**Although the claimant was not normally scheduled to work on Wednesdays, and the employer had mistakenly scheduled him to work on a Wednesday just prior to his separation, the claimant saw that the was scheduled on the Wednesday and failed to notify the employer that he would not report to work, despite knowing the employer's expectations that he report to work when scheduled or notify the employer of any conflict in the schedule. This failure was deliberate misconduct in wilful disregard of the employer's interest.**

**Board of Review**
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**Chairman**
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**Member**

**Issue ID: 0021 6979 42**

# BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 his position with the employer on April 28, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 26, 2017. 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 December 14, 2017.

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 and remanded the case to the review examiner to allow the claimant an opportunity to provide testimony regarding his separation from employment. 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 before the Board is whether the review examiner's conclusion that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant was scheduled to work on April 19, 2017, he received the schedule, he saw the schedule, but he did not report to work or inform the employer that he was not going to work on April 19, 2017.

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 part-time — 20-25 hours per week — as a waiter for the employer, a restaurant, from June 2014 until April 28, 2017. The claimant's last day of work for the employer was April 7, 2017.

2. While the claimant worked for the employer, he also attended school full-time to become a radiology technician.

3. The claimant's supervisor was the employer's rotating manager on duty.

4. The employer maintained an employee handbook (the handbook) that was issued to all employees. The claimant acknowledged receipt of the handbook on June 25, 2014.

5. The handbook contains a section titled "Termination of Employment" which states, in relevant part, "Although progressive discipline procedures will generally be followed, [the employer] reserves the right to omit one or more steps depending on the situation and facts involved. Progressive disciplinary action will not be applied for situations calling for immediate termination." and "employees may be terminated immediately for any of the following reasons." The list of reasons includes, "failure to report to work as scheduled without prior authorization, without making notification within an appropriate time, and/or without sufficient cause, including 'no-call, no-show'."

6. The handbook also contains a section titled "Punctuality," which states, in relevant part, "an employee who thinks he or she will be late for a shift, whether one minute or more, should notify his or her supervisor immediately" and "frequent tardiness, or failure to follow the guidelines described above, will be dealt with as a disciplinary issue."

7. When an employee is late, absent or a no-call, no-show, the employer will take into consideration the employee's reason as to why before issuing discipline.

8. The policy is a means to ensure adequate staffing and coverage if needed.

9. Throughout his employment, if the claimant was going to be late to work or miss a scheduled shift, he would notify the manager on duty.

10. The employer asks employees to notify it of the days they are available to work. The employer schedules employees to work within their availability.

11. One of the employer's front of the house managers is in charge of making the schedule for the wait staff. Employees are sent the schedule via email a few days prior to the start of the week.

12. The front of the house manager was aware that the claimant was in school.

13. The employer expects that all employees will check the weekly work schedule and notify the employer if there are any conflicts with their schedule. The employer's expectation is a means to ensure adequate staffing and coverage if needed.

14. During his employment, the claimant had not had any problems with his work schedule prior to April 19, 2017.

15. On July 31, 2014, the claimant received a written warning for being 30 minutes late to work. The claimant indicated that he "misread" the schedule and was stuck in traffic.

16. On July 3, 2016, the claimant received a counseling session for being 2 hours late to work. The claimant indicated that he was late because he "misread" the schedule. During the counseling, the employer's attendance expectation, including notification to the supervisor, was reviewed with the claimant.

17. On August 11, 2016, the claimant sent an email to the front of the house manager who was in charge of making the schedule. The claimant stated in relevant part, "So far I can work starting September Friday night and saturday whenever and every other sunday."[sic]

18. On August 17, 2016, the claimant sent another email to the front of the house manager stating, "I originally said I would do every other Sunday once school starts but that won't be possible."

19. Due to his school schedule, the claimant was only available to work Friday nights and Saturdays. He informed the employer of his availability through his email in August, 2016. At no time did the claimant specifically state that he was not available to work on Wednesdays.

20. The claimant's spring semester began on January 15, 2017.

21. During the spring semester, if the claimant's school schedule allowed him to pick up extra shifts, he would notify the front of the house manager and ask to be scheduled for additional shifts.

22. During the semester, the front of the house manager would ask the claimant if he could pick up certain shifts that he usually was not available for. The claimant agreed to do so, if he was available.

23. The claimant worked on the following Wednesday nights during the spring semester: January 25, 2017, February 1, 2017, March 8, 2017 and March 15, 2017.

24. The claimant requested to be off of the schedule for the week ending April 15, 2017.

25. The employer sent the claimant his work schedule for the week ending April 22, 2017. The schedule indicated that the claimant was scheduled to work on Wednesday April 19, 2017, Friday April 21, 2017 and Saturday April 21, 2017.

26. The employer mistakenly scheduled the claimant for Wednesday April 19, 2017.

27. The claimant reviewed the work schedule and did not notify the employer that that he was not available to work on April 19, 2017.

28. On April 19, 2017, the claimant did not report to work or notify the manager on duty of his absence.

29. On April 19, 2017, at 5:26 p.m., the claimant's coworker (coworker 1) sent him a test message asking, "where you at?" The claimant also received another message that night from another coworker (coworker 2).

30. The claimant did not respond to his coworkers because he did not have his phone. It is unknown why the claimant did not have his phone.

31. It is unknown if a manager on duty tried to contact the claimant on April 19, 2017.

32. On April 20, 2017, the claimant sent an email to the general manager (GM) stating, "I am extremely sorry that I missed my shift last night. I saw a text this morning from [coworker 1] saying "where you at?" There was also a message from [coworker 2] saying I was supposed to close yesterday. I didn't have my phone with me last night and seeing the messages this morning I was confused because I have not worked a Wednesday since this semester because I thought I requested no availability especially closing shift."

