The claimant had permission from two supervisors to move to Massachusetts and continue to work remotely for a year and a half after the employer notified its employees to return to in-person work at its New York office. When the employer later told her she would be fired if she did not work in the office, the Board held her failure to comply with the expectation was not done in wilful disregard of the employer's interest, but due to the mitigating circumstance that she'd already resettled out-of-state. Claimant is eligible for benefits 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

Issue ID: 0079 2643 63

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 separated from her position with the employer on January 31, 2023. She filed a claim for unemployment benefits with the DUA, effective January 29, 2023, which was denied in a determination issued on April 20, 2023. 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 May 25, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without demonstrating that it was for good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, she was disqualified under G.L. c. 151A, § 25(e)(1). 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 resigned her employment, is supported by substantial and credible evidence and is free from error of law, where the record shows that she was discharged because she could not return to in-person work after she had moved out of state with her supervisors' permission.

Findings of Fact

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

1. The claimant worked full time as a project manager coordinator for the employer, a large retail jeweler, from February 2019 to 1/31/2023.

2. When initially hired, the claimant worked on site at the employer's corporate headquarters in New York (NY) and lived in the NY area.

3. The clamant reported to the director.

4. In March 2020 at the start of the [COVID-19] pandemic, the employer required its employees to work full-time from home.

5. In February or March 2021, the employer sent out a notification to all employees that they were required to return to the workplace.

6. The claimant notified the director that she planned to move to Massachusetts in June 2021 and would continue to work remotely from there.

7. In June 2021, the claimant moved to Massachusetts to be nearer to her family.

8. From June 2021 on, the claimant worked remotely from Massachusetts.

9. In November 2022, the director told the claimant she would be discharged on 12/31/2022 because she was living in Massachusetts and had not returned to work at the headquarters work location in NY.

10. The employer then asked the claimant to stay until 1/31/2023 because there was more work that needed to be done.

11. On 1/31/2023, the claimant separated from her job because she had moved to MA for personal reasons and had not returned to work in the NY office as required by her employer.

12. The employer did not have any suitable jobs for the claimant in 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. Finding of Fact # 6 is accurate insofar as it reflects what the claimant communicated to the employer about moving to Massachusetts, but we note that it is incomplete, as it fails to capture the employer's response, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question is whether the review examiner properly concluded that the claimant's separation should be treated as a voluntary resignation. Finding of Fact # 9 states quite clearly that the employer's director advised her in November, 2022, that she was to be discharged because she

had not returned to work at the employer's New York headquarters. Although the employer needed her to continue working until January 31, 2023, she was let go at that point because had had not returned to work in-person at the New York office. *See* Findings of Fact ## 10 and 11. In short, the employer told her it would discharge her, and it did.

As the findings show that the employer terminated her employment, the claimant's separation was not voluntary. Her eligibility for benefits must be analyzed pursuant to G.L. c. 151A, § 25(e)(2), which states, in relevant 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).

The employer presented no evidence that the claimant violated a particular policy, or that its rule about a return to in-person work was uniformly enforced. Thus, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2). Alternatively, we consider whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

There is no question that, in March, 2020, the employer required its employees to work from home. Finding of Fact # 4. Nor is there any question that the employer notified all employees in February or March, 2021, that they were required to return to the workplace. Finding of Fact # 5. In and of itself, there is nothing unreasonable about an employer expecting its workforce to report to the workplace to perform their work.

Moreover, the record indicates that the claimant was aware of the expectation and acted deliberately in not returning to her employer's physical location in February or March, 2021. During the hearing, the claimant testified that, after the February or March announcement, she notified the director that she planned to move in June to [City A], Massachusetts, where she would continue to work remotely. *See* Finding of Fact # 6.[1] 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. A person's intent may be adduced from all of the facts and

[1] While not explicitly incorporated into the review examiner's findings, we have referred to portions of the claimant's testimony as they are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

circumstances in the case." Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

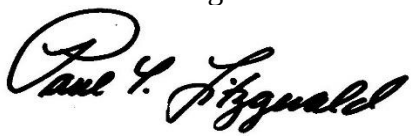
The claimant also testified that, after the February or March announcement, it seemed that people started to go into the office, but not really, and that, when she notified the director that she planned to move in June to Massachusetts, this director told her it was fine. Moreover, she stated that, when a new boss was assigned before she moved, she made the new boss aware of her plans, and that the new boss was also fine with it. Further, she explained that it was not until November, 2022, that the employer said working at headquarters was mandatory. *See* Finding of Fact # 9.

In our view, the fact that the claimant was able to continue to work for the employer remotely for around 20 months, between March, 2021, and November, 2022, (including from her new home in Massachusetts since June, 2021) supports the claimant's testimony that her directors had allowed her to relocate and work remotely from Massachusetts. *See* Findings of Fact ## 5–9.

Thus, the claimant had the permission of two supervisors to move to Massachusetts. By her continued employment over the next year and a half, we can reasonably infer that, notwithstanding its February or March, 2021, notice to return to the office, the employer had consented to the claimant working remotely. Under these circumstances, we believe that her failure to comply with the employer's November, 2022, mandatory directive to return to in-person work was not done in wilful disregard of the employer's interest. It was due to mitigating circumstances. She had moved too far away to be able to commute to the employer's physical headquarters. *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).

We, therefore, conclude as a matter of law that the claimant was discharged from her employment. We further conclude that she did not knowingly violate a uniformly enforced policy or engage in 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 entitled to receive benefits for the week beginning January 29, 2023, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - July 28, 2023

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.

AB/rh