Board of Review
19 Staniford St., 4 1h Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0013 6849 13
Claimant ID:

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joan Berube, 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 was separated from her position with the employer on May 16, 2014. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 11, 2014. 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 August 29, 2014. 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 and, thus, was disqualified, under G.L. c. 151A, § 25(e)(I). 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 to make subsidiary findings from the record. Thereafter, the review examiner issued her 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 conclusion that the claimant quit without good cause attributable to the employer is supported by substantial and credible evidence and is free from error of law, where her supervisor told her to initial an employer memo or stop working, and the claimant wanted to consult the manager and human resources about how the memo affected her back pay issue before signing the memo.

Findings of Fact

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

1. The claimant worked full-time as a pharmacy technician for the employer's pharmacy business from 9/11/12 until 5/16/14. The claimant worked a regular schedule of 40 hours per week; she worked on Mondays through Fridays from 8:00 am until 4:30 pm or from 9:30 pm until 6:00 pm and was paid $12.25 per

hour. The claimant was provided a 30-minute unpaid meal break on days when she worked more than six hours.

2. The employer maintains a written policy which addresses attendance and punctuality. The policy includes a section which reads: "hourly employees should not clock in or out more than 7 minutes before or after their shift begins or ends." The purpose of the employer's policy is to prevent employees from working unauthorized overtime. The employer requires employees to receive approval in advance of working overtime.

3. The employer did not provide the claimant a copy of its written policy at the time of hire.

4. On or about 4/11/14, the claimant notified her supervisor that she believed there was an error in her paycheck and that she was short by one hour. The supervisor advised the claimant to speak with the corporate office manager who was responsible for processing the employees' payroll. The claimant contacted the manager and requested he provide a copy of her time records for the period in question.

5. On 4/13/14, the claimant sent a letter to the corporate office manager stating: "It has come to my attention that I should have been receiving pay for all work I perform as stated on my time cards. It has been brought to my attention that under Massachusetts labor laws specifically M.G.L.c.151, s113, I believe I am owed back pay due to the time I have worked. On numerous occasions I have worked more than 8 hours a day and/or 40 hours a week. 1 have gone through all my pay stubs and have noted that I am paid per minute in weeks that I have worked less than 40 hours, however my pay stubs have never indicated the times when I have work (sic) more than 40 hours and I have not been compensated for this time. Due to these facts I am formally requesting all my time card record Unedited since my date of hire, please understand that I am aware of the requirements regarding time card records specially M.G.L.c.151a, §45 and 430 CMR §5.01(1) I am willing to resolve this matter in a timely manner. Though if I do not receive my unedited timecards within two weeks of the date of receipt of this letter, I will file a claim with the Attorney General of Massachusetts for these records. After reviewing the time cards alongside all of my paystubs I will send an additional certified letter, stating the specific amounts that I am owed."

6. During the period of 4/7/14 through 4/11/14, the claimant worked 40 hours. During the period of 4/14/14 through 4/17/14, the claimant worked 31 hours. On 4/24/14, the employer issued the claimant a paycheck for the two-week period of 4/6/14 through 4/19/14. The claimant was paid 71.5 hours for the two-week period despite having worked only 71 hours. On 4 occasions during the period of 4/7/14 through 4/17/14, the claimant registered in more than 7 minutes prior to the start of her shift. On 4/7114, the claimant registered in 9 minutes prior to the start of her shift. On 4/9/14, the claimant registered in 10

minutes prior to the start of her shift. On 4/10/14, the claimant registered in 10 minutes prior to the start of her shift. On 4/17/14, the claimant registered in 10 minutes prior to the start of her shift.

7. After receiving the claimant's letter dated 4/13/14, the manager contacted the claimant and requested time to gather her time records. The manager told the claimant that she could view the electronic version of her time records at her workplace. The manager requested the claimant allow him time to retrieve the hard copies of her time records because the documents were stored at a facility located in Ashbumham and he works in Worcester.

8. On 4/28/14, the supervisor issued the claimant a written warning for violating the employer's time clock policy. The warning cited 9 days on which the claimant violated the policy during the period of 3/31/14 and 4/24/14 by registering in more than 7 minutes prior to the start of her shift. The supervisor attached a copy of the policy to the warning. The claimant wrote on the warning that she had not been given a handbook at the time of hire and this had not been an issue during the last 2 years but became an issue after the claimant requested copies of her time cards.

