

Where the claimant refused to adhere to the requests of the new Executive Director and limited the employer's computer systems' ability to permit such requests from being carried out by other employees, her insubordination constituted deliberate misconduct in wilful disregard of the employing unit's interest pursuant to G.L. c. 151A, § 25(e)(2).

**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 9970 82

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 was discharged from her position with the employer on January 6, 2023. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 4, 2023. 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 April 29, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not knowingly violate a uniformly enforced policy or engage in deliberate misconduct in wilful disregard of the employer's interest 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's refusal to follow the Executive Director's instructions and her decision to limit other employees' ability to follow the Executive Director's instructions were not deliberate misconduct because she believed the Executive Director's decision was detrimental to furthering the employer's interests, 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 as the comptroller for the employer, the operator of an addiction treatment center.
2. The claimant had for the first fourteen months of her employment been reporting to one executive director (former ED).
3. Then on January 4, 2023, a new person assumed the executive director position, and the claimant started reporting to her (“ED” or “new ED”) instead.
4. Based upon emails between the new ED and a co-worker that the claimant had read, whether properly or improperly, from months earlier, the claimant was pre-disposed to think that the new ED, upon arrival to the new position, wanted the claimant to no longer be working for the employer.
5. As comptroller, the claimant was the administrator of financial software that recorded all fees collected by the employer.
6. The claimant also had online access to the employer’s banking system and payroll system.
7. Only two other people within the organization had access to the employer’s financial software: a senior accountant and a financial services representative.
8. A fourth person, the director of program services, had access to the financial software until June of 2022, but he no longer did as of January 4, 2023.
9. The director of program services had been responsible for collecting fees, and in that role, he had relied upon the financial software for information.
10. In June of 2022, at the direction of the then-executive director, *i.e.*, the former ED, the collection role was taken away from the director of program services, and the claimant, as administrator of the financial software, simultaneously removed that director’s access to the financial software.
11. Immediately upon assumption of her new role, the new ED started making organizational changes.
12. By email on January 4, 2023, the new ED asked the claimant to grant the senior accountant (who had not had access for months) access to the employer’s payroll system and to reinstate the director of program services to the financial software so that he could resume his collections role.
13. The claimant had a strong negative reaction to both these requests because the requests were contrary to plans that had been in place for months and were not consistent with plans that the former ED had set in place.

14. On January 4, 2023, the claimant and the ED exchanged emails back and forth regarding the requests.
15. In her emails, the claimant objected, in an unreserved manner, to the changes that the ED had asked her to make and to the executive director's having made these changes without first consulting the claimant.
16. The exchange proved unproductive, and neither the claimant nor the Executive Director sought to speak with the other directly.
17. After a few exchanges back and forth by email, the claimant announced, again by email, that she was sick to her stomach and was going home.
18. The claimant, decidedly upset, left for the day, and the claimant and the ED did not communicate for the rest of the day.
19. The claimant was not willing to carry out the ED's requests without first discussing the requests with the ED.
20. To prevent others from carrying out the requests, the claimant took a further step: she limited the privileges of the two other users of the financial software so that they could not grant the requested access to the director of program services.
21. For the most part, other functions of the system remained intact, and the claimant did not cripple the financial software.
22. Word of the claimant's refusal to honor the ED's requests and her efforts to guard against those requests reached the ED that same day.
23. The claimant had no intention of causing the employer harm.
24. Out of concern that the claimant might retaliate against the employer because of her anger, the ED began on January 4, 2023, to limit the claimant's authority to act in connection with the employer, including by eliminating her banking access and shutting down her company email.
25. The claimant remained out of work the next day, Thursday January 5, 2023, and neither the claimant nor the ED reached out to each other that day except as described below.
26. The ED held an emergency meeting with the board of directors on the evening of January 5, 2023, to discuss the situation regarding the claimant.
27. With the board of directors' approval, the ED decided during that meeting to terminate the claimant's employment.

28. The ED based her decision to terminate upon the claimant's refusal to follow the ED's directives, the claimant's limiting access of other employees to the financial and payroll systems, and past performance issues raised by the board of directors concerning the claimant.
29. The past performance issues included alleged personality conflicts, alleged infliction of emotional and mental distress by the claimant on co-workers, and alleged unprofessional conduct in the community.
30. While still in the meeting with the board, the ED called the claimant and left her a voicemail message asking her to meet the next morning at 10:00 a.m. and then immediately sent the claimant a text message to the same effect.
31. The claimant responded to neither the voicemail message nor the text message and did not appear the next morning (Friday) for the 10:00 [a.m.] meeting as requested.
32. The purpose of the meeting had been to announce to the claimant the termination of her employment.
33. On January 6, 2023, after the claimant had failed to appear for the meeting and failed to communicate with the ED, the ED sent the claimant a certified letter announcing the claimant's termination and explaining that it was not in the employer's best interest to continue with the employment.
34. By Notice of Disqualification, dated February 4, 2023, the claimant was denied unemployment benefits as of January 1, 2023.
35. The claimant appealed the disqualification.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems 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 entitled to 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 willful 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 this provision of the statute, it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or deliberate misconduct in willful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996).

Finding of Fact # 28 provides that the employer fired the claimant, at least in part, because she refused to follow his directives. Although the employer testified that it has an expectation requiring employees to adhere to the requests of the Executive Director, it did not present a written policy to this effect, nor did it show that other employees were discharged under similar circumstances. Thus, it has not shown that the claimant knowingly violated a reasonable and *uniformly enforced policy*.

Alternatively, we consider whether the employer met its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. The claimant's refusal to follow the Executive Director's instructions is insubordination, a form of misconduct.

Finding of Fact # 19 indicates that she acted deliberately, refusing to comply with the Executive Director's requests until he discussed them with her. Moreover, the record shows that the claimant took steps to limit other users' access within the employer's financial and payroll systems to prevent other employees from implementing such directives. *See* Finding of Fact # 20. We are satisfied that the claimant's actions were deliberate.

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." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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). 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). 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).

As the claimant had previously complied with the former Executive Director's instructions, the record establishes that she was aware of the employer's expectation that she comply with the instructions of the Executive Director. *See* Finding of Fact # 10.

We see nothing unreasonable about the new Executive Director's decision to restore the senior accountant's access to the employer's payroll system and to reinstate the director of program services' access to the financial software. *See* Finding of Fact # 12. The review examiner found that the claimant refused the Executive Director's requests because they were contrary to plans

that had been in place for months and were not consistent with plans that the former Executive Director had set in place. Finding of Fact # 13. Aside from disagreeing with these changes, the claimant has not demonstrated how they were unreasonable business decisions.

We next must consider whether the record contained sufficient evidence to conclude that mitigating circumstances prevented the claimant from adhering to 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). The absence of 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*.

Here, the claimant's refusal to comply with the employer's instructions stemmed from the claimant's belief that the instructions seemed inconsistent with those of the former Executive Director. *See Findings of Fact # 11-13*. The claimant's disagreement with these changes does not amount to a circumstance beyond her control.

The claimant knew of the employer's expectation, the expectation was reasonable, and she chose, under no compulsion, not to comply with the instructions of the Executive Director. Absent evidence of mitigating circumstances, we can reasonably infer from the evidence in the record that the claimant's actions were done in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to 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 reversed. The claimant is denied benefits for the week of January 1, 2023, 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.

BMP/rh