Although the claimant violated the terms of a Last Chance Agreement by having many unscheduled absences, he is not subject to disqualification under G.L. c. 151A, § 25(e)(2), because the final absence was attributable to a medical condition rather than to any intentional or wilful misconduct.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member

Issue ID: 0022 5993 57

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 reverse.

The claimant was discharged from his position with the employer on August 9, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 24, 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 November 28, 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 testify 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 review examiner has found that the claimant's final absence on July 31, 2017, was due to illness, specifically a migraine.

Findings of Fact

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

1. On November 3, 2015, the claimant started working for the employer, a postal service provider, as a fulltime lead mail and processing clerk.

2. The claimant was most recently scheduled to work Sunday through Tuesday and Friday through Saturday from 11 p.m. until 7:30 a.m.

3. The claimant's supervisor was the Distribution Supervisor.

4. The employer maintains an Employee & Labor Relations Manual listing that employees are required to be in regular attendance at work.

5. The employer expects employees to be in regular attendance at work to ensure customer satisfaction.

6. The claimant received the Employee & Labor Relations Manual.

7. Whether an employee is discharged for attendance issues is left to the discretion of the employer.

8. On September 12, 2016, the claimant entered into a Last Chance Agreement with the employer (Exhibit # 6). The Last Chance Agreement addresses attendance issues.

9. In the Last Chance Agreement, the employer writes in part (Exhibit # 6, Page 3):

   "[Claimant's name omitted] agrees that for the length of the probation period outlined in Item#1 of the Agreement, to maintain adherence to all work schedules and will not experience more than six (6) unscheduled absences, totaling not more than 48 hours in each year of this Agreement. Should he do so he will be in violation of this Agreement. It is further understood that he will comply with the Employee & labor relations Manual Section 665.41 which states: "Employees are required to be regular in attendance" and Section 511.43 which states in part: "Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences: (An unscheduled absence for the purpose of this Agreement is any absence not protected by FMLA and not requested and approved in advance, utilizing a PS Form 3971, including but not limited to, Sick Leave, Emergency Annual leave, Leave Without Pay, Tardiness, Short Hits, or Failing to Report As Scheduled for Overtime or Holidays). It is also understood that unscheduled absences on part or all of a day constitute a separate absence even though the days may be consecutive or the absences occur during different times in a workday. It is clearly understood that unscheduled absences may be approved for pay purposes only (Exhibit 6 Page 3)."

10. It did matter to the employer whether the claimant's absences, while perhaps unscheduled, were due to circumstances beyond his control such as a health reason preventing him from getting to work.

11. In a medical note dated March 23, 2017, a doctor lists the following medical history for the claimant: migraines and insomnia (Remand Exhibit # 10). In the medical note, the following information is listed: "The patient has been provided with certification for the medical use of marijuana, which has been shown to be helpful for such conditions of chronic pain. The risks and benefits of use have been reviewed and, in this case, the benefits appear to outweigh the risks. The patient has been cautioned to not drive or operate heavy equipment for at least 6 hours after the use. Marijuana should not be mixed with alcohol. The patient has been reminded that smoking marijuana is harmful and that the use of a vaporizer is the safer way to obtain the potential benefit of cannabinoids (Remand Exhibit # 10 Page 2)."

12. The claimant exceeded more than 6 absences at work after entering into the Last Chance Agreement with the employer. The claimant was absent from work due to medical issues and personal issues involving a miscarriage of his expected child.

13. Between the dates of October 29, 2016, through July 5, 2017, the claimant was absent from work 27 times.

14. The last discipline the employer issued the claimant was the Last Chance Agreement from September 12, 2016.

15. On July 31, 2017, the claimant was scheduled to work. This was the shift that ran from 11 p.m. on July 30, 2017, until 7:30 a.m. on July 31, 2017.

16. On July 31, 2017, the claimant was absent from work. The claimant notified the employer he was going to be absent from work. The claimant was absent from work on this date as he was ill with a migraine.

17. On July 31, 2017, the claimant went to the [Hospital A] in [Town A], Massachsuetts due to his illness. In a medical document, titled Discharge Instructions, from [Hospital A] it lists the claimant was seen at the facility on July 31, 2017, and may return to work on August 1, 2017 (Remand Exhibit # 4Y).

