Although the claimant had been absent thirteen times and tardy seventy-four times in a year's time, the final incident of absence had to do with an unexpected childcare problem which the claimant did not reasonably anticipate. Therefore, she is not disqualified under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0017 5074 97

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric Sullivan, 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 November 10, 2015. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on January 30, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 14, 2016.

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 accepted the claimant's application for review[1] and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding her separation from employment. Both parties 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 conclusion that the claimant is subject to disqualification, under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where, although the claimant had a history of

[1] The claimant's appeal to the Board, which was filed on September 28, 2016, was late. However, the claimant indicated in her appeal that she was discouraged from pursuing an appeal by a representative of the DUA. The Board requested further information about this, and the claimant submitted responses to several questions asked by the Board. *See* Remand Exhibits ## 3 and 4. Following our review of the claimant's responses, we concluded that the appeal should be considered timely and that the case should be remanded for additional evidence.

poor attendance and tardiness, the final absence prior to her separation involved an unexpected incidence of a lack of childcare for the claimant's two children.

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 for the instant employer as an Orthodontic Assistant from 8/7/2012 until her separation on 11/10/2015.

2. The employer has a policy titled "Attendance and Punctuality." Such policy states that tardiness and excessive absenteeism may result in disciplinary action up to and including termination.

3. The employer's policy states that if there is an emergency tardiness or absenteeism, the employee must call the employer the morning of the absence. The employee is allowed to leave a message if needed.

4. The employer's policy also states that if the employee if aware of the need for time off in the future, the time off request must be made three weeks in advance.

5. The claimant was provided this policy in writing at the time of hire.

6. From 10/31/2014 through 10/31/2015, the claimant was tardy 74 days and absent 13 times.

7. The claimant was commonly tardy due to traffic and being a single mother of two girls ages 12 and 7. The claimant was absent due to either herself being ill or her two children.

8. During this course of time, the claimant was issued multiple verbal and written warnings due to her absenteeism and tardiness.

9. The claimant was informed that her absenteeism and tardiness was excessive and it was putting a strain on the employer's business.

10. The weekend prior to 11/3/2016, the claimant became aware that her two daughters did not have school on 11/3/2016 due to elections.

11. The claimant arraigned [sic] a babysitter so that she had childcare in order to report to work on 11/3/2016.

12. On the evening of 11/2/2016, the claimant's babysitter backed out and the claimant no longer had childcare for 11/3/2016 when she was scheduled to work.

13. The claimant attempted to secure another babysitter but was unsuccessful.

14. On 11/3/2015, the claimant called out the morning of her scheduled shift stating that she would not be into work because her children did not have school due to elections.

15. The claimant did not violate the employer's calling out aspect of their Attendance and Punctuality policy.

16. The employer was dissatisfied that the claimant did not notify them of the unscheduled absent until 11/3/2015. If the claimant had informed them of the situation prior to 11/3/2015 arraignments [sic] in scheduling would have been made.

17. The employer felt that the claimant's actions were unacceptable because she had called out many other times just prior to her shift and they considered such call outs excessive.

18. On 11/10/2015, the employer informed the claimant that she was terminated due to her excessive tardiness in addition to tardiness and neglect of duties.

19. The employer [had] originally planned to terminate the claimant on 11/6/2016, however, the claimant called out prior to her scheduled shift due to her and her daughter having a rash head to toe which required medical treatment.

Credibility Assessment:

The Secretary's testimony is accepted as credible in all contested [areas] since [] he was forthright in giving testimony and his version of the events made more sense. The claimant's testimony was evasive and lacked logical sense thus causing the claimant's testimony to be less credible in all contested [areas].

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact[2] and deems them to be supported by substantial and credible evidence. As discussed more fully

[2] We do note that the year noted in Consolidated Findings of Fact ## 10, 11, 12, and 19 appears to be incorrect. The events in this case took place in 2015, not 2016. We adopt the findings with the understanding that the events noted therein occurred in 2015, and we deem the incorrect years in the findings to be typographical errors.

below, we conclude that the claimant is not subject to disqualification, under G.L. c. 151A, § 25(e)(2).

