The claimant was discharged because she left the employer's store during her shift and refused to come back when the owner instructed her to return. As the review examiner reasonably rejected as not credible the claimant's testimony that she left because she was not feeling well, the record indicates the claimant left because she was displeased with the employer's decision to issue her a verbal warning. As the claimant did not establish mitigating circumstances, she was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0078 5840 97

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 separated from her position with the employer on November 12, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 10, 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 April 20, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 because the claimant's attorney had been unable to attend the initial hearing as a result of exigent circumstances. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 quit voluntarily when she decided to leave work without a reason and refused to return to the employer's store to meet with the owner, 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 as a salesperson for the employer, the operator of a jewelry store.

2. The claimant worked part-time, typically about thirty hours per week, and she generally made herself available to work whenever her employer wanted to schedule her.

3. The claimant was aware, as a matter of common sense, that the employer expected [sic] to report to work and remain at work for the duration of her scheduled shifts.

4. By text message on November 9, 2022, about three hours before her shift was to start, the claimant informed the owner that she would not be coming to work that day.

5. The boss responded by text that the claimant's absence presented a problem, and he asked for her to come in.

6. The claimant responded, "my list is too long, I need a personal day."

7. The owner then asked the claimant to ask one of the other store employees to cover for her.

8. The claimant did not have the contact information for this other employee, and she did not respond to or otherwise act on the owner's request.

9. The claimant worked the next day, November 10, 2022, as scheduled.

10. The owner was not at the store that day; and he and the claimant did not speak that day.

11. On Saturday November 12, 2022, when the claimant reported to work for her next scheduled shift, she did not, upon seeing the owner, announce that she was sick.

12. The claimant rightly understood that the employer expected employees who believed themselves to be sick with [COVID-19] to stay away from work.

13. The owner asked the claimant whether she had contacted the other employee on November 9, 2022, as he had requested.

14. The claimant said she had not.

15. The owner told the claimant that if she called out in the same manner in the future as she had done on November 9, 2022, he would terminate her employment.

16. Minutes later, the claimant walked past the owner without saying anything and left the store.

17. The claimant had earlier told the owner's brother, who also works at the store, that she was leaving; in doing so, she did not explain why she was leaving.

18. Soon after she left, the owner texted the claimant, "Why did you leave?"

19. The owner then sent a text stating, "If you don't get back here today, I'm going to have no choice but to let you go for Wednesday and walking out today . . . ."

20. The claimant responded by text, "I'm not feel [sic] well."

21. The claimant added, "Threatening me isn't very kind. I won't be returning to work today."

22. The owner did not believe that the claimant was sick.

23. Because he did not believe her, the owner made clear, and the claimant understood, that the claimant's refusal to work that day would result in her being fired, and he specified, "[T]he invitation is open to the close of business today."

24. In explaining her refusal to come to work that day, the claimant cited other reasons for not coming to work besides her being sick.

25. The claimant texted the owner, "[I] left today after you told me that your originally [sic] plan was to tell me that you didn't need me today."

26. At 3:45 p.m., the claimant texted the owner, "It's my choice after you've threatened me?"

27. As she had asserted, the claimant did not return to work that day.

28. The claimant was not sick that day; she stayed away from work not because she was sick but because she did not like the way she was being treated.

29. The employer discharged the claimant because she left work and did not return on November 12, 2022, after having been instructed to do so.

30. The claimant's choice not to return to work on November 12, 2022, was harmful to the employer in that the employer had a business to run and needed the claimant's services to run that business without overwhelming other employees.

31. The claimant was aware of the adverse consequences to the business of her not returning to work because, among other reasons, the owner informed her by text

message on November 12, 2022, "This is not a large company, everyone needs to contribute or it falls to someone else!"

32. By Notice of Disqualification dated December 10, 2022, the Department informed the claimant that she was disqualified as of November 6, 2022, until she had 8 weeks of work and had earned an amount equivalent to or in excess of 8 times her weekly benefit amount.

33. The claimant appealed the Notice of Disqualification.

Credibility Assessment:

It was undisputed that the owner told the claimant that she would lose her job if she did not return to work on November 12, 2022. It was likewise undisputed that the claimant did not return to work that day. Both parties agreed that the claimant rightly understood that based on her failure to return that day, she was being discharged from her employment.

A central factual issue is whether the claimant was sick on November 12, 2022. The claimant has not established that she was, and the evidence strongly points to her not being sick that day. The claimant testified that she was sick that day when she arrived to work, that she told the owner she was, that after leaving the store she went home, took a [COVID-19] test, and went to bed. The owner testified, on the other hand, that the claimant did not tell him she was sick and did not tell him why she was leaving. The owner testified that the claimant had spoken with his brother and stated to him that she was leaving but that, in doing so, she had not explained to the brother why she was leaving.