18. The last absence the claimant had from work prior to termination was on July 31, 2017.

19. The "Request for or Notification of Absence" form, which was signed by a supervisor on August 4, 2017, is a leave request form. The claimant's absence of July 31, 2017, was approved even though it was unscheduled to allow the claimant's sick pay to be granted.

20. The claimant's last date of work was on August 4, 2017.

21. The employer placed the claimant on an unpaid leave status due to attendance issues.

22. On August 9, 2017, the employer discharged the claimant from work via letter (Exhibit # 5). The employer discharged the claimant from work for excessive absenteeism with the last incident being July 31, 2017.

23. In the August 9, 2017, letter, the employer wrote in part "This action is taken without any right of appeal, in accordance with item # 3 of the Last Chance Agreement" (Exhibit # 5, Page 2).

24. The employer discharged the claimant from work for being absent from work on July 31, 2017.

25. The claimant was a union member. The claimant did not have a right to appeal or grieve the August 9, 2017, discharge in accordance with the terms of the Last Chance Agreement.

26. The claimant's Unemployment Insurance Benefits claim is effective the week beginning August 6, 2017 (Exhibit # 1).

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 deems them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to disqualification.

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. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Following the initial hearing, the review examiner concluded that the employer had carried its burden. After reviewing the documentary evidence in the record, the testimony

from both hearings, and the consolidated findings of fact, we now conclude that the claimant should not be disqualified from receiving unemployment benefits.

The claimant was discharged for violating the terms of the September 12, 2016, Last Chance Agreement (LCA), specifically the provision relating to excessive unscheduled absences. Under the LCA, the claimant was prohibited from having more than six unscheduled absences in each year of the LCA. The LCA also stated that "unscheduled absences may be approved for pay purposes only." *See* Exhibit # 6, p. 3, para. 9.[1] In order for the employer to carry its burden under G.L. c. 151A, § 25(e)(2), it must first show that the claimant violated this provision. The review examiner found that he did. *See* Consolidated Finding of Fact # 12. This finding is supported by substantial and credible evidence in the record, in the form of various "Request for or Notification of Absence" forms, many of which were signed by the claimant himself. *See* Remand Exhibit # 15. These forms show the days that the claimant was absent and also indicate that the absences were unscheduled.

The dispositive issue in this case is not whether the claimant violated the terms of the LCA. The key consideration in discharge cases is whether the claimant had the necessary state of mind at the time of the misconduct to disqualify him under the above-cited statutory provision. *See* Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In this regard, we focus on the final incident which led to the claimant's discharge. Although the claimant had many absences, he was only discharged after the final absence, which occurred for the claimant's July 30–July 31, 2017 shift. If he had a disqualifying state of mind with respect to that incident, he will not be eligible to receive benefits.

On the record before us, we conclude that the claimant did not deliberately engage in misconduct on July 30–31, 2017, nor was his absence from work done in wilful disregard of the employer's interests. The review examiner found that he "was absent from work on [July 30–July 31, 2017] as he was ill with a migraine." Consolidated Finding of Fact # 16. This finding is supported by documentation supplied to the review examiner. *See* Remand Exhibit # 4Y and Consolidated Finding of Fact # 17. This finding indicates that the claimant's absence is attributable to a medical condition beyond the claimant's control, not to any intentional disregard of the employer's interests. Therefore, he did not have a disqualifying state of mind when he was absent from work on July 30–31, 2017. *See* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted) (state of mind analysis takes into account, among other things, presence of mitigating factors).

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because, although the claimant did engage in misconduct by violating the unscheduled absence provisions of the LCA, the final absence was due to a medical condition rather than to deliberate or intentional disregard of the employer's expectations and interests.

[1] Although the claimant's final absence for the July 30–31, 2017 shift was "approved," this occurred only so that the claimant could use his accrued time to obtain pay for this shift. *See* Consolidated Finding of Fact # 19. The "approval" was not done in advance, such that the final absence could be considered a "scheduled" absence. *See* Remand Exhibit # 4X.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning August 6, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 30, 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