The reason for the claimant's absences from work was her need to attend to her grandmother's illness and not wilful disregard of the employer's interest. Due to these mitigating circumstances, the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0020 1404 24

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Rachel Zwetchkenbaum, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. Benefits were granted on the ground that the employer did not establish that the claimant had engaged in deliberate misconduct in wilful disregard of the employer's interest, pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on January 16, 2017. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on May 9, 2017. The employer sought review by the Board, which denied the appeal, and the employer appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On October 6, 2017, the District Court allowed the DUA's Assented to Motion to Remand for Additional Findings (the Motion). The Motion asks the Board to make such additional findings of fact as are necessary to determine whether the claimant was entitled to unemployment benefits. Consistent with this order, we remanded the case to the original review examiner to make further subsidiary findings of fact from the record. The review examiner has now returned her consolidated findings of fact.

The issue before the Board is whether the review examiner's conclusion that the claimant's absences during her final week of employment were due to mitigating circumstances and not due to wilful disregard of the employer's interest is supported by substantial and credible evidence, sufficient findings of fact, and is free from error of law.

After reviewing the recorded testimony and evidence from the hearing, the review examiner's decision, the employer's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's original decision to award benefits.

Findings of Fact

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

1. The claimant worked as a Nanny, for the employer, an [i]ndividual [f]amily, from February 22, 2016, until November 3, 2016, when she was discharged.

2. The claimant worked a varied full-time schedule of hours for the employer.

3. The claimant did not have any other jobs.

4. The family the claimant worked for was comprised of a mother, father, and two children.

5. The father is an attorney.

6. The attorney drafted a nanny agreement which the claimant was required to sign in order [to] work for the employer.

7. The agreement listed the claimant's working days and hours as Monday, Tuesday, and Thursdays, from 7:30 a.m. until 6 p.m. The claimant would also sometimes work different hours depending on the needs of the family and the claimant.

8. The claimant was entitled to two weeks of paid vacation per year.

9. The claimant was entitled to three paid sick days.

10. The agreement states that the claimant could be terminated for cause for persistent absenteeism. No definition of what "persistent absenteeism" is [sic] given in the agreement.

11. Disciplinary action for violation of the agreement was dealt with on a case-by-case basis.

12. The claimant found out on Monday, October 31, 2016, that her grandmother was very ill and would be admitted to the hospital for pneumonia. The claimant needed to be at the hospital at various times to both support her grandmother and to help take care of her affairs.

13. The claimant is her grandmother's health care proxy.

14. On October 31, 2016, the claimant sent the employer a text message, informing them that because of her sick grandmother that she could not go to work on Tuesday, November 1, 2016.

15. The employer said that was fine, but asked the claimant if she could come and work on Wednesday November 2, 2016.

16. Because the claimant's parents and uncle were able to go to the hospital and stay with the grandmother on November 2, 2016, the claimant agreed to work for the employer that day.

17. On November 1, 2016, even though the claimant already informed the employer she could not work, the employer messaged the claimant asking if she could come in and watch the children anyway. The claimant responded that she was unable to do so because she had a scheduled meeting with a doctor and social worker regarding her grandmother.

18. The claimant worked on November 2, 2016.

19. By Thursday morning, November 3, 2016, the claimant's grandmother's condition worsened. The claimant was unsure whether her grandmother would survive the pneumonia.

20. At 6:50 a.m. on November 3, 2016, the claimant sent her employer a text message informing them that her grandmother took a turn for the worse and that she would not be able to report for work that day.

21. On November 3, 2016, the employer sent the claimant a text message, stating that she sympathized with what the claimant was going through, but that the claimant's absences put her in a terrible position and her own job in jeopardy.

22. As of Thursday afternoon on November 3, 2016, the claimant was unsure whether her grandmother would survive and had been discussing the possibility of hospice with her family.

23. Because the claimant had no idea whether or not her grandmother's condition would stay the same, improve, or get worse over the next several days, the claimant sent her employer another text message on November 3, 2016, at 1:11 p.m. The claimant apologized for her absences and informed the employer that because of her situation, she was unsure when, if at all, she would be able to report to work the next *week*.

24. Because the claimant did not know what was going to happen with her grandmother, the claimant did not give her employer definitive information about how much work she would need to miss the next week.

25. The claimant never told her employer that she would definitely be missing work for the entire next week.

26. The claimant never told her employer that she would need to miss work past the next week.

27. The claimant never told the employer that she did not plan to return to work because of her grandmother's condition or any other reason.

28. On November 3, 2016, at 4:31 p.m., the employer sent the claimant an e-mail informing her that even though they feel bad for what she is going through, that their family is the top priority and that because they did not think the claimant was providing consistent and reliable care for their children, that she could no longer continue to work for them. The employer also stated that if the claimant wanted to continue to be in touch with the children that she could.

29. The claimant was shocked and upset when she read the e-mail.

30. The claimant never thought that her inability to work, for at most, a week and a half, would result in the termination of her employment.

31. At the time the claimant received the employer's e-mail, her grandmother was still hospitalized.

32. The claimant responded to the e-mail on November 3, 2016. The claimant wanted to make sure to end things on a positive note so she could use them as a reference in the future. The claimant apologized for her absence and stated that she understood the employer's decision. The claimant stated she would get all of the employer's belongings back to them.

33. The claimant's grandmother was not discharged from the hospital until November 6, 2016, or November 7, 2016.

34. The claimant did not quit her job. The claimant never intended to quit her job at that time.

35. Had the claimant not been terminated, she would have continued to work for the employer.

36. The claimant filed for unemployment benefits and received an effective date of November 13, 2016.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant was discharged from her job, her eligibility for benefits is properly analyzed pursuant to 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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The employer's stated reason for discharging the claimant, as expressed in its November 3, 2016, email to the claimant, was that the claimant was not providing "consistent and reliable care for their children." Consolidated Finding of Fact # 28. In short, the sequence of events shows that the employer fired the claimant because she was absent two days during the week of October 31, 2016, and was not sure when or if she would be able to work the following week. *See* Consolidated Findings of Fact ## 14, 20, and 23.