The mere fact the claimant came to work the morning of November 12, 2022 suggests she was not sick. She testified during the remand hearing that she reported to work on November 12, 2022 despite being sick in an effort to be a dependable employee. She also testified, however, that she thought she had [COVID-19] and that she believed the employer's policy was to have people sick with [COVID-19] stay [sic]. The owner confirmed that to be the employer's policy. It made little sense that the claimant would have reported to work on November 12, 2022 if she thought both that she was sick with [COVID-19] and that [sic] the employer had a policy against employees working when they were sick with [COVID-19]. The natural conclusion is that the claimant was not sick with [COVID-19] and did not believe herself to be.

The text messages exchanged between the claimant and the owner after the claimant left the store further support the owner's testimony and undercut the claimant's testimony. Straight away, the owner asks, "Why did you leave?" If the claimant had already told the boss the reason she was leaving, he probably would not have asked this question. Furthermore, the claimant probably would have mentioned in her response that she had already told the boss about her sickness.

> Instead, she responds simply, "I don't feel well," as if she is telling him this information for the first time.
>
> In later text messages, the claimant focuses on other reasons for having left the store and not on her being sick. These other reasons include that the boss had told her that her services were not needed that day and that her boss had threatened her. The claimant's pivoting to new rationales suggests that the claimant's sickness was not the reason she had left her employment that day and, indeed, that she was not sick at all.
>
> The conclusion that the claimant was not sick on November 12, 2022, is reinforced by the fact that the claimant likewise testified that she was sick on November 9, 2022 when the text messages strongly indicated to the contrary. A person who needs to stay home because she is sick does not typically cite a long list as her reason for staying home. The claimant testified during the initial hearing that she meant by that that she had a "long list of ailments." The claimant's testimony in this regard was not credible, and it undermines her testimony that she was sick on either November 9, 2022 or November 12, 2022.

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. As discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is not entitled to benefits.

As the claimant was discharged, 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 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. . . .

Under the foregoing provision, it is the employer's burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy or for deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

In this case, the employer did not present any policy that it asserts that the claimant violated. Therefore, the employer did not meet 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.

As a threshold matter, the employer must show that the claimant engaged in misconduct. In her testimony, the claimant confirmed that she left the employer's store prior to the end of her shift on November 12, 2022, and refused to return to work to complete her shift when asked or to discuss her reason for leaving. Consolidated Findings ## 16–21. Thus, there is no question that the claimant engaged in the misconduct for which she was fired. *See* Consolidated Finding # 29.

As there is nothing in the record to suggest that the claimant left her shift early by mistake, we can reasonably infer that she acted deliberately.

However, the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest." Goodrich v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978). 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. 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 v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

By her own admission, the claimant understood that the employer expected its employees would remain at work for the duration of their scheduled shifts. Consolidated Finding # 3. Further, text correspondence between the claimant and the employer's owner shows that the claimant acknowledged but then refused the owner's instruction to return to the employer's store. Consolidated Findings ## 18–27. Thus, she was aware that the employer expected her to complete her shift on November 12th.

The employer's expectation that the claimant complete her scheduled work shift was reasonable, as it needed the claimant's services so as not to overwhelm other employees. *See* Consolidated Finding # 30.

However, at both hearings, the claimant maintained that she was unable to return to work on November 12, 2022, because she was unwell. *See* Consolidated Finding # 20. We must, therefore, consider whether the claimant articulated mitigating circumstances for her failure to comply with the employer's expectations. 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). Such circumstances may be sufficient to negate the willfulness of the claimant's actions.

A claimant's illness may, in certain contexts, fall within the ambit of mitigating circumstances for that claimant's failure to remain on shift. *See e.g.*, Board of Review Decision 0017 2561 68 (Sept. 15, 2016) (the claimant's illness constituted mitigating circumstances for his decision to leave during his shift). In this case, however, the review examiner rejected the claimant's contention

that she was unwell when she left work on November 12, 2022. He found the claimant's testimony not credible, because her actions between November 9, 2022, and November 12, 2022, and text messages between the claimant and the employer's owner during this period were inconsistent with her contentions that she was ill. *See* Consolidated Findings ## 4–6, 9, 11, and 17–25. 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). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Consolidated Finding of Fact # 28 explains that the claimant left her shift and refused to return because she did not like the fact that the owner had issued her a warning for her actions on November 9, 2022, and subsequently informed the claimant that he would terminate her if she did not return to work after walking out on November 12, 2022. *See* Consolidated Findings ## 13–19. The claimant's displeasure with the employer's owner's statements is not evidence of mitigating circumstances. Absent credible evidence of factors that might have precluded the claimant from adhering to the employer's expectations, the record supports the review examiner's conclusion that the claimant acted in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant is not entitled to benefits because she was discharged for 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 of November 6, 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 - August 15, 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