Claimant hospital aide whose first language is not English lacked requisite state of mind for disqualification after being discharged as a no-call/no-show while he was being hospitalized for vertigo. Claimant's medical condition also constituted mitigating circumstances.

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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 September 29, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 1, 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 30, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant both engaged in deliberate misconduct in wilful disregard of the employer's interest, as well as knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 remanded the case to the review examiner to allow the claimant to present testimony and evidence, and to obtain additional evidence from both parties regarding the circumstances surrounding the claimant's separation. Both parties attended the two-day 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's discharge for being a no-call/no-show on the date in question constituted both a knowing violation of a reasonable and uniformly enforced rule or policy of the employer as well as deliberate misconduct in wilful disregard of the employer's interest is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as an Environmental Services Department Aid[e], for the employer, a Hospital, from May 30, 2000 until September 29, 2017, when he was discharged.

2. The claimant worked a full-time schedule. The claimant worked overnight shifts.

3. The claimant's first language is Haitian Creole. The claimant does not speak English very well.

4. The employer has a written attendance policy that requires all employees to work all scheduled shifts. Any employee who needs to call out of work [sic] to call out of work at least four hours prior to the start of his shift. Failure to call the employer and inform the employer that one will not be working one's scheduled shift is considered a no-call/no-show.

5. A first offense will result in a final written warning. Consecutive no-call/no-show days count as one offense. A second offense will result in termination. The employer discharges all employees on a second offense. The employer maintains the policy in order to properly staff the hospital.

6. The claimant received a copy of the policy after hire.

7. The claimant was a no-call/no-show for four consecutive shifts on May 4, 2017, May 5, 2017, May 8, 2017, and May 9, 2017.

8. On May 26, 2017, the claimant was given a final written warning for his no-call/no-shows that month. The claimant was also told that any further no-call/no-shows would result in termination. The claimant was also reminded of the correct phone number to call if he was unable to work one of his scheduled shifts. The employer has a designated attendance phone line.

9. In May 2017, the claimant did not disclose to the employer any medical conditions that he may have had.

10. In May 2017, the claimant did not ask for any accommodations for any medical conditions.

11. The claimant worked his scheduled shift on August 10, 2017.

12. The claimant was next scheduled to work at 11:30pm on August 11, 2017.

13. The claimant did not show up to work for his scheduled shift on August 11, 2017.

14. The claimant went to the hospital during the evening of August 11, 2017.

15. The claimant went to [Hospital A] in [City A], Massachusetts.

16. The claimant did not call an ambulance to get to the hospital.

17. The claimant was not admitted to the hospital.

18. At the hospital, the claimant was diagnosed with vertigo.

19. The claimant was discharged from the hospital at approximately 3:43am on August 12, 2017.

20. The claimant did not provide his supervisor with a medical note.

21. At approximately 12:53am on August 12, 2017, the claimant called the employer's environmental services phone number and left a voicemail that he was not feeling well.

22. At approximately 6:28am on August 12, 2017, the claimant left an unintelligible voicemail on the environmental services phone number.

23. The claimant was next scheduled to work August 14, 2017.

24. On August 14, 2017, the employer attempted to call the claimant.

25. The claimant went to the doctor on August 14, 2017 and got a note that stated he may return to work on August 16, 2017. The note did not specify any particular reason or condition.

26. Aside from the claimant's hospital visit on August 11, 2017 and his doctor's visit on August 14, 2017, the claimant did not have any other apparent medical conditions that affected his ability to work between May 1, 2017 and September 29, 2017.

27. During the evening of August 14, 2017, the claimant called the employer twice on two different phone numbers. Neither phone number was the attendance-line phone number. The claimant stated in the voicemails that he had not been feeling well.

28. The claimant did not show up to work for his scheduled shift on August 14, 2017.

29. On August 15, 2017, the employer called and spoke with the claimant. The employer asked the claimant what happened on August 11, 2017. The claimant said he was not feeling well and that he had gone to the hospital. The employer advised the claimant to contact "[Insurance Company A]" because

that company handles all of the employer's leave requests for employees. The employer told the claimant that he needed to provide the employer and [Insurance Company A] with medical documentation pertaining to his absence on August 11, 2017. During that conversation, the employer informed the claimant that he should not report to work until he has provided the medical documentation to the employer.