9. On 5/5/14, the claimant sent an email to the manager, asking about the status of her time records. The manager responded, telling the claimant that he was in the process of gathering the requested information. The manager wrote: "As I have mentioned to you, I have to go physically to our storage facility to get all these time sheets. I will do my very best to get all these time sheets record to your mailing address as quickly as possible."

10. On 5/5/14, the claimant prepared a letter to the manager, writing: "Thank you for responding in regards to request of my time cards from you. On the 25th of April (supervisor) showed me how to print what may be time cards I don't know. I am unsure if these are what you use to figure our weekly time or if you use something different. Just barely scratching the surface of these 'time cards?' I have noticed inconsistencies such as but not limited to...." The claimant's letter listed specific weeks between 11/19/12 and 6/28/13. The claimant wrote that the situation was causing her stress and she complained about having been issued a warning by the supervisor. On 5/7/14, the manager responded, informing the claimant that all of her time sheets were being mailed to her home address and she should receive them by 5/9/14.

11. On 5/9/14, the manager sent the [claimant] written notice, along with copies of her time cards, indicating that he reviewed her time cards and found discrepancies. The manager wrote that he found that the claimant had not been following the employer's time policy and that she modified her in punches on several occasions. The manager wrote: "In the future, please remember that you need a supervisor's authorization to modify time in/time out entries. You also require a supervisor's authorization to work overtime before you work in excess of 40 hours a week." The letter informed the claimant that, after

reviewing her time records, and despite finding she had been overpaid an amount nearly twice that which she may have earned through her work, a payment was included for the time which the claimant contended to have worked. The time paid to the claimant was calculated based upon the small increments of time between when the claimant registered in and her scheduled start time. The manager wrote: "If, after your review, you come up with a different calculation, please bring it to my attention."

12. On 5/14/14, the claimant sent the manager an email message stating: "My husband and I have reviewed the time cards you mailed on Friday, and we have found additional discrepancies that both of us would like to discuss with you." The claimant proposed a conference call be held after working hours so that her husband could participate.

13. On 5/16/14, the employer requested all employees working in the pharmacy initial a memo which informed the employees of the requirement to begin using new time clocks on 5/18/14. The employer had the new time clocks installed sometime prior to 5/16/14. The memo informed employees that with the new clocks, they would no longer be able to modify their time punches. The memo also reminded employees of the existing attendance and punctuality policy, including that employees should not punch in or out more than 7 minutes before or after their shift begins or ends.

14. On 5/16/14, the claimant found a copy of the memo had been taped on a bulletin board where work schedules and work assignments are posted. The claimant's co-workers had already initialed the memo. The claimant found a copy of the memo had also been left at her work station. At approximately 3:30 pm, the supervisor told the claimant that she needed her to sign the memo because it needed to be sent to the corporate office. The claimant told her supervisor that she would not initial the policy because of an ongoing human resources case and that she needed to speak with human resources. The supervisor told the claimant that she should not finish her work until she was able to speak with human resources (9:12). The supervisor reiterated the need for the claimant to sign the memo in order for the supervisor to forward it to the employer's corporate office. The claimant again refused, stating that she needed to speak with the corporate office manager. The supervisor told the claimant that she should sign the memo or not finish her work. (33:52 & 36:25). The supervisor did not tell the claimant that she would have to leave if she did not initial the memo. The claimant remarked that it was becoming harassment. The claimant considered that she and the supervisor had reached an impasse. The claimant gathered her personal belongings and told the supervisor that she was leaving; she placed a slip of paper on the counter near the supervisor and told the supervisor to have the manager call her. The claimant left the workplace without punching out. The supervisor believed the claimant was quitting. The claimant did not return to work or contact her supervisor after leaving on 5/16/14.

15. The claimant would not have quit her work on 5/16/14 if the employer had not required her to sign the memo related to time clocks and the attendance and punctuality policy.

16. After leaving the workplace on 5/16/14, the claimant attempted to reach the corporate office manager by telephone and was told that he was on vacation. The claimant did not call the corporate office manager repeatedly. On 5/19/14, the corporate office manager sent the claimant an email message which reads: "1 understand you resigned today but 1 remain interested in learning what your concerns are about your time sheets. Please forward a summary of your concerns to me by email if possible." The claimant did not respond to the message.

17. The claimant filed a claim for unemployment insurance benefits. The claim was filed with an effective date of 5/25/14.

18. On 7/11/14, the DUA issued a Notice of Disqualification, finding the claimant ineligible for benefits.

19. On 7/14/14, the claimant appealed the Notice.

Credibility Assessments:

No weight was given to the testimony of the claimant's supervisor. The supervisor failed to provide credible evidence to establish that prior to the claimant's demand for payment of additional wages she was aware of, or addressed, the claimant's practice of registering more than seven minutes prior to the start of her shift. The supervisor did not issue the claimant a disciplinary warning until after the claimant drew attention to her punches by requesting payment for the increments of time between when she registered and the start of her scheduled shift.