33. On April 21, 2017, the general manager made the decision to discharge the claimant for being a no-call, no-show on April 19, 2017, because she did not believe the claimant had a legitimate excuse for his failure to contact the employer.

34. On April 21, 2017, when the claimant arrived to work, the general manager informed him that he had been suspended for being a no-call, no-show on

April 19, 2017. The general manager did not discharge the claimant on April 21, 2017, because she did not have the claimant's final check.

35. On April 28, 2017, the employer discharged the claimant for being a no-call, no-show on April 19, 2017, in violation of its policy.

36. The claimant filed a claim for unemployment benefits effective April 30, 2017.

Credibility Assessment:

During the original hearing, the employer testified that the claimant did not request to have Wednesdays off. However, at the remand hearing, the general manager testified that while an employee must make the employer aware of their availability, this may be done in two ways. The employee can notify the employer of the days that they are available or notify the employer of the days that they are not available. If an employee states that they are only available on certain days, they are not then required to specifically state which days they are not available. Therefore, the claimant's testimony, supported by documentation that he notified the employer that he was only available to work on Fridays and Saturdays is accepted as credible.

During the remand hearing, the claimant testified that he did not see that he was scheduled to work on April 19, 2017 because he only looked to see if he was scheduled on Friday and Saturday. The claimant's testimony, on this point, is not credible. The claimant received 2 prior warning[s] from the employer for not reporting to work on time because he "misread" the schedule. After receiving the warnings, the claimant knew it was important to read the schedule carefully. The claimant admitted to reviewing the schedule sent by the employer, which clearly and specifically stated that he was scheduled to work on April 19, 2017. As such, I find the claimant's testimony that he did not know he was schedule[d] to work on Wednesday, April 19, 2017 is not credible.

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 and credibility assessment and deems them to be supported by substantial and credible evidence, except for one date noted in Consolidated Finding of Fact # 25. In that finding, the review examiner made a typographical error; the final date should be April 22, 2017, not April 21. As discussed more fully below, we conclude, as the review examiner originally did, that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2).

Because the claimant was terminated from his employment, his 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. After the initial hearing, at which only the employer offered evidence, the review examiner concluded that the employer had carried its burden. Following our review of the entire record, including the testimony from the remand hearing and the consolidated findings of fact, we conclude that the review examiner's decision was supported by the record.

The claimant was discharged for not reporting to work on April 19, 2017, and for not informing the employer that he would not report to work that day. The employer expected that all employees would check the weekly work schedule and inform the employer if there was any conflict with the schedule. Consolidated Finding of Fact # 13. In other words, the employer expected that employees notify the employer if they could not work a scheduled shift. The employer's handbook also included a provision which stated that "employees may be terminated immediately" for failing to report to work without notification to the employer. *See* Consolidated Finding of Fact # 5. The claimant generally notified the employer about absences or tardiness, *see* Consolidated Finding of Fact # 9, except for two occasions in 2014 and 2016 when he misread the schedule. *See* Consolidated Finding of Fact ## 15 and 16. The claimant was issued warnings in 2014 and 2016 when he did not report to work as scheduled. Based on the claimant's testimony that he knew he should review the schedule to see when he was supposed to be at work and the prior warnings about not reporting to work, it is clear that the claimant understood that he needed to review the employer's schedule and inform the employer if he was not going to work. As to the final incident on April 19, 2017, the review examiner found that the claimant "reviewed the work schedule and did not notify the employer that he was not available to work on April 19, 2017." Consolidated Finding of Fact # 27. Thus, the findings indicate that the claimant did engage in an act of misconduct by failing to report to work as scheduled and failing to notify the employer that he was going to be absent from work on April 19, 2017.

The review examiner's findings, read together with her credibility assessment, indicate that the misconduct was deliberate. Consolidated Finding of Fact # 27 suggests that the claimant saw the schedule and saw that he was scheduled to work on April 19, 2017, even though it was a Wednesday and he was not regularly scheduled to work on Wednesdays.[1] Although he saw this, he did not report to work or call out. In her credibility assessment, the review examiner specifically rejected the claimant's contention that he did not see that he was scheduled to work on April 19. Had he not seen that he was on the schedule, a reasonable conclusion would be that he did not deliberately fail to report to work. However, given the finding and the credibility

[1] The review examiner found both that the claimant told the employer that he was available to work on Fridays and Saturdays, *see* Consolidated Findings of Fact ## 17–19, and that the claimant sometimes did work on Wednesdays if he was available. *See* Consolidated Finding of Fact ## 21–23.

assessment, which are supported by the record, we must conclude that the claimant deliberately did not report or call out for the April 19 shift.

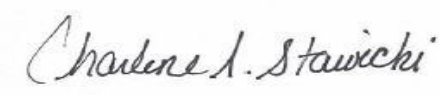
In order to carry its burden, the employer must not only show that the claimant engaged in deliberate misconduct, it must also show that the claimant exhibited wilful disregard of the employer's interest. To determine whether the claimant acted in wilful disregard, we examine the worker's knowledge of 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). Here, as we have noted above, the claimant was aware that he needed to report to work or notify the employer of a problem with the schedule. Such an expectation is reasonable, because the employer needed to ensure that it had adequate staffing in its restaurant. *See* Consolidated Finding of Fact # 13. No mitigating circumstances are referenced in the findings of fact. The claimant testified that he had a school project that he needed to do on April 19, 2017; the review examiner did not make a finding that this was true. Again, the claimant testified that he did not see that he was scheduled to work on April 19; the review examiner did not find this to be true. In short, the findings establish that the claimant was scheduled to work on April 19, 2017, that the claimant knew he was scheduled to work that day, and that he failed to report to work without an adequate or understandable explanation.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning April 23, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - March 29, 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.

SF/rh