



THE COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
 BOARD OF REVIEW

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**BOARD OF REVIEW
 DECISION**

In the matter of:

Appeal number: **BR-112807**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

D.S. # AAAA-A
 Hearings Docket # 530368

EMP. # _____

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Phyllis Desharnais, a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits following the claimant's separation from employment. 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 August 11, 2009. She filed a claim for unemployment benefits with the DUA and was awarded benefits in a determination issued on September 4, 2009. The employer 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 denied benefits in a decision rendered on January 20, 2010.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful 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 back to the review examiner to make additional findings of fact. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest when she had a confrontation, during which she used profanities, with her supervisor in the back of the employer's store on July 30, 2009.

Findings of Fact

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

1. The claimant had been employed as a part-time sales associate for the instant employer from January 2009 until her separation took effect on August 11, 2009. The claimant earned \$12.15 hourly.
2. The employer made the claimant aware of certain standards that were expected of her as a sales associate, namely that she had to conduct herself in a professional manner.
3. The claimant was aware of these standards, because the employer has a policy regarding employee behavior and professional conduct. Given that, the claimant was aware of the policy at the time of the incident which led to her discharge.
4. The claimant was not aware that she was in violation of the policy at the time of the incident which led to her discharge. She also did not know that her job was in jeopardy as of the day in which an incident happened that led to her discharge.
5. The employer has uniformly enforced this policy in the past after the application of progressive discipline.
6. On May 4, 2009, the employer issued a written warning to the claimant, because she became argumentative with an assistant manager and used foul language when speaking to him during an emotional outburst. This was not an isolated incident.
7. The employer had prior discussions on March 27, 2009 and April 16, 2009 about the claimant's inability to control her emotions while at work.
8. The claimant's lack of professionalism was addressed again on July 25, 2009 during a performance review.
9. On July 30, 2009, the claimant conducted a transaction with a family friend who returned a phone. The claimant thought that the family friend only used

five minutes of service on the phone. Instead, the store manager discovered that the customer used five hours of service. The company policy specified that phones cannot be returned when the customer used more than 60 minutes. The store manager addressed this concern with the claimant when she returned from lunch on July 30th.

10. The claimant became upset with the store manager because she understood that he had cancelled her transaction.
11. The claimant had confrontations with the store manager in the past and she "flipped-out" on July 30, 2009 in the back of the store. The claimant lost control of her emotions as she had done in the past. The claimant lost control on July 30th because a few hours before this confrontation, the manager made an inappropriate comment to the claimant that disturbed her. He asked the claimant if there was going to be "touching" involved when she informed him that she was going to lunch with a female coworker. The claimant did not believe that she would be fired when she lost control of her emotions with the supervisor.
12. The confrontation escalated, and the claimant used foul language while speaking to the store manager. She called him a "sick pervert" and a "fucking asshole". The claimant continued to use foul language when the store manager would not give her HR's number.
13. The store manager asked her to stop her behavior because customers were on the sales floor. When the claimant did not take control of her behavior, the store manager had a security guard escort the claimant out of the store. The store manager did not use foul language to the claimant during the confrontation.
14. The claimant contacted HR via e-mail on Saturday, August 1, 2009 to report the incident and to file a complaint against the store manager whom she felt had behaved inappropriately. The HR Generalist contacted the claimant on Monday, 8/3/09 in response to the claimant's e-mail.
15. During the conversation with the HR Generalist, the claimant admitted to the "blow-out" in the store between herself and the store manager. The claimant also admitted that she had made derogatory remarks to the store manager and admitted the inappropriateness of her behavior.
16. The claimant also brought to the HR Generalist's attention things which concerned her about the store manager's style of management and comments he had made to her which she deemed inappropriate. (See Exhibit 11, HR Generalist's statement dated August 3, 2009)

17. The HR generalist placed the claimant on suspension on August 3, 2009 pending an investigation of the incident which occurred on July 31, 2009 and the charges which the claimant made against the store manager.
18. The claimant was notified of discharge on August 11, 2009.
19. The claimant was discharged because of unprofessional conduct in the workplace.

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 ... 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, ... provided that such violation is not shown to be as a result of the employee's incompetence....

In a discharge case, the employer has the burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The review examiner found that the employer had met that burden in this case. We disagree.

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Director of Div. of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Director of Div. of Employment Security, 393 Mass. 271, 275 (1984). 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." Garfield, 377 Mass. at 97.

The review examiner found that the claimant knew the employer's reasonable standards of conduct. That finding is supported by the record, which shows that the claimant signed for the employer's handbook. She also received a document titled "Core Values and Principle Abilities," which promotes employees' "[a]bility to maintain a professional demeanor while dealing with interpersonal conflict." The claimant had also been warned, both verbally and in writing, about her professionalism and foul language. The employer's expectation that the claimant behave appropriately was reasonable, given that the claimant continuously interacted with customers. We see no reason to disturb the review examiner's findings on these issues.

PAGE 5


Despite the claimant's knowledge of the employer's expectations, she nonetheless lost control on July 30, 2009. There is no doubt that she engaged in misconduct. After being confronted about the cell phone return, she got into an argument with the store manager and used foul language directed at him. It was a violation of both the policy and the employer's reasonable expectations, and the claimant admitted that it was the wrong thing to do when she later spoke with a Human Resources representative.

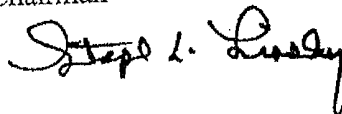
The employer, however, failed to carry its burden to show that the misconduct was deliberate. The findings show that the claimant was not aware that she was violating the policy at the time of the incident or that this incidence of misconduct would lead to her discharge. She was reacting, in large part, to the store manager's improper behavior toward her and her co-workers. On July 30, he had asked the claimant whether there would be "touching" at a lunch with a female co-worker. Although the claimant had not reported the manager to Human Resources before the final incident and had not had a conversation about her discomfort with the manager, the review examiner found that the manager engaged in the behavior described by the claimant. In light of the offensive behavior, the claimant's emotional outburst at the manager was understandable. This mitigating circumstance precludes a conclusion that the claimant's behavior was deliberate or wilful.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest when she had a confrontation with her supervisor on July 30, 2009.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 8, 2009 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - September 13, 2010


 John A. King, Esq.
 Chairman


 Stephen M. Linksy, 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 - October 13, 2010

