

The claimant clocked out and left even though his supervisor had denied his request to leave early. As he was aware he needed permission to leave early but still chose to leave without being granted permission, his actions constituted deliberate misconduct under G.L. c. 151A, § 25(e)(2). The claimant maintained that he had been given permission to leave. Because he denied engaging in the misconduct at issue, the defense of mitigation is not available to him.

**Board of Review
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Issue ID: 0080 9600 98

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 his position with the employer on July 26, 2023. He filed a claim for unemployment benefits with the DUA, effective August 6, 2023, which was denied in a determination issued on October 19, 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 overturned the agency's initial determination and awarded benefits in a decision rendered on November 9, 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 remanded the case to the review examiner to obtain additional evidence from the employer, as the employer's witness was unable to connect to the initial hearing due to technical issues beyond his control. Only the employer 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 employer had not met its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest because the claimant had been given permission to leave his shift early on July 22, 2023, 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 employer is a restaurant. The claimant worked as a part-time server for the employer. The claimant worked for the employer from 11/1/2021 to 7/22/2023.
2. The employer has two owners (“Owner 1” and “Owner 2”).
3. The employer has two managers (“Supervisor 1” and “Supervisor 2”). These managers supervised the claimant.
4. The claimant worked on 7/22/2023. Supervisor 1 and Supervisor 2 also worked on 7/22/2023 while the claimant worked.
5. On 7/22/2023, the employer directed some servers to leave early because business was slow. The employer did not direct the claimant to leave. The claimant asked the employer’s managers to direct a certain server (Server X) to leave. The employer allowed Server X to stay. The claimant became upset. The claimant expressed his dissatisfaction to Supervisor 1. The claimant then punched out from work and left the restaurant. The claimant left before his scheduled shift end time. Supervisor 1 did not give permission to the claimant to leave early. Supervisor 2 did not give permission to the claimant to leave early. The employer did not give permission to the claimant to leave early.
6. The claimant attempted to return to work on 7/26/2023. The claimant spoke to Owner 2. Owner 2 told the claimant that the claimant had abandoned his shift. Owner 2 did not allow the claimant to return to work.

Credibility Assessment:

The claimant testified about what happened on 7/22/2023. Owner 1 testified about what happened on 7/22/2023. The two accounts differed. Owner 1’s testimony is accepted as more credible than the claimant’s testimony because the claimant did not attend the remand hearing and thus avoided cross-examination from the employer and additional questions from the examiner.

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. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant is entitled to benefits.

As the claimant was discharged, his 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. . . .

“[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 employer did not provide evidence demonstrating that the claimant's actions in leaving his shift early and without permission violated any specific employer policy. Therefore, the employer has not met 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 the conduct for which he was discharged. Following remand, the review examiner accepted as credible the employer's testimony that the claimant left his shift early and without permission on July 22, 2023. Consolidated Finding # 5. 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). While the review examiner failed to identify specific evidence from the record that supports his credibility assessment, the presence of such evidence in the record leads us to conclude that the review examiner's assessment crediting the employer's testimony is reasonable in relation to the evidence presented.

In addition to its witness' testimony, the employer presented an email sent from the claimant's supervisors to the employer's owners on the night of July 22, 2023. This email, which was admitted into evidence as part of Remand Exhibit 1, was created at the time of the misconduct at issue by two individuals with firsthand knowledge of the claimant's actions.¹ As the substance of this email corroborates the employer's testimony that the claimant had left his shift early and without permission on July 22nd, 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 consolidated findings confirm that the claimant engaged in the misconduct for which he was discharged. Further, as the claimant expressed his dissatisfaction about the situation to his supervisor and then clocked out, it

¹ Remand Exhibit 1 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).

is self-evident that his decision to leave early and without permission was deliberate. Consolidated Finding # 5.

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 parties’ testimony did differ on other matters, there was no dispute that the claimant had sought his supervisor’s permission to leave early. The claimant’s decision to bring such a request to his supervisor confirms that he understood that the employer expected its waitstaff to remain for the duration of their scheduled shift unless permitted to leave early. Therefore, as the claimant had not been granted permission to leave before the end of his shift on July 22, 2023, we conclude that he understood that his decision to leave early was contrary to the employer’s expectations. See Consolidated Finding # 5.

Finally, we need not consider whether the claimant presented mitigating circumstances for his misconduct, as he maintained that he had been given permission to leave his shift early on July 22, 2023. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. See Lagosh v. Comm’r of Division of Unemployment Assistance, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant’s defense of full compliance, the review examiner properly found that mitigating factors could not be found).

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer’s expectation 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 August 6, 2023, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 26, 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.

LSW/rh