Review examiner's legal conclusion that the claimant's tardiness constituted deliberate misconduct in wilful disregard of the employer's interests is unsupported by substantial and credible evidence, where the employer's inconsistent application of its own attendance policy and tolerance of repeated tardiness clouded the claimant's awareness that the attendance policy would be enforced. Held the claimant was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0076 8413 24

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 was discharged from his position with the employer on April 29, 2022. He filed a claim for unemployment benefits with the DUA, effective May 15, 2022, which was approved in a determination issued on June 7, 2022. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 16, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to allow the claimant to provide testimony and evidence and for the employer to provide copies of documentation relevant to the claimant's separation. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 clamant engaged in deliberate misconduct in wilful disregard of the employer's interest by continuing to report to work late after receiving a final warning for attendance issues, 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 part-time as a cashier for the employer, a retail store, from 4/20/18 until 4/29/22.

2. The employer maintained an attendance and tardiness policy which required employees to report to work on time and that lateness may be the cause for disciplinary action up to and including termination.

3. The claimant received the policy and acknowledged receipt at Orientation on 4/20/2018.

4. The policy indicated that 6 tardies in a 12-month period would result in verbal counseling, 8 tardies would result in a written warning, 10 tardies would result in a final warning and 12 tardies would result in termination.

5. The policy is a measure to ensure the employer met customer service standards.

6. The claimant was reminded of the policy multiple times in discussions and warnings.

7. The employer maintained an expectation that its employees would come to work on time.

8. The employer maintained this expectation so that it had adequate staff to ensure customer service standards.

9. The claimant received his schedule two weeks in advance when it was posted in the break room and issued digitally.

10. In October 2020, the claimant started having trouble with tardiness.

11. Over the next several months, the claimant suffered anxiety concerning his treatment by coworkers, including being referred to using female pronouns, being once called a faggot, being accused of undergoing plastic surgery when he lost 110 pounds; and felt the employer's response was not adequate.

12. For example, the coworker who called him and referred to him as a faggot was warned by the employer but not made to attend sensitivity training.

13. The claimant also felt unappreciated by management because they were promoting people that he had trained ahead of him.

14. The claimant told the employer he was tardy because he was at the gym before work, or because his bus was late.

15. The employer gave the claimant multiple chances because he was a good associate, good with customers, and they did not want to lose him.

16. The claimant received a verbal warning on 7/7/2021.

17. The claimant received a formal counseling (first written warning) on 11/19/2021 for 12 tardies.

18. The claimant was tardy an additional 13 times in 2021 and 12 times in January and February 2022.

19. The claimant received a second (final) written warning on 2/24/22 that indicated the next step was termination.

20. The claimant did not consider the final warning to be serious as he had believed the employer would not follow through with it.

21. The claimant was tardy 8 more times between 3/11/2022 – 4/26/2022.

22. For the period 11/1/2021 – 4/26/2022 the claimant was tardy 45 times.

23. On 4/29/22, the claimant was verbally discharged by the store manager for excessive tardiness.

Credibility assessment:

The claimant appeared for the first time at the remand hearing. The employer participated in both the initial hearing and the remand hearing. The credible testimony of both the claimant and the employer witness during both hearings, was largely free of disagreement or conflict with regard to the facts of the claimant's employment and separation. The claimant testified that based on his experience, the employer would not discharge him for his excessive tardiness. The attendance and warning details provided by the employer corroborate his testimony which is found to be authentic and 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. However, after remand, we believe that the review examiner's consolidated findings support the conclusion that the claimant is entitled to unemployment benefits, as outlined below.

Since the record establishes that the employer discharged the claimant from his employment, this case 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 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 Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The review examiner made no findings that the claimant was intentionally or deliberately late for work. The review examiner only found that the claimant was late because his bus was late or because he was at the gym before work. *See* Consolidated Finding # 14. The review examiner also found that the claimant suffered from anxiety concerning how he was treated by coworkers in the workplace. *See* Consolidated Findings ## 11–12.

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. *See* 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, 377 Mass. at 97.

The review examiner's consolidated findings of fact do not support a conclusion that the claimant had the requisite state of mind to warrant disqualification.

It is well-established that an employer's inconsistent application of discipline can cloud its expectations. *See* Gold Medal Bakery, Inc. v. Comm'r of Division of Unemployment Assistance, No. 08-P-767, 2009 WL 995867 (Mass. App. Ct. Apr. 15, 2009), *summary decision pursuant to rule 1:28* (awarded unemployment benefits to a claimant who had been discharged for an absence, because the employer's attendance policy had been "inconsistently applied."). The Court found that the fact that the employer had effectively excused the claimant's past absences led the claimant to "reasonably [believe] that his absence . . . would be excused as it had been before, and that [he] did not possess the requisite state of mind" to be disqualified for deliberate misconduct. Id. *See also* New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 533–535 (2004) (where the employer had overlooked the claimant's prior absences and then discharged the claimant for excessive absences, the employer led the claimant

"to believe that he would not lose his job for failing to adhere to the attendance policy's . . . requirements.").

Here, the review examiner found that the employer had an attendance policy that required employees to report to work on time and cautioned that lateness could lead to discipline up to and including termination. *See* Consolidated Finding # 2. Under that policy, an employee who was late six times in a 12-month period would receive a verbal warning, eight times late in 12 months would result in a written warning, ten times late would result in a final warning, and 12 tardies in a 12-month period would result in discharge. *See* Consolidated Finding # 4. The claimant received the policy upon hire and was reminded of the policy through various warnings he received during his employment. *See* Consolidated Findings ## 3 and 5. Arising from the policy was an expectation that employees would report to work on time. *See* Consolidated Finding # 7.

The review examiner found that the claimant began reporting to work late in approximately October of 2020. *See* Consolidated Finding # 10. The employer issued a verbal warning to the claimant on July 7, 2021. *See* Consolidated Finding # 16. The claimant received a written warning on November 19, 2021, when he had accrued 12 tardies. *See* Consolidated Finding # 17. After receiving the written warning, the claimant was late 13 more times in 2021 and 12 times in January and February of 2022. *See* Consolidated Finding # 18. This led to the claimant receiving a final written warning on February 24, 2022, which cautioned the next disciplinary step would be termination. *See* Consolidated Findings # 19.

The review examiner further found that, after the claimant received his final warning, he was tardy eight more times between March 11 and April 26, 2022, and that he had been tardy 45 times between November 1, 2021, and April 26, 2022. *See* Consolidated Findings ## 21–22. This far exceeded the number of tardies (12) which the employer's policy indicated would result in discharge. *See* Consolidated Finding # 4. The employer finally discharged the claimant on April 29, 2022, for excessive tardiness. *See* Consolidated Finding # 23.

Under these circumstances, the claimant cannot have reasonably known that his continued lateness after February 24, 2022, would have violated the employer's expectation and led to his discharge, as it appears from the record that the employer tolerated the same behavior (tardiness) on at least eight prior occasions after the issuance of the "final" warning. Further, the review examiner found that the claimant did not believe that the employer would follow through with discharge after the final warning, and that the employer had given him multiple chances because he had been a good employee, and they did not want to lose him. *See* Consolidated Findings ## 15 and 20.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending May 7, 2022, and for subsequent weeks if otherwise eligible.

Paul T. Fitzgerald

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 26, 2024

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.

JPCA/rh