30. The claimant did not provide the employer with any medical documentation.

31. Due to the language barrier with his employer and [Insurance Company A], the claimant did not really understand what was being asked of him or what he was supposed to do.

32. The employer contacted the claimant and told him to report to work for a meeting on August 22, 2017.

33. At the meeting on August 22, 2017, the employer informed the claimant that he was being placed on a paid administrative leave because he was a no-call/no-show on August 11, 2017 and that he had already been given a final written warning in May 2017.

34. The paid leave was open-ended pending an investigation.

35. The Director of Hospitality and the Senior Employee Relations Team Lead conducted the investigation.

36. As part of the investigation, the claimant was questioned by the employer on August 22, 2017.

37. The claimant's supervisor and the Director of Hospitality were also interviewed as part of the investigation.

38. At some point after August 22, 2017, the claimant contacted [Insurance Company A] and applied for a medical leave of absence.

39. Although the claimant contacted [Insurance Company A], he was unaware that he was applying for a leave of absence. The claimant only contacted [Insurance Company A] because he was instructed to do so by his employer.

40. The employer had the claimant come in on August 29, 2017. The employer told the claimant that if he signed a release of claims that they would make his termination effective September 5, 2017, which would allow the claimant to have health insurance coverage for an extra month. The employer asked the claimant to come back in on September 1, 2017 and inform them if he was going to sign the release.

41. The claimant did not go back to the employer's place of business on September 1, 2017.

42. Because of what the agreement stated, the employer needed to wait twenty-one days to actually terminate the claimant in case he accepted the agreement.

43. The claimant was terminated on September 29, 2017 with an effective date of August 29, 2017.

44. The employer discharged the claimant for being a "no-call/no-show" for his shift on August 11, 2017.

45. The claimant filed for unemployment benefits and received an effective date of October 1, 2017.

46. On October 9, 2017, [Insurance Company A] denied the claimant's leave request for lack of submitted documents. The nature of the underlying request for the leave is unknown.

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.

The review examiner denied benefits after analyzing the claimant's separation under 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 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. Based solely on the employer's testimony at the initial hearing, the review examiner concluded that the employer had met its burden. We remanded the case to take the claimant's testimony, and to clarify some of the events surrounding the claimant's separation. After remand, we conclude that the employer has not met its burden.

The review examiner initially found that the employer discharged the claimant for being a no-call/no-show on his shift beginning August 11, 2017, after having received a warning for being a no-call/no-show earlier in the year. The employer's policy calls for discharge of all employees who have a second no-call/no-show offense. The review examiner concluded that the claimant's discharge constituted both a knowing violation and deliberate misconduct with no evidence of mitigating circumstances.

We note at the outset that the employer's policy and expectation requiring employees to call out before shifts are generally reasonable and are related to the employer's legitimate interest in maintaining adequate staffing levels at its hospital. We also note that the claimant received his first and final warning for being a no-call/no-show on May 26, 2017. Finally, we note that the employer discharged the claimant for being a no-call/no-show again on the night beginning August 11, 2017.

However, after remand, the review examiner modified her finding regarding the claimant's conduct on the night at issue and provided additional findings regarding his circumstances and actions that night.

The review examiner initially found, "The claimant was a no-call/no-show for his scheduled shift on August 11, 2017." *See* Remand Exhibit # 2 (Finding # 10). However, after remand, the review examiner found, "The claimant *did not show up for work* for his scheduled shift on August 11, 2017." *See* Consolidated Finding # 13 (emphasis added).

The review examiner issued supplemental findings after remand that show the claimant went to the hospital on the night of August 11, 2017, where he was diagnosed with vertigo, and for which he was prescribed medication. *See* Remand Exhibit # 14. She found that he attempted to call the employer twice during the night, indicating that he was not feeling well. Although the claimant did not call the specific number designated for employees who are unable to work, the claimant nevertheless attempted to inform the employer of his inability to work.

