

The claimant left her shift early without permission or explanation after getting into an argument with a coworker. As she conceded she understood her decision could subject her to discipline, the claimant knew her actions were contrary to the employer's expectations. Though frustrated and attempting to avoid an escalation, the claimant did not show mitigating circumstances, as she could have sought a manager's assistance rather than walk away during her shift. Held the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0080 9159 70

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 August 2, 2023. She filed a claim for unemployment benefits with the DUA, effective August 6, 2023, which was denied in a determination issued on September 7, 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 November 18, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated 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 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 employer had not met its burden to show the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest when she left her shift early, 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 as a sandwich maker, counter service provider and food preparer for the employer, a sandwich shop and bakery, from 1/1/2023 until 7/31/2023.
2. The employer's general manager (GM) supervised the claimant.
3. On 7/29/2023, GM was out sick from work and placed a different manager (Manager 1) in charge in her absence.
4. The shop was busy on 7/29/2023. The claimant was assigned to make sandwiches.
5. At some point during her shift, a coworker (Coworker 1) told the claimant to stop making sandwiches.
6. The claimant was confused about being told to stop being [sic] sandwiches because the shop was busy.
7. The claimant asked out loud if she should stop making sandwiches and another coworker (Coworker 2) said she did not know.
8. The claimant continued making sandwiches and Coworker 1 told her a second time to stop making them.
9. The claimant asked Manager 1 if she should stop making sandwiches and Manager 1 told her not to stop making sandwiches.
10. After Manager 1 told her to continue making sandwiches, Coworker 2 squatted in front of her and asked, "why do you keep asking the same question?"
11. The claimant felt Coworker 2 spoke to her like a "moron" or like a "child" when she squatted in front and asked her "why do you keep asking the same question?"
12. After that, the claimant and Coworker 2 began to argue.
13. While the claimant and Coworker 2 argued, the claimant felt frustrated and believed it was best she removed herself from the situation.
14. The claimant felt she should leave to not escalate the argument with Coworker 2.
15. The claimant packed her things to leave, and GM asked if she was leaving. The claimant told her she was going home.
16. The claimant left work one hour before her shift ended.

17. The claimant did not say she quit.
18. Manager 1 was GM's aunt and Coworker 2 was GM's mother.
19. The claimant's next scheduled workday was 8/2/2023.
20. On 7/31/2023, the claimant sent GM a text message that told the GM she left work early on 7/29/2023 "not to escalate the situation more than it did" and asked she was "still going in tomorrow or not".
21. GM responded to the claimant's text telling her that the employer accepted her "voluntary termination of employment" because she walked out of her shift early without explanation on 7/29/2023.
22. On 8/2/2023, the claimant was discharged for leaving work early on 07/29/2023.

[Credibility Assessment:¹]

The claimant contends that she was discharged when she left work early because she wanted to deescalate the argument with Coworker 2. The claimant testified during the hearing that she had felt belittled and frustrated with Coworker 2 and felt it was best to remove herself from the situation, an hour before her shift ended. Further, she told Manager 1 she was leaving, but never said she quit.

GM testified during the hearing that the claimant quit her job when she left work early without notification. The employer's witness only offered hearsay testimony about the argument between the claimant and Coworker 2. The employer's witness stated that she did not speak with the claimant prior to 7/29/2023 because she was waiting to speak with the claimant in person, then told her she had "voluntarily terminated" her employment.

The claimant offered detailed testimony about the incident in question. The hearsay evidence of the employer was rebutted by the direct testimony of the claimant. As the hearsay evidence of the employer is uncorroborated in any way and is rebutted by the direct testimony of the claimant, the hearsay evidence of the employer cannot be considered to be "substantial" as required by the Law. The claimant's testimony is deemed more credible.

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

¹ We have copied and pasted here the portion of the review examiner's decision which contains her credibility assessment.

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 was entitled to benefits.

While the employer maintained that the claimant quit her job by leaving work early without permission, the review examiner accepted as credible the claimant's contention that she was discharged. *See* Finding of Fact # 21. 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). The claimant did not inform the employer that she was quitting at the time she left and, after leaving, sought further clarification from the employer because she was unsure of her employment status. Findings of Fact ## 17 and 20. As the record indicates that the employer decided to sever its employment relationship with the claimant, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Consistent with the review examiner's reasonable credibility assessment, the claimant's separation is appropriately analyzed under 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).

The review examiner did not conduct any analysis of the claimant's separation under G.L. c. 151A, § 25(e)(2), because the employer maintained that the claimant had quit. The employer's perception of how it would prefer to classify the claimant's separation is evidence probative to assessing a claimant's eligibility but is not a determinative fact. Where the facts indicate that a claimant may have been discharged for a knowing violation of a uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's expectations, some analysis under G.L. c. 151A, § 25(e)(2), must be completed.

In this case, the employer did not present any policy which it alleged the claimant's violated. Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and uniformly enforced policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged. As the claimant conceded she left her shift an hour early on July 29, 2023, and did not seek permission or provide any explanation for her decision to leave, there is no question that she engaged in the misconduct for which she was discharged. Findings of Fact ## 15 and 21. Further, as the claimant explained that she made the decision to leave following an argument with a co-worker, it is self-evident that her decision to do so was deliberate. Findings of Fact ## 13 and 14.

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. 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).

While the claimant testified that she did not believe she would be discharged for leaving early, she acknowledged that she understood that she could be disciplined for leaving before the end of her shift.² Consistent with this concern, the claimant reached out to the employer's general manager to ascertain whether she should be returning to work. Finding of Fact # 20. We, therefore, believe that the claimant's testimony and actions confirm that she understood that her decision to leave her shift early without permission or explanation was contrary to the employer's expectations.

However, the claimant explained that she made the decision to leave early because she was concerned a disagreement between herself and a coworker would continue to escalate. Findings of Fact ## 12-14. We must, therefore, consider whether the claimant's explanation for her misconduct constituted mitigating circumstances that prevented the claimant from following the employer's instructions. 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 claimant left because she had engaged in an argument with another coworker, felt frustrated, and she wanted to avoid further escalating the argument. *See* Findings of Fact ## 11-14. However, there was no indication that circumstances beyond the claimant's control compelled her to leave. She chose to leave early instead of ignoring the coworker or attempting to get further help from a manager. Thus, she has not demonstrated mitigating circumstances for her misconduct.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectations under G.L. c. 151A, § 25(e)(2),

² The claimant's testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed into the record, and it is 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).

because she left her shift early without requesting permission or providing any explanation for her actions.

The review examiner's decision is reversed. The claimant is denied benefits for the week of August 6, 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 - April 26, 2024



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.

LSW/rh