Already on probation for attendance issues, the claimant failed to show up for work after being told that she did not have permission to be absent. The review examiner's rejection of the claimant's evidence showing a medical excuse for the absence is supported by the fact that the claimant did not tell the employer she needed the days off for medical reasons and the chiropractor's note does not cover the correct dates.

Board of Review
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Issue ID: 0021 2677 71

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. I. Cofer, 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 affirm.

The claimant was discharged from her position with the employer in February, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 20, 2017. 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 September 30, 2017. We accepted the claimant's application for review.

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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when she failed to report for work after the employer declined to give approval for being absent is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer is a landscaper. The claimant worked as a full-time contract administrator for the employer. The claimant worked for the employer from 3/26/14 until 2/14/17.

2. The claimant's supervisor created a document titled "Written Reprimand/Probation Terms." The document was dated 1/05/17. The document indicated that the claimant had arrived late for work on several dates. The document read, "Your excessive tardiness has a negative impact on the department's productivity. Consequently, this letter serves as a Written Reprimand and a copy will be retained in your permanent personnel file. Excessive tardiness has a very negative affect on operations, and therefore cannot be tolerated." The document read, "With this document I am formally advising that you are required to meet the following conditions and complete a 30 day probation period…You will be required to furnish a signed statement from your physician for any absence, including routine and recurring medical appointments. This statement is not to provide any details regarding your specific injury/illness, but rather, will need to reflect the following information: Date that you were seen by a doctor or nurse documenting and excusing you from work for that day." The claimant read and signed the document on 1/05/17.

3. The employer expected the claimant to work on her scheduled workdays. The claimant understood this expectation.

4. The employer assigned the claimant to work on 2/15/17 and 2/16/17.

5. On 2/14/17, the claimant asked her supervisor for permission to not work on 2/15/17 and 2/16/17. The claimant told the supervisor that she wanted to miss work on those two days due to some personal issues. The claimant did not tell the supervisor that she needed to miss work for any medical reason. The supervisor told that claimant that she would not approve the request.

6. The claimant knew that the employer denied her request to not work on 2/15/17 and 2/16/17.

7. The claimant did not work on 2/15/17. The claimant did not work on 2/16/17.

8. The employer discharged the claimant because she did not work on 2/15/17 and because she did not work on 2/16/17.

9. The supervisor told the claimant that she was discharged. When the supervisor discharged the claimant, the claimant did not tell the employer that she missed work on 2/15/17 and 2/16/17 due to medical issues. She did not offer to submit any medical documentation.

10. The employer never received any medical documentation that addressed the claimant's absences on 2/15/17 and 2/16/17.

11. Medical issues did not necessitate the claimant's absence from work on 2/15/17. Medical issues did not necessitate the claimant's absence from work on 2/16/17.

[Credibility Assessment:][1]

No mitigating circumstances existed. In the hearing, the claimant testified that she did not work on 2/15/17 and 2/16/17 due to medical issues. The claimant's testimony is rejected as not credible and it is concluded that the claimant did not miss work due to any medical necessity. First, when the claimant asked for permission to not work on 2/15/17 and 2/16/17, she did not tell the employer that she needed the two days off for medical issues. This is an indicator that she did not miss work due to medical issues. Second, when the employer discharged the claimant, the claimant did not tell the employer that she missed work due to medical issues and she did not offer to submit any medical documentation. This is another indicator that the claimant did not miss work due to medical issues. Third, the claimant knew that the employer would potentially allow her to miss work due to medical reasons, given the probation document. Thus, it is more likely that the claimant would simply tell the employer that she needed to miss work due to a medical issue if she indeed had to miss work for that reason. Fourth, the chiropractor's note that the claimant submitted to DUA indicates that the claimant should not work on 2/14/17 and 2/15/17. The note does not cover 2/16/17. This diminishes the claimant's assertion that she missed work for medical reasons on 2/15/17 and 2/16/17.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 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 ineligible for benefits.

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 relevant 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 . . . .

[1] Although not labelled as a credibility assessment, this portion of the review examiner's decision explains his reasons for not crediting the claimant's testimony.

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

The employer fired the claimant for failing to report for work on February 15 and 16, 2017. On appeal, the claimant asserts that the review examiner got the dates wrong, that the dates of her absences were February 14 and 15, 2017, and submits a chiropractor's note excusing her from work for the latter dates.[2] The review examiner found the dates of absence to be February 15th and 16th. *See* Findings of Fact ## 4–11. These were the dates given under oath by both the claimant and the employer during the hearing. As such, his findings are supported by substantial evidence and will not be disturbed on appeal.

In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must "[T]ake into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

During the hearing, the claimant testified that the day before her absences, she put in a written request for the days off, and that her supervisor did not say one way or another whether she approved the request. The supervisor testified that she told the claimant that she could not approve the days off. Findings of Fact ## 5 and 6 show that the review examiner accepted the employer's testimony and, thus, that the claimant knew her request had been denied. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31-32 (1980). Unless such assessments are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.) Both the employer's testimony and the fact that the claimant was on probation for attendance issues constitute substantial evidence that support the review examiner's assessment.

The employer's expectation that the claimant report for work as scheduled is reasonable. The only logical inference to draw from the fact that the claimant did not report for work, knowing that she was not allowed to be absent, is that she did so deliberately and in wilful disregard of the employer's interest. Unless the claimant can demonstrate mitigating circumstances for such conduct, she is ineligible for benefits under G.L. c. 151A, § 25(e)(2). *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control).

[2] Exhibit # 4, page 1 is a copy of the chiropractor's note.

In this case, the employer freely admitted that it would have allowed the absences, if the claimant had explained that they were needed for medical reasons, and provided the claimant had corroborated that need with a note from her doctor.[3] This is consistent with the terms of the claimant's probation requiring medical notes to excuse absences. *See* Exhibit # 2, page 4.[4] However, as stated in the review examiner's decision, the claimant did not mention medical reasons as the basis for asking for the time off. Finding of Fact # 5. Nor did the claimant raise medical reasons when the supervisor called to terminate her employment for the absences. Finding of Fact # 9. Moreover, the chiropractor's note that she presented during the hearing as Exhibit # 4 does not cover the correct dates. In sum, the claimant has failed to present substantial evidence demonstrating mitigating circumstances for her misconduct.

We, therefore, conclude as a matter of law that the employer has sustained its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

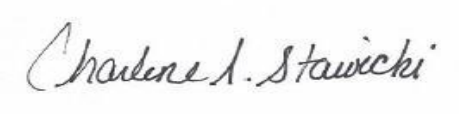
[3] This assertion was part of the supervisor's testimony during the hearing. While not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[4] The claimant acknowledged receiving this page of her January 5, 2017, warning.

The review examiner's decision is affirmed. The claimant is denied benefits for the period beginning February 19, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 16, 2018

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