The review examiner also found that the claimant called the employer again to say he could not work on August 14, 2017, because he was still not feeling well. He obtained medical documentation indicating that he could return to work on August 16, 2017. *See* Remand Exhibit # 15.

Although the claimant had a doctor's note dated August 14 that medically cleared him to return to work on August 16, he spoke with the employer by telephone on August 15, 2017. After telling the employer that he had not been feeling well and went to the hospital on August 11, 2017, the claimant was told to call "[Insurance Company A]," which handles all leave requests for the employer's employees; the employer told the claimant he needed to provide the employer and [Insurance Company A] with medical documentation regarding his absence on August 11; and the employer told the claimant not to return to work until he had provided the requested documentation. The review examiner found the claimant did not provide the employer with medical documentation[1]; he was put on a paid leave on August 22, 2017, pending the outcome of

[1] We note that the claimant testified he gave a copy of his doctor's note to his supervisor, the review examiner found that he did not give the employer any medical documentation. It is unknown why the claimant did not provide the August 14 note to the employer's human resources team leader after speaking to her on August 15, 2017. Because

an investigation; on August 29, 2017, the employer informed the claimant he would be terminated; and the claimant was discharged on September 29, 2017, with an effective date of August 29, 2017.

While the claimant did not call the proper telephone number on the night of August 11, 2017, the decision whether or not he qualifies for unemployment benefits requires further analysis. To be a knowing violation at the time of the act, the claimant must have been ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996). In order to determine whether his 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).

The evidence before us compels the conclusion that the employer failed to meet its burden under either prong of G.L. c. 151A, § 25(e)(2).

The review examiner found that the claimant's first language is Haitian Creole, and that he does not speak English well. She also found that, after speaking with the employer on August 15, 2017, the claimant did not understand what was being asked of him, or what he was supposed to do.[2]

While the review examiner found that the claimant did not provide the employer with medical documentation, he provided contemporaneous documentation during the remand hearing to corroborate that he was, in fact, sick and went to the hospital on the night in question. His discharge instructions confirm he was diagnosed with vertigo, which "causes loss of balance when trying to walk" with the possibility of "nausea or vomiting." *See* Remand Exhibit # 14. The document also references "increased weakness or fainting," "severe headache or unusual drowsiness," and "difficulty with speech, vision, or movement of arms or legs." Id. From this, it can reasonably be inferred that the claimant was unable to recall the specific extension to call when he was ill, and that his already limited English was further impaired by his medical condition at the time he called.

Despite having a doctor's note that cleared him to resume working on August 16, the claimant was not permitted to return to his job. Ultimately, he was discharged for allegedly being a no-call/no-show on the night in question. But while the review examiner's findings show that the claimant failed to comply with the expectation that he would notify the employer before his shift started if he were going to be absent or late, his failure to comply with the expectation is mitigated by other factors credited by the review examiner. Consideration of the factors in a discharge must "take 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.

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we conclude that the employer failed to meet its burden for other reasons, we need not resolve this apparent inconsistency.

[2] We note the employer's witness testified that the company directs employees who seek medical leaves to supply the employer's third-party insurer, [Insurance Company A], with medical documentation for [Insurance Company A] to determine whether the employee qualifies for a leave of absence. The claimant's limited English proficiency very likely affected his ability to follow the employer's instructions — particularly where he had a doctor's note to return to work at the time of this telephone call.

of Division of Employment Security, 377 Mass. 94, 97 (1979). Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

Although the claimant failed to comply with the employer's expectation to call the proper number before his shift started, the evidence shows he attempted to comply with the employer's expectation by calling the employer. The claimant lacked the requisite state of mind to disqualify him from benefits under G.L. c. 151A, § 25(e)(2). Moreover, the claimant established circumstances that mitigated compliance with that expectation: he was ill with vertigo, which required medical treatment and medication. We, therefore, conclude as a matter of law that the claimant was discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest, and without a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 5, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 27, 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.

JPC/rh