. The claimant did not tell AM to report to work.

11. February 22, 2022, was the claimant's day off.

12. On February 22, 2022, AM called the claimant informing them they were ill. The claimant informed AM to find coverage.

13. At no time did the claimant tell AM that they should report to work ill.

14. AM had access to the same email sent regarding DM2 covering for DM1. AM was also aware as a matter of common practice who DM2 was, how to get in touch with them, and most importantly, they knew DM2 would be covering for DM1.

15. AM did not remember DM1 was on vacation.

16. AM did not contact other staff or management for coverage.

17. On February 22, 2022, AM reported to work.

18. When DM1 returned from vacation, AM informed DM1 the claimant had allegedly forced them to report to work ill.

19. AM did not inform DM1 they were asked by the claimant to find coverage.

20. On March 4, 2022, DM1 discharged the claimant for allegedly requiring AM to work while ill and exposing customers and other employees to a virus.

Credibility Assessment:

Here, the claimant testified that they did not require the AM to report to work ill on February 22, 2022, but, instead, told AM to find coverage. Although DM1 testified that they believed the claimant had "forced" AM to work ill on that day, AM subsequently testified the claimant had informed them to find coverage for their shift and had not actually told them to report to work ill. Given that the claimant's testimony was corroborated by AM (the only other first-hand witness to the incident that led to their discharge), the claimant's testimony is accepted as credible, and it is concluded that the claimant did not require AM to report to work sick.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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.

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 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, 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).

As a threshold matter, the employer must demonstrate that the claimant engaged in the misconduct or policy violation for which she was discharged. In this case, the employer discharged the

claimant after determining that the claimant had allegedly required the assistant manager to work while ill on February 22, 2022, which then caused customers and other employees to be exposed to a virus. *See* Consolidated Finding # 20. Specifically, the employer contended that the claimant forced the assistant manager to report to work while ill, and allowed her to do so, because February 22, 2022, was the claimant's day off. *See* Consolidated Findings ## 11 and 18.

After both parties testified during the remand hearing, the review examiner accepted as credible that the claimant did not require the assistant manager to report to work while ill at any time. *See* Consolidated Findings ## 10 and 13. In reaching this determination, the review examiner concluded that the employer did not present credible evidence to support its allegations against the claimant.

Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

We agree that the record does not contain substantial evidence to support the employer's allegations that the claimant had required the assistant manager to work while ill on February 21, 2022, or February 22, 2022. Given this record, the review examiner's assessment that the employer did not prove any of the allegations against the claimant is reasonable in relation to the evidence presented. Accordingly, the employer has failed to show that the claimant's discharge was attributable to misconduct or a policy violation.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or that she knowingly violated a reasonable and uniformly enforced 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 27, 2022, and for subsequent weeks, if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 14, 2024

Charlene A. Stawicki, Esq.
Member

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.

JMO/rh