

The claimant failed to complete her annual training certifications in violation of the employer's expectation. As the review examiner found that she had access to her e-mail and could complete the certifications from any computer, the findings negate any mitigating circumstances. Held she was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), due to deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0076 2505 26

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 was discharged 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 April 30, 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 August 17, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). 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 was discharged for a knowing violation of a reasonable and uniformly enforced policy when she failed to complete her annual training certifications, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked per diem as a direct support professional for the employer, an adult care program from October 19, 2020, to January 31, 2022.
2. The claimant earned \$15.30 per hour.

3. The claimant had to work a minimum required 75 hours in a three-month period to maintain employment.
4. The employer had a rule all employees must maintain annual certifications.
5. The claimant received the employment handbook at the time of hire.
6. During the claimant's employment she had faced termination before for not completing certifications timely.
7. The claimant had access to her work email every time she signed in for a shift on the employer computer, and anytime on her mobile phone.
8. November 9, 2021, was the claimant's last physical day at work for the employer.
9. As of November 9, 2021, the claimant's mailing address ha[d] not changed.
10. After November 9, 2021, the claimant could have worked shifts at another program but did not.
11. On November 12, 2021, the claimant sent a text message to her program manager stating she will not be picking up shifts at that location and to cancel all future shifts.
12. In the text message, the claimant addressed issues of staffing ratios, staff retention, and concluded by "wishing the program manager success with her career" with the employer.
13. After November 12, 2021, the claimant did not work any shifts or check her email from the employer.
14. After November 12, 2021, the claimant did not contact any program supervisor about working other shifts after November 12, 2021.
15. The claimant did not work any shifts at any program after November 9, 2021.
16. Between November 12, 2021, and December 2, 2021, the claimant could still access her email on her phone or her program location computer.
17. After November 12, 2021, the claimant was still employed because she never resigned, she could still access her work email and pick up shifts at other program locations.
18. On December 2, 2021, the employer emailed and mailed the claimant notices of her specific six overdue certifications for the claimant to complete.

19. The claimant was given six weeks after the December 2, 2021, notice to complete the required certifications.
20. The claimant did not complete the overdue certifications within six weeks for unknown reasons.
21. The claimant previously faced termination for failing to complete another certification.
22. The claimant had access to the employer's computer and her email to complete the certifications if she chose to do so.
23. On January 31, 2022, the employer discharged the claimant for failing to complete the overdue certifications for unknown reasons.

Credibility Assessment:¹

The employer sent the claimant a written notice by email and mail on December 2, 2021, about the six overdue certifications instructing the claimant to complete the certifications and the repercussion of termination if she failed to complete the certifications. The claimant testified she was not aware of the notice. However, the claimant's testimony is not credible because she admitted she knew the employer sent emails, and did not call or text, and she had previously faced termination for not completing another certification. The employer's representative credibly testified [sic] claimant was given six weeks from the notice date of December 2, 2021, to complete the certifications. The claimant did not complete the overdue certifications. The claimant did not receive the email because she chose not to frequently check her email after she had issues on a shift on November 9, 2021. The claimant is aware of the policy, and how overdue certification notices are sent, and the repercussion for not completing the certifications, but chose not to check her emails. The evidence does not support the claimant's assertion about why she did not complete the certifications.

Ruling of the Board

In accordance with our statutory obligation, we review 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. Upon such review, the Board adopts the review examiner's 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. However, while we believe that the review examiner's findings of fact support the conclusion that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), we do so on other grounds, as outlined below.

¹ We have copied here the portion of the review examiner's decision which sets forth her credibility assessment.

Where a claimant is discharged from employment, her eligibility 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 had a rule that all employees must maintain their annual certifications. *See* Finding of Fact # 4. On December 2, 2021, the employer notified the claimant by e-mail and regular mail that she had six specific outstanding certifications to be completed within six weeks from the date of the letter. *See* Findings of Fact ## 18 and 19. The notice informed the claimant that the certifications could be completed online using the employer's training application system and listed the outstanding core certifications to be completed as follows: [Employer] Code of Ethics Review, Cultural Competence, Harassment in the Workplace Self-Paced, HIPAA: The Basics, TIER 1 Online/TIER 1 Review and Workplace Violence Prevention Review. *See* Exhibit # 1.² Because the claimant did not complete the training certifications, the employer discharged her on January 31, 2022. *See* Findings of Fact ## 20 and 23.

We agree with the review examiner's conclusion that the claimant is subject to disqualification pursuant to 151A, § 25(e)(2). However, the employer has not met its burden to show the claimant knowingly violated a *uniformly enforced* policy, as the employer failed to present evidence demonstrating that it discharged other employees for engaging in similar behavior. Alternatively, the claimant will be disqualified from receiving benefits if the employer shows she engaged in deliberate misconduct in wilful disregard of the employer's interest.

In order to determine whether an employee's actions constitute deliberate misconduct, 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).

² The six outstanding certification requirements listed in the letter marked as Exhibit # 1, while not explicitly incorporated into the review examiner's findings, 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).

It is undisputed that the employer had a requirement that all employees must complete their annual certifications. *See* Findings of Fact ## 4 and 6. We agree with the review examiner that the employer's rule to maintain certifications was reasonable as a means to keep staff properly trained. The claimant was aware of the rule to maintain her certifications as she had been warned, in a separate incident, of her likely termination if she failed to complete them. *See* Findings of Fact ## 6 and 21.

We next consider whether her failure to complete the certification was deliberate. The claimant argued that she did not receive the notice and was unaware that she had any outstanding certifications due, and, thus, it was not deliberate. The review examiner dismissed this argument as disingenuous, as the claimant testified that she was aware of the policy and the repercussions for not completing her certifications and previously received e-mail notifications from the employer when her annual certifications became due. 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). We believe her assessment is reasonable in relation to the evidence presented.

We now address whether the claimant had any mitigating circumstances. 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 argued that she was unable to access her work e-mail from her cellular device as her Outlook application was not working and, therefore, unaware of the notice. However, the findings do not support claimant's assertion. The review examiner found that, after November 12, 2021, the claimant did not work any shifts and did not frequently check her email, even though she had the ability to access her work e-mail from her cellular device and through her employer's computer at any one of their locations. *See* Findings of Fact ## 7, 13, 16 and 22. The record does not reflect any other mitigating circumstances that may have prevented the claimant from completing her certification requirements. The absence of any other mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See Lawless v. Department of Unemployment Assistance*, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant engaged 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 affirmed. The claimant is denied benefits for the week ending March 5, 2022, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 21, 2023



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.

DY/rh