The claimant testified that she refused to sign the memo in question because she believed that doing so would relieve the employer of its obligation to pay her wages due. She also testified that the corporate office manager did not want to deal with her payroll issue. The claimant's testimony was not credible. The manager furnished the claimant with the time records she requested, as well as payment for increments of time worked outside of her regular schedule. Along with the payment, the manager sent a letter which invited the claimant to bring any additional discrepancies to him. The employer made no statement to suggest that its payment represented final settlement of the claimant's issue or that it was unwilling to address any additional concerns which the claimant might have.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except that we set aside the characterization of the claimant's separation as a "quit" in Finding of Fact # 15, as this incorporates a legal conclusion addressed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We conclude that the claimant was discharged and that the employer has not met its burden of establishing that the claimant had engaged in a knowing policy violation or deliberate misconduct in wilful disregard of the employer's interests, as required for disqualification, under G. L. c. 151A, § 25(e)(2).

The initial question to be resolved is whether the claimant quit her employment or instead was discharged. Prior to remand, the review examiner had concluded that the claimant had quit. We remanded in order to obtain findings of fact regarding the claimant's final conversation with her supervisor and the claimant's efforts to communicate with the employer after leaving work on May 16, 2014. The consolidated findings following remand support a conclusion that the claimant did not voluntarily quit her job, but rather was discharged.

Determining whether the claimant initiated her separation (quit) or instead was discharged requires a close review of the circumstances surrounding her final months of employment. Since approximately April 11, 2014, the claimant had been engaged in communications with the corporate office (specifically the manager) about the possibility that she was not being paid correctly for her hours of work, which, in her view, included overtime. In the course of these communications, the claimant requested copies of her time cards and referred to her rights under certain Massachusetts statutes and regulations.

While investigating the claimant's concerns, the employer became aware that the claimant had clocked in more than seven minutes prior to the start of her shift on several occasions, which would be in violation of the employer's time clock policy. The employer issued a warning to the claimant on April 28, 2014, for violating the policy. In response, the claimant noted that she had not been given a copy of the policies at the time of hire (which the review examiner found to be true) and also pointed out that the issue of early clocking in had not been raised during her two years of employment prior to her requesting copies of her time cards. (Findings of Fact # 3 and # 8). Between May 5 and May 14, the parties corresponded several times, with the claimant indicating that her review of her time cards showed "discrepancies" with her paychecks and the manager asserting that his review showed that the claimant had not been following the employer's time policies. On May 9, 2014, without conceding that the claimant had in fact been underpaid, the manager conveyed to the claimant a modest payment for time the claimant believed she was owed. On May 14, the claimant e-mailed the manager that she and her husband believed there were more "discrepancies" and proposed a conference call in which her husband could participate.

Sometime prior to Friday, May 16, the employer installed new time clocks that would not permit them to modify their time punches. On May 16, the employer requested that all pharmacy employees initial a memo which informed them that they would have to begin using the new time clocks on May 18, and reminded them of the existing attendance policies, including the

seven minute early and late punch-in limitation. On May 16, the claimant, along with the other employees, was given a copy of the memo to be initialed. At about 3:30 p.m., the supervisor told the claimant she had to sign the memo so that it could be sent to the corporate office. The claimant said she would not sign it because of the ongoing wage dispute and that she needed to speak with human resources. The supervisor told her that she could not continue working unless she signed the memo. The claimant refused again, stating that she needed to speak with the corporate manager. The supervisor again told her she had to sign the memo or not continue working. The claimant expressed concern that the situation felt like harassment, believed she was at an impasse with her supervisor, gathered her belongings and told the supervisor she was leaving. She put her phone number on a slip of paper, left it on the counter, and told the supervisor to have the manager call her. After leaving the work place, the claimant telephoned the corporate manager later that day and was told he was on vacation. The manager did not respond until Monday, May 19, 2014, when he sent her an e-mail stating his understanding that she had resigned.

We think the circumstances summarized above are not consistent with a conclusion that the claimant initiated her separation. Instead, the separation is most appropriately viewed as a constructive discharge, in that the claimant quit on May 16 because she was told, twice, that her only alternative was immediate compliance with a directive that the claimant genuinely believed would compromise her legitimate interests. Her supervisor insisted that the claimant could not continue to work without signing the memo. Since the claimant sincerely (although we think mistakenly) believed that she could not sign the memo without giving up important rights, she felt constrained to quit. This is the legal and functional equivalent of being terminated for insubordination.

