

BR-124136

CLAIMANT APPELLANT:
Hearings Docket #616631

EMPLOYING UNIT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Michele Lerner, 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 18, 2012. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 27, 2012. 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 16, 2012. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in willful disregard of the employer's interest, and, thus, was 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 claimant's appeal, we remanded the case to the review examiner for clarification of the date of the claimant's absence that led to her discharge, and to allow the parties to submit documentary evidence regarding the illness and subsequent death of the claimant's fiancé's mother. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant had mitigating circumstances for the absence that led to her separation, based upon the sudden hospitalization and death of her fiancé's mother.

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 as a part time Customer Service Representative at the Front Desk for the employer, a dry cleaning business, from August 24, 2011 until May 18, 2012.
2. The claimant worked part time 20-30 hours a week for most of the year. She was normally scheduled to work Monday through Friday either 10am to 6pm or 12pm to 6pm. She sometimes covered shifts for other employees who were absent.
3. The Owner posted schedules 4 weeks in advance. Before posting the schedule he would review it with the claimant and give her a copy to keep. The claimant would put this copy on her refrigerator.
4. The employer expected employees to come to work on time and to call and give notice if they were going to be late or absent. This was because the business only had 9 employees. If someone was not present it placed a burden on the employees who did come to work and had a negative effect on customer service.
5. The employer would repeatedly tell employees that it was better to be a half hour early than 1 minute late.
6. The claimant, on several occasions before May 21, 2012, had not shown up for her shift as scheduled. The Owner would call her and ask her where she was and she would say that she thought she had the day off. When she came into work, the Owner would counsel her regarding the importance of coming into work on time.
7. When the May 2012 schedule was posted, the Owner talked to the claimant about how June, July and August were the employer's slow months and that the schedule would, therefore, be different during these months. Her hours might be reduced in some weeks but not to the point where she would not earn a living wage. She was also told that some employees would take vacations during these months and that the other employees would get additional hours to cover their shifts during those weeks.
8. The claimant's boyfriend's mother was in the hospital with a brain aneurism. The family made the decision to stop life support. She passed away on Sunday, May 20, 2012 at 1:35pm.

9. The claimant was scheduled to work on Monday, May 21, 2012. She misread the schedule and did not realize she was scheduled to work. She, therefore, did not come in to work.
10. The claimant called on the evening of Monday, May 21, 2012 to ask for the day off on Tuesday, May 22, 2012 due to the death of her boyfriend's mother. The Owner told the claimant that she was supposed to have been at work on Monday and that her absence had been a serious problem because it had been so busy. The claimant told him that she had thought she had Monday off. The claimant apologized and explained that there was so much stuff going on at the hospital with her boyfriend's mother's illness and her passing that she was not thinking straight. The Owner let the claimant know that he was tired of dealing with her personal issues with her boyfriend and that he needed to have an employee who would be at work when scheduled. He told her that he was not sure if he was going to let her come back to work this time and that he needed some time to think about it. He asked her to come in on Thursday to talk about the situation. He asked her to think about what she would do if she had an employee who was repeatedly late and absent without notice.
11. The claimant came in on Tuesday, May 22, 2012 to get her pay check. She asked where the Owner was and the employees working that day did not tell her. They just gave her the check that was there for her.
12. The claimant assumed that she was being discharged given how angry the Owner had been when she spoke to him on Monday night. She did not want to have to a face to face discussion regarding why she is being discharged. For this reason and because she was occupied with matters relating [to] the death of her boyfriend's mother and caring for her children, the claimant did not come in to talk to the employer on Thursday, May 24, 2012. She also did not call him to tell him that she was not coming in or to reschedule the meeting for a different day.
13. The employer decided that if the claimant did not care enough about her job to come in to talk to him, accept responsibility for having missed her shift, and/or promise that it would not happen again, then he did not want to continue her employment.
14. The employer was closed for business on Monday, May 28, 2012, because it was Memorial Day.
15. The Tuesday after Memorial Day is the employer's busiest day of the year. It was, therefore, a stressful day for the Owner.