The first question is whether the claimant's absences constituted misconduct. The employer reasonably expected the claimant to come to work. She missed two days and expected to miss up to another full week of work the following week. Since there is no indication that the employment agreement allowed for days off to attend to family illness, we accept that her failure to report for work in this case was misconduct.[1]

As the review examiner found, the parties' employment agreement stated that the claimant could be terminated for persistent absenteeism, but the agreement did not explain what the employer meant by "persistent absenteeism." Consolidated Finding of Fact # 10. Because it is not defined, there is no way to determine whether the claimant's absences during the week of October 31, 2016, and anticipated absences during the following week amounted to persistent absenteeism under their agreement. Therefore, we cannot conclude that the claimant knowingly violated a reasonable and uniformly enforce rule or policy of the employer pursuant to G.L. c. 151A, § 25(e)(2).

Alternatively, we consider whether the employer has established that the claimant's failure to come to work was deliberate misconduct in wilful disregard of the employer's interest. There is no suggestion in the record that the claimant forgot to come to work. In fact, before each absence, the claimant diligently notified the employer in advance. Thus, her not coming to work

[1] For purposes of our analysis, we assume that the claimant could not use the sick or vacation days allotted to her under the agreement for these days off. *See* Findings of Fact ## 8 and 9.

was deliberate. The real issue is whether the claimant took these days off in wilful disregard of the employer's interest.

The Motion asserts that the review examiner's decision "failed to consider whether the grandmother's illness affected [the claimant's] state of mind so that she could not form the intent required for disqualification under G.L. c. 151A, § 25(e)(2)." As the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.) A person's intent may be adduced from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

In the present case, the consolidated findings show that the claimant knew missing scheduled workdays was contrary to the employer's interest, and they also show that she tried to accommodate that interest. In response to taking Tuesday, November 1st off, the employer asked her to work on her regularly scheduled day off, Wednesday, November 2nd, and she agreed. *See* Consolidated Findings of Fact ## 14–16. However, when the employer asked her to come in to work anyway on November 1st, even though the claimant had explained that she could not work because of her sick grandmother, we think the employer made it painfully apparent to the claimant that their interests lie in caring for their children instead of her grandmother. *See* Finding of Fact # 17.

In Garfield v. Dir. of Division of Employment Security, the SJC stated:

> When a discharged worker seeks [unemployment] compensation, the issue before the board is not whether the employer was justified in discharging the claimant but whether the Legislature intended that benefits should be denied in the circumstances. . . . The apparent purpose of § 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."

377 Mass. 94, 96 (1979) (citations omitted). In evaluating a claimant's state of mind, we are instructed to consider the reasonableness of the employer's expectation and the presence of any mitigating factors. Id. at 97.

Serious personal family problems may constitute mitigating factors. In Wedgewood v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 30 (1987), the Appeals Court refused to deny benefits to a night-shift maintenance worker, who was fired for falling asleep on the job. The maintenance worker was going through a divorce and was responsible for the care of both his 78-year-old mother, who was in a hospital intensive care unit, and his 80-year-old father, who was at home terminally ill with cancer. Id. at 31–32.[2] The Appeals Court held that these constituted mitigating factors that prevented his act of sleeping on the job from being considered deliberate misconduct in wilful disregard of the employer's interest. Id. at 33. *See also* Board of Review Decision 0015 8673 87 (Feb. 17, 2016), where the Board held that a claimant's failure to

[2] The Appeals Court stated, "Wedgewood gave testimony, and there is no indication the hearing officer disbelieved it, that, as a result of the family problems, he did not have sufficient time to sleep during the day." Id. at 32.

return to work on the employer's expected date was driven by mitigating circumstances beyond the claimant's control, including a delay in making funeral arrangements because an autopsy took longer than expected and attending to other affairs following her mother's death in Jamaica, rather than by any wilful disregard of the employer's interest.

In the case before us, the claimant's state of mind is embedded in Consolidated Findings ## 12 and 13. She needed to be at the hospital to support her grandmother, to help take care of her grandmother's affairs, and because the claimant was the grandmother's health care proxy. *See* Consolidated Findings ## 12 and 13. Her reason for taking more than the first day off and not being able to commit to the following work week was the claimant's uncertainty about whether her grandmother's condition would improve or get worse and the need to discuss the possibility of hospice care with her family. *See* Consolidated Findings ## 19 and 22–24.

Whether these circumstances mitigated the willfulness of the claimant's misconduct requires an exercise of judgment that is not purely factual. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). Applying the law to the facts, we conclude that the grandmother's illness and the uncertainty of her condition over the next several days created the need for the claimant, as health care proxy, to meet with the grandmother's doctor, social worker, and family on days that the claimant was also scheduled to work. These circumstances, over which the claimant had no control, constituted mitigating circumstances[3] that prevented the claimant from reporting for work. Stated another way, her absences were due to her grandmother's illness and not to wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has failed to show that the claimant either knowingly violated a reasonable and uniformly enforced policy or engaged in deliberate misconduct in wilful disregard of the employer's interest, pursuant to G.L. c. 151A, § 25(e)(2).

[3] *See* Black's Law Dictionary, 236 (7th ed. 1999), which defines "mitigating circumstances" as follows: "3. *Contracts*. An unusual or unpredictable event that prevents performance, such as a labor strike."

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning October 30, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 6, 2017

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

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.

AB/rh