Because the claimant was terminated from her employment, her 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 this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Following the initial hearing, at which the claimant was absent, the review examiner concluded that the employer had carried its burden. After reviewing the testimony from both hearings, as well as the documentary evidence and the consolidated findings of fact, we conclude that the claimant is eligible to receive benefits, under the above-cited section of law.

The review examiner found that the claimant was discharged for "her excessive tardiness in addition to tardiness and neglect of duties." Consolidated Finding of Fact # 18. The review examiner noted that the claimant was "tardy 74 days and absent 13 times" from October 31, 2014, through October 31, 2015. Consolidated Findings of Fact # 6. Although the claimant had numerous instances of being late to work, and the review examiner noted that the claimant was often tardy due to traffic and due to her childcare responsibilities, *see* Consolidated Finding of Fact # 7, the review examiner's main, specific findings focus on the final events in November of 2015. The final incident of absence occurred on November 3, 2015, and the employer decided at that point to discharge the claimant. It had not discharged her after prior absences and instances of tardiness. Therefore, our focus in this case is on the November 3, 2015, absence, as it was the direct precursor to the discharge. *See* Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 626–627 (1984).

We consider first the knowing violation portion of G.L. c. 151A, § 25(e)(2). After the November 3, 2015, absence, the employer considered the claimant to have violated its policy prohibiting "tardiness and excessive absenteeism." *See* Consolidated Findings of Fact ## 2–5. Based on the findings, it is difficult to conclude whether or not there was a violation. The review examiner did not make a finding as to what constitutes "excessive," and the policy does not specifically define the term. *See* Exhibit # 4, p. 8. Objectively, the seventy-four days and thirteen absences noted in Consolidated Finding of Fact # 6 indicate that the claimant was late and absent many times. It is not clear from the policy or, for that matter, from the findings what number was too many. Since the terms of the policy are not specified, we cannot conclude that the claimant could have known she was violating them on November 3, 2015. In other words, there are insufficient evidence and findings to conclude that the claimant knew that calling out on November 3 would have turned her long history of absences into "excessive absenteeism," as

provided for in the policy. Thus, we conclude that the employer has not shown that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy of the employer.

We turn now to the deliberate misconduct provision. The initial question in unemployment cases is whether the claimant engaged in the behavior which led to the discharge — in this case, whether the claimant violated the employer's reasonable attendance expectations. Even if that is established, however, the misconduct must be shown to have been deliberate and in wilful disregard of the employer's interests. 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. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Vital to this analysis is the claimant's state of mind at the time of the conduct which leads to the separation. *See* Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984).

In this case, even if we were to assume that the absence on November 3, 2015, violated the employer's written policy or an attendance expectation, we cannot conclude that the claimant had the state of mind necessary for disqualification. In short, the claimant's absence on November 3 was unexpected. The claimant knew that there would be no school that day for her children due to elections, *see* Consolidated Finding of Fact # 10, and so she arranged for a babysitter for that day. *See* Consolidated Finding of Fact # 11. However, the babysitter backed out of her obligation to watch the children on the night of November 2, 2015. This was an unforeseen circumstance for the claimant. She attempted to secure other childcare, but was unable to find any. *See* Consolidated Finding of Fact # 13. When she knew that she could not report to work on November 3, she complied with the employer's notification policy and called the employer to inform it of her absence. *See* Consolidated Findings of Fact ## 3 and 15. In light of these circumstances, we cannot conclude that the claimant engaged in the conduct of being absent on November 3 in wilful disregard of the employer's interest. There were mitigating circumstances. *See* Garfield, 377 Mass. at 97 (claimant's state of mind evaluated by taking into account worker's knowledge of expectation, reasonableness of expectation, and presence of mitigating factors).

We, therefore, conclude as a matter of law that the review examiner's decision to deny unemployment benefits, under G.L. c. 151A, § 25(e)(2), is not free from error of law or supported by substantial and credible evidence, because the consolidated findings of fact indicate that the final absence, while possibly a violation of the employer's policy and expectations prohibiting excessive attendance, was not done with the knowing or wilful state of mind necessary for disqualification.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning November 8, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2017

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, 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.

SF/rh