16. On Tuesday, May 29, 2012, the claimant still did not want to talk to the Owner. She, therefore, sent someone in to get her check. That person was told that the claimant had to pick up the check personally unless the he had something in writing giving them permission to give her check to him. The claimant came in sometime later to get her pay check. The Owner met her and asked her for the key. After she presented him with the key, he gave her a final paycheck
17. The claimant filed her claim for unemployment benefits on June 11, 2012.
18. The claimant's testimony was found to be more credible given the fact that the employer insisted at the first hearing that the claimant was absent on the Tuesday after Memorial Day and on the second day conceded that he was mistaken and that the absence was Monday, May 21, 2012. This indicates not only that the employer's memory is faulty as to material facts that related to this case, but also that he was either unaware that he was uncertain or is willing to lie about the dates in order to strengthen his case.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), 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 . . . [T]he 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

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the clamant was discharged for deliberate misconduct in willful disregard of the employer's interest. The review examiner initially concluded that the employer established that the claimant was discharged for deliberate misconduct. We remanded the case for the review examiner to make additional findings regarding mitigating circumstances to which the claimant testified, but about which the review examiner made no findings, and for evidence regarding the death of the claimant's fiancé's mother. The claimant had testified that her fiancé's mother was rushed to the hospital with a brain aneurism and that she died on Sunday, May 20, 2012, after the family made the decision to remove her from life support.

The review examiner noted in her conclusion that the claimant testified that she was distracted during that weekend because her fiancé's mother was hospitalized, which could be a mitigating circumstance that could excuse an absence without calling in, but that the claimant had not presented any evidence to substantiate the hospitalization and death of her fiancé's mother. We also remanded the case for additional findings of fact regarding the actual date of the claimant's absence that led to her discharge, which the parties disputed, and on which the initial findings of fact were inconsistent. Following remand, we reach the conclusion that the employer did not meet its burden.

At the remand hearing, the claimant submitted documentary evidence in the form of a death certificate verifying the death of her fiancé's mother on May 20, 2012. After remand, the review examiner found that the claimant's fiancé's mother passed away during the afternoon of Sunday, May 20, 2012, and that the claimant misread the work schedule and did not realize that she was scheduled to work on Monday, May 21, 2012. The claimant called the employer on the evening of May 21, 2012 to ask for the day off on Tuesday May 22, due to the death. The claimant apologized for her absence on Monday and explained that there was so much going on at the hospital with the illness and death of her boyfriend's mother that she was not thinking straight, and she thought she had Monday off. The employer told her he wasn't sure he would let her come back to work and he needed time to think about it. He told her he was tired of dealing with her personal issues and that he needed to have an employee who would be at work when scheduled. The claimant believed she was being discharged because of how angry the employer had been when she spoke to him.

On remand, the review examiner made a credibility assessment that the claimant was more credible than the employer based on the employer's inconsistent testimony. The employer had insisted at the initial hearing that the claimant had been absent on the Tuesday after Memorial Day. However, at the second hearing, the employer conceded that he was mistaken and the absence occurred on Monday, May 21, 2012. The review examiner found that the employer's was memory faulty as to material facts related to the case, and also that the employer was either unaware that he was uncertain or was willing to lie about the dates in order to strengthen his case. 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. MCAD*, 423 Mass. 7, 15 (1996).

In determining whether a claimant should be disqualified for willful misconduct, the critical factor is the claimant's state of mind, taking into account her knowledge of the employer's expectation, the reasonableness of the expectation and whether there were any mitigating factors. *Garfield v. Dir. of Division of Employment Security*, 377 Mass 94 (1979). Due to the critical nature of an employee's state of mind and surrounding mitigating circumstances, mere violation of an employer's rule or expectation does not automatically disqualify her from unemployment benefits. *Torres v. Dir. of Division of Employment Security*, 387 Mass. 776 (1982). Mitigating circumstances over which a claimant may have no control include the situation here where the claimant was upset and distracted by the events of the sudden illness and untimely death her of her fiancé's mother's and was unable to think straight, leading her to misread the work schedule. The review examiner found that the claimant did not realize that she was scheduled to work.

After reviewing the testimony and evidence presented, we conclude that the claimant had mitigating factors over which she had no control that resulted in her separation. We reach the conclusion that based upon her emotional upset, the claimant's absence was unintentional and that she, therefore, did not have the state of mind for deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

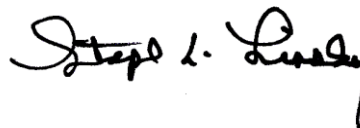
We, therefore, conclude as a matter of law that that the claimant did not have the state of mind for deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is reversed. The claimant entitled to receive benefits for the week ending June 16, 2012 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 7, 2015



John A. King, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- February 22, 2013

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.