The circumstances under which this scene unfolded are also inconsistent with a conclusion that the claimant was leaving work voluntarily. Before doing so, the claimant offered a way around the impasse, by asking to speak with human resources and, later, the manager, about the memo. The supervisor, in contrast, offered the claimant no alternative to the ultimatum, such as signing the memo under protest. Even after the claimant left, she evinced an intention to remain employed. She left a note with contact information and asked the supervisor to have the manager call her. She went home and promptly telephoned the manager. We agree with the claimant's contention that her "quit" under these circumstances was not voluntary and should be evaluated under the standards that apply to a discharge.

In a discharge case, a claimant's 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 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 establish that the claimant engaged in misconduct, by violating either a written, uniformly enforced rule or a reasonable expectation. Further, a showing of misconduct alone will not disqualify the claimant from receiving benefits. The employer must also show that the conduct was deliberate, or intentional. In discharge cases, the "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine the employee's state of mind, we "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

In the instant case, the employer effectively discharged the claimant (forced her to quit) because she would not sign a memo concerning the employer's time card and time recording policies. There is no question that the claimant refused her supervisor's directive to sign the time card memorandum. There is also little question that signing the memorandum, a requirement imposed on all employees at the pharmacy, was an inherently reasonable directive. Even if, as appears likely, the new time clock and the May 16 memorandum were prompted by the claimant's time card dispute with the employer, the employer was reasonable in attempting to prevent further disputes by installing a better time keeping system and reminding employees of its punch-in and punch-out policies. The claimant was concerned that signing the memo would somehow negatively affect her rights in her ongoing dispute with the employer, but no objective evidence suggests that, in fact, the memorandum was intended to or would have had that effect. Accordingly, the employer could have reasonably expected the claimant to sign the memo acknowledging its policies and its new time clock.

However, a reasonable directive can be implemented in an unreasonable way, which is what we believe occurred here. The employer has not established such urgency about obtaining the claimant's signature that the employer could not let her discuss it first with human resources or the corporate manager. The claimant's concerns may have been unwarranted, but they were sincere. It reasonably could have seemed to the claimant that the memo was a reaction to her dispute with the employer. That dispute had already led to the claimant being disciplined for time clock infractions, which were only discovered in the course of the employer investigating her claims. It was not unreasonable for her to want a chance to obtain reassurances about the effect the memo would have on her ongoing dispute. The record reflects no compelling reason for the employer to force the issue on the 16th, and we conclude that the supervisor acted unreasonably in insisting that the claimant either "stop working" or sign the memo. Accordingly, the employer has not met its burden to establish that its expectation that the claimant sign the memo on May 16, without any discussion with corporate management, was "reasonable." Garfield, *supra*, at 97.

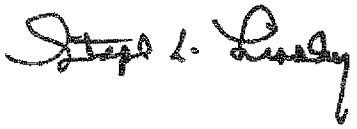
Looked at another way, we would conclude that the employer has also failed to establish that the claimant had the requisite state of mind when she engaged in this conduct that, at the time she refused to sign the memo, she was consciously aware that she was violating a reasonable directive or expectation of the employer. We are convinced in this case that the claimant genuinely believed that the memorandum was part of the employer's increasingly negative response to her persistence with her wage concerns and that signing it could undermine her interests. Whether correct or not, in the claimant's mind she was being subjected to retaliation for pressing her concerns. This state of mind is reflected in her comment about "harassment"

when her supervisor insisted she sign the memo or stop working. Such a state of mind is inconsistent with the statutory requirement of "wilful disregard of the employer's interests."

Finally, to the extent the claimant's refusal was an act of insubordination and perforce misconduct, the record reflects mitigating circumstances. The claimant, in fact, did not outright refuse to comply. Rather, she pointed out that she was in the midst of discussions with management about her time cards and wanted an opportunity to discuss the implications of the memo with either human resources or the corporate manager before signing. While this, understandably, may have frustrated the claimant's supervisor, it did not reflect a wilful disregard, but rather an effort on the part of the claimant to reach an accommodation with the employer's interests as well as her own.

We, therefore conclude as a matter of law that the claimant was discharged, and did not engage in a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G. L. c. 151A, § 2.5(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending May 17, 2014, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION June 8, 2015

Stephen M. Linsky, Esq.
Member

Judith M. Neumann, Esq.
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

SPE/th