**The claimant's discharge was for deliberate misconduct under G.L. c. 151A, § 25(e)(2). Although her absences were mitigated by illness, the claimant repeatedly violated the employer's expectation to phone in, rather than text or email, absences.**

**Board of Review**
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**Issue ID: 0024 0334 30**

# 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 her position with the employer on December 9, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 3, 2018. 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 May 1, 2018. 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). 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 provide the claimant with an opportunity to present evidence. Only the employer attended the remand hearing. Because the claimant, who is the appellant in this matter, failed to attend the remand hearing, the Board issued a Notice of Order to Show Cause for Failure to Prosecute and a Notice of Dismissal. The claimant responded to this Order, and, upon review, the Board found good cause to excuse the claimant's absence. Consequently, a remand hearing was reconvened and twice continued. 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 decision, which concluded that the claimant was subject to disqualification for intentionally failing to adhere to the employer's expectation that the claimant timely telephone the employer to report an absence or tardiness, 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 full time as a Home Health Aide for the instant employer, a home health company, from 5/10/14 to 12/3/17.

2. The employer has a written attendance policy which states that last minute requests for time off must be made via telephone call, and not via e-mail, and the employee must speak directly with a staff member when requesting this time off.

3. The above policy states that, in the event of absence due to illness or emergency, the employee must personally call the caregiver's phone line at the earliest possible opportunity, and the employee must speak with the on call coordinator.

4. The above policy states that excessive absenteeism or tardiness will result in termination from employment. The policy does not define excessive absenteeism or tardiness; nor does it describe whether the employer uses progressive discipline when employees violate the policy.

5. The policy is in place to ensure that the employer meets staffing needs. The claimant acknowledged receipt of the policy on 6/11/14.

6. The claimant was diagnosed with vestibular migraines sometime in 2014.

7. The claimant worked twelve-hour and seven-hour shifts, starting at 8am, from 9/24/14 to 3/25/15.

8. The claimant worked twelve-hour shifts, starting at 8pm, beginning 4/25/15.

9. The claimant worked twenty-four hour shifts, starting at 9am, between 7/30/17 and 8/3/17.

10. The claimant asked the Owner for time off, twice, in August 2017, as the claimant got divorced, had some health issues, and moved to a new location and wanted time to unpack and organize her space.

11. On 9/15/17, the claimant sent a text message to the Scheduler at 2pm, informing the employer she was going to be absent for her 5pm shift, due to tooth pain.

12. On 9/22/17, the claimant sent an e-mail to the Scheduler informing the employer she would be absent on 9/29/17, to have a tooth pulled. The e-mail went to the Scheduler's junk file and the Scheduler later discovered the e-mail.

13. On 9/26/17, the Owner replied to the above e-mail and told the claimant she was removing the claimant from the schedule, completely, and told the claimant she can call and set up an appointment to come into the office when she wanted to return to work.

14. On 10/24/17, the claimant e-mailed the Owner and said she really needed the time off for the past couple weeks and she should have talked to the Owner and asked for a leave of absence. She asked to come in and talk to the Owner.

15. On 11/1/17, the Owner met with the claimant and reviewed the employer's attendance expectations, and how to appropriately communicate with the office about attendance issues. She reminded the claimant that she must call the employer, not text or e-mail the employer, if she was going to be late or absent.

16. The claimant said she would be able to follow these expectations.

17. On 11/15/17, the claimant sent a text message to the Owner at 7:56am and said she was running a few minutes late to work. The Owner replied and asked the claimant when she would arrive. At 8:19am, the claimant replied and said she could not send an estimated time of arrival while she is driving. At 8:29am, the claimant sent another text message and said, "We knew ahead of time I would not be perfect adjusting to the morning schedule, give me a break, I'm trying!"

18. On 12/1/17, the claimant sent a text message to the Scheduler asking her to find someone to cover her 12/2/17 shift, as the claimant had a migraine. The Scheduler said she was doubtful she could find someone to cover that shift.

19. The Owner sent a text message to the claimant asking the claimant to call her to discuss what the options were with regard to the claimant's 12/2/17 shift.

20. On 12/4/17, the claimant sent a text message to the Owner and said she was going to be late because she overslept.

21. On 12/9/17, the claimant sent a text message to the Owner at 7:19am saying she was going to be absent for her twelve hour shift scheduled to start at 8am because she has been awake for two days with a migraine and she was going to go to the emergency room.

22. The claimant waited until 7:19am to call out on 12/9/17, because she believed the Owner would yell at her when she called out.

23. The claimant received no discipline for reporting her absences or instances of tardiness via text message during the course of her employment.

24. On 12/12/17, the Owner sent the claimant an e-mail saying that, since 9/15/17, the claimant has been late or absent seven times, often with very little notice, and this was an excessive number in a short period of time.

25. The Owner said that the claimant repeatedly violated the employer's policy that requires employees to call, rather than send text messages to the employer to report these absences and instances of tardiness, and that the Owner reviewed this policy with the claimant on 11/1/17.

