

The claimant, who worked as an administrative assistant for the employer, understood that she was only allowed to engage in personal calls while on shift if those calls were related to her academic studies. As she admitted that she participated in a lengthy telephone interview with another potential employer while on shift and testified that she understood her decision to do so was wrong, the employer met its burden under G.L. c. 151A, § 25(e)(2) to show the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0078 2679 79

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 reverse.

The claimant separated from her position with the employer on September 16, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 24, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 30, 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 obtain subsidiary findings of fact pertaining to the claimant's state of mind at the time she engaged in the conduct for which she was discharged. 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 have the requisite state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest when she participated in a telephone interview with a new potential employer while on shift, 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. From July 19, 2022, until September 16, 2022, the claimant worked full-time (40 hours weekly) as an Office Manager Human Resources (HR) Coordinator for the employer, a homeless shelter service provider.
2. The employer maintained a policy, which it provided to the claimant at her time of hire, prohibiting employees from engaging in time fraud at work. The employer retained discretion on the level of discipline it imposed to employees in the event of a violation.
3. The claimant was hired to work an 8:30 a.m. to 4:30 p.m. shift weekdays.
4. The claimant's hourly rate was \$26.00.
5. During her employment, the claimant was enrolled as a student at a local community college.
6. The claimant's direct supervisor was the Senior Director of HR.
7. Sometime after she started her employment, the claimant told the Senior Director that she would periodically need to take school-related phone calls. The Senior Director told the claimant she was permitted to take these school-related phone calls during the workday, away from her desk.
8. As a result, the claimant understood that she was permitted to periodically take school related phone calls during her work shifts.
9. At no time was the claimant told by the Senior Director that she was allowed to engage in job interviews with other employers during her work shifts.
10. The claimant was aware, as a matter of common sense, that the employer expected her to refrain from participating in job interviews with other employers during her work shifts.
11. Prior to September 16, 2022, the claimant participated in at least one job interview with another employer during her work shift with the instant employer.
12. On September 16, 2022, the claimant, during her shift, left her desk, went into one of the employer's conference rooms and engaged in a job interview, on her personal cell phone, for potential employment. The job interview was unrelated to the claimant's school or classroom activities.

13. On September 16, 2022, at the time she participated in the job interview, the claimant did not believe that the telephone interview was related to her school or classroom activities and was aware that her conduct could get her in trouble.
14. On September 16, 2022, the Senior Director noted that the claimant had been away from her desk for over an hour. The Senior Director searched for the claimant and observed the claimant talking on her phone in a conference room. The Senior Director listened in on the claimant's conversation from the other side of the door. When she determined that the claimant was engaged in a job interview, the Senior Director knocked on the door and asked the claimant to report to her office.
15. The claimant met the Senior Director in her office and acknowledged that she was interviewing for another job. The Senior Director told the claimant she would have to think about what happened; she sent the claimant home.
16. On September 16, 2022, the Senior Director reported the incident to the employer's Chief Executive Officer (CEO). The CEO decided to discharge the claimant for having engaged in a job interview with another employer during her work shift earlier that day. The Senior Director agreed with the CEO.
17. On Sunday, September 18, 2022, the Senior Director sent the claimant a text message informing her that she was discharged from her employment effective immediately.
18. In a fact-finding questionnaire submitted to the Department of Unemployment Assistance (DUA), the claimant stated that she was discharged for taking a personal call on company time, in violation of the employer's rule. The claimant further stated that she had "knowledge of the rule because of common principle" and "knowledge of it prior to it happening."

Credibility Assessment:

During the hearing, the claimant admitted that [sic] understood it was "not right" for her to interview during the company time because of common sense. Given this, and in conjunction with her factfinding responses, it is concluded that the claimant was aware that interviewing for another during her work shift could get her into trouble.

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,

as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to benefits.

Because the claimant was discharged from her 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).

As an initial matter, we note that the employer's time-theft policy allows the employer to exercise discretion when imposing discipline for violations. Consolidated Finding # 2. The Massachusetts Appeals Court has held that, where the written policy provided the employer with discretion in its strict enforcement, it is not uniform on its face. New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 534 (2004). Therefore, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. As such, we consider only whether the claimant 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).

As a threshold matter, the employer must show that the claimant engaged in the conduct for which she was discharged. The claimant admitted to leaving her desk on September 16, 2022, in order to engage in an interview over the telephone while on shift with the instant employer. Consolidated Findings ## 12 and 15. Thus, there is no question that she engaged in the behavior for which she was terminated.

There is also no question that the claimant understood that the employer expected her to refrain from taking or making personal telephone calls while on shift unless those calls were related to her academic studies. Consolidated Findings ## 5, 7–10. Nothing in the record suggests that there were any mitigating circumstances which required her to participate in these calls. See Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances

include factors that cause the misconduct and over which a claimant may have little or no control). As the claimant chose to participate in this lengthy call while on shift and knew that the interview was unrelated to her work or academic studies, it is clear that her actions on September 16, 2022, were deliberate and in wilful disregard of the employer's interest. See Consolidated Finding # 13.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged 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 reversed. The claimant is denied benefits beginning the week of September 18, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 25, 2023



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

LSW/rh