

BR-124425

CLAIMANT APPELLANT:
Hearings Docket #618751

EMPLOYING UNIT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rorie O'Connor, 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 discharged from her position with the employer on June 14, 2012. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 26, 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 31, 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 to take additional testimony regarding the claimant's assertions on appeal that she is homeless, that the employer was aware of her circumstances, and that she made every attempt to report to work in a timely manner although it was difficult. 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, due to her homelessness and unexpected lack of transportation, for forgetting to call her supervisor to report that she would be late, after she had already called and reported it to other staff.

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 an overnight/awake counselor for the employer, a residential group home, from 12/01/07 until 06/14/12. The claimant's rate of pay was \$11.08 per hour.
2. The claimant was discharged for failing to contact a supervisor when reporting to work late.
3. The employer has a written Overnight Policy that requires overnight staff to notify the supervisor if arriving late to work.
4. The employer determines discipline for Overnight Policy violations on a case by case basis.
5. The purpose of the policy is to ensure the safety of the home's residents.
6. The claimant was aware of the employer's policy having signed off on receipt of it and having been issued a final warning for violating it.
7. On 03/08/12, the employer issued the claimant a final warning for failure to follow the Overnight Policy when arriving late to work.
8. At the time of her separation, the claimant was homeless and staying with a friend in Spencer, Massachusetts. The claimant did not have a vehicle of her own and relied on the friend to transport her to and from work.
9. On 06/13/12, approximately twenty minutes before she needed to leave for work, the claimant's friend informed her that she was unable to transport her to work that day. The claimant was upset and flustered and scrambled to find another ride.
10. The claimant telephoned the staff at the residential home and notified them that she would be late to work.
11. The claimant did not remember to telephone the supervisor as required by the Overnight Policy.

12. The claimant reported to work late and completed her shift.
13. On 06/14/12, the Division Director requested a meeting with the claimant.
14. On 06/19/12, the Division Director and Director of New Business met with the claimant and discharged her.
15. On 06/22/12, the claimant filed a claim for unemployment benefits.

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), the employer has the burden of proving that the claimant was discharged for deliberate misconduct in willful disregard of the employer's interest. The review examiner initially concluded that the employer had met its burden. We remanded the case for additional information regarding the claimant's homelessness and her difficulty in getting to work. Following remand, we conclude that the employer has not met its burden.

The review examiner's consolidated findings of fact establish that the claimant was homeless and staying with a friend in Spencer, Massachusetts. The claimant did not have her own vehicle and relied on the friend to drive her to and from work. On June 13, 2012, approximately twenty minutes before the claimant needed to leave for work, her friend informed her that she would not transport her to work that day. The claimant was upset and flustered and scrambled to find another ride. The claimant telephoned the staff at the residential program where she worked, and notified them that she would be late to work. The claimant did not remember to telephone the supervisor as required by the Overnight Policy. The claimant reported to work late and completed her shift.

The claimant testified that being homeless made her depressed and also made it harder for her to get to work.¹ She had lived in four or five different places and she never knew where she would be living the next day or the next week. The new callout procedures for overnight staff for reporting late to work had only been in effect for a few months. Prior to the new policy, since 2007, the claimant was only required to call the program and advise she would be late. The claimant testified that she was frantic and angry at suddenly learning out of the blue, only ten to twenty minutes before she had to leave, that she didn't have a ride to work. Consequently, she was preoccupied with how she was going to get to work. She was not thinking clearly, and forgot about the new procedure. She called the program to advise that she would be late as she had done before the procedure was changed.

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's homelessness and sudden last minute refusal of the expected ride to work from her friend only twenty minutes before the claimant was scheduled to leave for work made her frantic, causing her to forget to call the supervisor to report that she would be late to work.

After reviewing the testimony and evidence presented of the claimant's homelessness and her inability to think clearly after learning that she had no transportation only twenty minutes before her promised ride to work, we conclude that there were substantial mitigating factors for the claimant's noncompliance with the employer's expectation that she would call her supervisor. Moreover, as the review examiner found, the claimant did make the effort to notify her workplace that she was going to be late, so this is not a case of failure to provide actual notice of her tardiness, but merely a matter of non-adherence to protocol.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in willful disregard of the employer's interest.

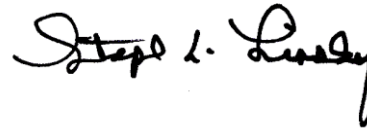
¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 23, 2012 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING -



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.