26. The Owner said that the claimant's actions have put enormous stress on office staff and fellow home health aides, and effective immediately, the claimant's employment was terminated

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 conclude that the review examiner's original decision disqualifying the claimant from receiving benefits is supported by the record and is reasonable in relation to the evidence presented.

Because the claimant was discharged from her employment, we analyze the claimant's eligibility for benefits 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] . . . (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 . . . .

Pursuant to G.L. c. 151A, § 25(e)(2), a claimant will be disqualified from benefits if his or her separation was solely attributable to either a knowing violation of a reasonable and uniformly policy or deliberate and wilful misconduct. Under this provision, the employer bears the burden of proof. We note at the outset that the review examiner ultimately concluded that the employer presented insufficient evidence to show that the attendance policy at issue was uniformly enforced. We concur, and thus we conclude the employer has not met its evidentiary burden under the "knowing policy violation" prong of G.L. c. 151A, § 25(e)(2). We now consider whether the employer has established that the claimant was discharged for deliberate and wilful misconduct within the meaning of this provision.

The employer has asserted two grounds for the claimant's separation: (1) excessive absences; and, (2) failure to abide by the employer's call out policy. Relative to the claimant's work attendance, the review examiner's findings indicate that the claimant was absence or late a number of times between September 15, 2017, and her termination date of December 12, 2017. The fact that the claimant was absent or late on numerous occasion does not itself establish deliberate and wilful misconduct on her part. "Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.) Thus, 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 "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. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

After remand, the consolidated findings establish that the employer expects that employees will timely report for their scheduled work shifts and, if unable to do so, personally report any absences or tardiness to the employer by telephone. These expectations are inherently reasonable, because they protect the employer's interests to ensure that all home health care shifts are covered and all the employer's clients receive their required care. The employer has codified these expectations in a written attendance policy. This policy provides that excessive absence or tardiness will result in termination from employment. The policy further requires that, in the event of absence or illness, an employee must personally call the employer's telephone number at the earliest possible opportunity and that the employee must speak with the on-call coordinator. The claimant acknowledged having received the policy and thus was aware of the employer's reasonable expectation regarding attendance and the absences or tardiness call-in requirement. The consolidated findings, however, indicate that the claimant's failure to abide by the employer's attendance expectation was not solely attributable to intentional and wilful conduct. Rather, her absences and tardiness resulted from the claimant's illnesses or, in one case, her oversleeping. Given that the review examiner has found that mitigating circumstances existed, we cannot conclude the claimant's actual absences or tardiness were the result of deliberate and wilful misconduct on her part.

We next turn to consider whether the claimant failed to abide by the employer's call-out expectation relative to her absences and tardiness. As noted above, the consolidated findings establish that the claimant was aware of the employer's reasonable expectation that employees personally report any absences or tardiness to the employer's on-call coordinator by telephone.

The findings further establish that the employer's owner and the claimant met on November 1, 2017, to discuss the claimant's failure to adhere to the employer's attendance policy. At this meeting, the owner reviewed the employer's attendance expectations with the claimant and reminded her that she must call the employer and should not text or email that she would be absent or late. The review examiner found that the claimant agreed that she would be able to follow the employer's expectations. Yet, two weeks later on November 15, 2017, the claimant violated the employer's expectation by notifying the employer at the last minute via text and not by telephone that she would be late for her shift. On December 1, 2017, the claimant again

failed to abide by the employer's expectation when, rather than calling the employer, the claimant sent a text message to the scheduler asking her to cover the claimant's shift for the next day. On December 4, 2017, the claimant texted rather than called to report that she would be late for shift due to oversleeping. Again on December 9, 2017, the claimant notified the owner by text rather than by phone that she would be absent for her twelve-hour shift, which was due to start in only 40 minutes, because she had a migraine for the past two days and was going to the emergency room. The review examiner found that, on December 9th, the claimant chose to text when she did rather than personally call as required, because she believed the owner would yell at her when she called out. This finding indicates a conscious decision on the claimant's part not to abide by the employer's calling out expectation. The claimant's reason for doing so, to avoid a potentially difficult conversation with the owner, does not mitigate her conscious failure to abide by the call-out expectation. On December 12, 2017, the employer terminated the claimant for excessive absences over a short period and repeated failure to use the telephone to call out, rather than send text messages reporting absences or tardiness.

While the findings before us establish mitigating circumstances regarding the reason for the claimant's absences and tardiness, they do not establish any factors beyond her control, which prevented her from abiding by the employer reasonable call out expectation. Our review of the entire record shows: (1) the existence of a reasonable expectation regarding calling out from work; (2) the claimant's awareness of this expectation; (3) the claimant's failure to abide by this expectation; and, (4) a lack of circumstances mitigating the claimant's failure in this regard. On this basis, we believe that the employer has met its burden of establishing deliberate and wilful misconduct on the claimant's part.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interests within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning December 10, 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 - December 21, 2018**

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**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.

SPE/rh