The claimant, hired as a remote worker, moved to Texas unaware that the employer expected her to work from New England. Subsequently, she did not comply with the employer's directive to relocate back to Massachusetts, because she could not financially afford to break her lease in Texas or to relocate back to Massachusetts. Held her discharge was due to mitigating circumstances and not wilful disregard of the employer's interest. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0078 3528 37

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 her position with the employer on October 3, 2022. She filed a claim for unemployment benefits with the DUA, effective October 2, 2022, which was denied in a determination issued on October 29, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on February 11, 2023. 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). 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's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest when the claimant refused to relocate back to Massachusetts to work remotely and attend monthly in person meetings, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the employer, a hospital, as practice liaison, beginning in May of 2019 [sic], until October 3, 2022.

2. The claimant worked 40 hours a week, Mondays through Fridays from 8:30 a.m. to 5:00 p.m., at an hourly rate of $29.00.

3. The claimant worked for the employer in a remote capacity.

4. The claimant moved to Texas to live with her sister in June of 2021. The purpose of her move was to reduce her living expenses. The claimant signed a one-year lease on a rental apartment in September of 2021.

5. The claimant entered her new address in the employer's software system in late June of 2021, but she did not immediately inform her supervisors that she had relocated to Texas.

6. In April of 2022, the employer informed the claimant that she would have to come into the office once a month for meetings.

7. In April of 2022 [sic], an audit conducted by HR revealed that the claimant's primary address was outside the 4 approved New England jurisdictions for remote employees.

8. The employer, upon confirming that claimant lived in Texas, sent the claimant an email on April 22, 2022, informing her that she had to return to Massachusetts by May 13, 2022.

9. The employer made it clear to the claimant that they expected her to work remotely from Massachusetts and attend monthly meetings in person.

10. In April of 2022, the claimant told the employer that she could not return to Massachusetts by May 13, 2022, because she could not afford either the moving expenses or the living expenses. She expressed her desire to continue working remotely.

11. On April 21, 2022, the claimant told the employer that she refused to voluntarily resign, and she would not return to live in Massachusetts.

12. While living in Texas, the claimant was also working full time for another employer from November 20, 2021, until her termination on March 11, 2023 [sic]. She worked 40 hours a week and was paid an hourly rate of $27.00. The claimant's termination letter from this employer shows that the claimant has a [City A], California address.

13. On October 3, 2022, the employer terminated the claimant because she relocated to a non-approved location, and she voluntarily chose not to return to 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. In Finding of Fact # 1, we believe the date of commencement of employment, May of 2019, is a typographical error as the unrefuted evidence reflects that she began her employment on September 12, 2016. We reject the portion of Finding of Fact # 7 which provides the date of the audit as April of 2022, as Exhibit # 6 reflects that the audit was performed on or about May 16, 2022.[1] We further reject the portion of Finding of Fact # 12, which provides a termination date of March 11, 2023, as the testimony and unrefuted evidence reflects a termination date of March 11, 2022. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not eligible for benefits.

Because the claimant was terminated from her employment, her qualification 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. . . .

"[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).

Considering that the employer did not present any evidence of any particular policy violation, we cannot conclude that the claimant violated a reasonable and uniformly enforced rule or policy. Alternatively, we consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The findings provide that the employer discharged the claimant because she relocated to Texas, a non-New England approved remote work state, and because she did not relocate back to Massachusetts when the employer informed her that she had to attend monthly in-person meetings. *See* Findings of Fact ## 7 and 13. Since the claimant was discharged for two distinct reasons, we analyze each one separately.

[1] Exhibit # 6 is the HR audit email correspondences. Although not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and 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).

The findings indicate that when the claimant began her employment in 2016, she was hired to work in a remote capacity. *See* Findings of Fact ## 1 and 3. Nothing in the record suggests that, at the time of hire, the claimant was informed that she was required to perform her duties in Massachusetts or that she was limited to performing her duties within the four approved New England states. Also, we see no evidence to indicate that the claimant tried to conceal the fact that she relocated to another state as she immediately updated her contact information upon her relocation to Texas. *See* Findings of Fact ## 4 and 5.

The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Since the claimant was apparently hired to work remotely, and the record does not show that the employer communicated to the claimant that she was expected to perform her duties within a specific locale prior to her move, she may not be disqualified for deliberate misconduct in wilful disregard of the employer's interest because she moved to Texas.

We next consider the claimant's failure to relocate back to Massachusetts by May 13, 2022, to attend in-person monthly meetings. It is unrefuted that the employer requested that the claimant relocate back to Massachusetts and that she would not return. *See* Findings of Fact ## 6, 9, and 10. Her failure to do so was misconduct. Inasmuch as the claimant expressly told the employer that she would not, there is no question that her action was deliberate.

However, deliberate misconduct alone is not enough. The employer must also show that the claimant's actions were done in wilful disregard of the employer's interest. 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). 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 (citation omitted). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Id. at 95.

There is no question that the claimant knew the employer expected her to return to Massachusetts and attend in person meetings, as the employer communicated this to the claimant in April of 2022. *See* Findings of Fact ## 6 and 8. Moreover, we believe that it is reasonable for an employer to expect its employees to perform their work in the workplace.

The question is whether mitigating circumstances prevented the claimant from complying with the employer's expectation. 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).

Here, the claimant had already relocated to Texas ten months prior to the employer instituting its new hybrid work schedule. *See* Findings of Fact ## 4 and 6. There is nothing contained in the record to suggest that, at the time the claimant relocated, her remote work arrangement was to change. Moreover, the rationale behind the claimant's inability to return to Massachusetts is based

upon the claimant's financial circumstances. When her employer directed her to return, she could neither afford the relocation expenses nor the living expenses in Massachusetts, and she was contractually bound to a one-year lease on an apartment in Texas. *See* Findings of Fact ## 4 and 10. Thus, her failure to return to Massachusetts was not done in wilful disregard of the employer's interest but due to mitigating circumstances that she could not financially afford to return.

We, therefore, conclude as a matter of law that the claimant did not knowingly violate a reasonable and uniformly enforced policy or engage in deliberate misconduct in wilful disregard of the employer's interest, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending October 2, 2022, and for subsequent weeks if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 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.

DY/rh