Claimant's final series of absences were due to a mental health condition and she could not get a medical note before her appointment – both factors beyond her control. Held her actions were due to mitigating circumstances and not done in wilful disregard of the employer's interest. The claimant is not disqualified under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0024 9007 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 reverse.

The claimant was discharged from her position with the employer on February 27, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 5, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties,[1] the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on July 20, 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, she 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 afford the claimant an opportunity to present testimony and other evidence. 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 original decision, which concluded that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when she was absent without providing requested medical documentation, is supported by substantial and credible evidence and is free from error of law, where the findings after remand show that, upon being asked, the claimant told the employer that she could obtain the requested documentation when she saw her medical provider two days later.

[1] The claimant attended the first but not the continued hearing, when she would have provided her testimony.

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 full time as a customer service representative for the instant employer, a broadband communication company, from 06/19/17 until 02/17/18.

2. The employer maintains an Attendance and Punctuality policy that states in part:

   Absenteeism, tardiness, and early departures place a burden on other employees. It is essential that employees report to work as scheduled, give proper notice when expected to be late or absent from work, and are held accountable for unacceptable absences from work.

   Employees who will be absent unexpectedly from work are required to promptly notify their supervisors or use other approved notification processes to advise management of the reason for the absence. It is every employee's responsibility to report all absences each day they will be absent. Failure to timely and properly report an absence may be grounds for discipline, up to and including termination of employment.

3. The purpose of the policy is to ensure adequate staffing.

4. The claimant was given the policy at the time of hire.

5. All employees are subject to the policy.

6. Disciplinary action for being in violation of the policy is at the employer's discretion based on the nature and severity of the incident.

7. The employer expects employees to be on time and present for their shifts and to notify a supervisor as soon as they know they are going to be out.

8. The purpose of the expectation is to ensure adequate staffing.

9. The claimant was given the policy at the time of hire and it was reviewed during each disciplinary action issued to the claimant.

10. On 07/07/17, 08/18/17, & 09/18/17, the claimant was given coachings for attendance.

11. The purpose of a coaching is to make the employee aware of their behavior.

12. In October of 2017, the claimant began attending an outpatient treatment program for mental illness.

13. The claimant was diagnosed with bipolar disorder, anxiety, and post-traumatic stress disorder (PTSD). The claimant was prescribed approximately 7 different medications.

14. The program would frequently alter the claimant's medications based on her counseling sessions.

15. The claimant was having difficulty with the medications being constantly changed. She would have difficulty sleeping or oversleep and was very anxious.

16. The treatment program recommended that the claimant not return to work. The claimant did not want to lose her job so she chose to try and still work while attending the program.

17. On 10/01/17, the claimant was given a verbal warning for attendance because she was absent from work on 09/29/17.

18. On 10/13/17, the claimant was given a written warning for attendance because she was absent from work on 10/10/17.

19. From 10/28/17 through 11/26/17, the employer allowed an approved leave of absence due to the claimant's mental health.

20. In January of 2018, the claimant was no longer attending the program and was only seeing her nurse practitioner (NP). It was determined that the claimant had been misdiagnosed as having seizures while in the treatment program.

21. On 01/27/18, the claimant was given a final warning for attendance because she was absent from work on 01/22/18.

22. The warning stated in part: "Employee has been advised that further violations of company policies will lead to termination of employment."

23. The claimant does not recall receiving all the warnings, but she signed all of the warnings.

24. The majority of the claimant's absences were due to illness and she would submit medical notes to Human Resources (HR).

25. On 02/17/18, the claimant left work early without permission. The claimant remained out of work until 02/24/18 due to illness.

26. On 02/23/18, the Human Resources Generalist (HRG) spoke to the claimant regarding her most recent absence period. The HRG advised the claimant to bring medical documentation to substantiate her recent absences.

27. The claimant explained to HR that she had been in a manic state and that she wouldn't be able to turn anything in until 02/26/18 because that is when she was seeing her NP and she would provide her with a note.

28. The HRG again told the claimant to bring the note on Saturday. The claimant again explained that she would not have it until 02/26/18.

29. On 02/24/18, the claimant reported to work as scheduled. The claimant spoke to a team lead and he said the person she was supposed to speak with wouldn't be in for a few hours.

30. The claimant started to feel very anxious because she didn't want to lose her job. The claimant went out to her car to see if it would ease her anxiety.

31. The claimant did not come back to work. The claimant called the absence line later that day to report her absence.

32. On 02/25/18 & 02/26/18, the claimant called out of work using the automated line.

33. On 02/26/18, the claimant was able to get a medical note which covered her recent absences from work.

34. On 02/27/18 & 02/28/18, the claimant was not scheduled to work.

35. On 02/27/18, the employer prepared and mailed a termination letter due to the claimant's most recent absences.

36. On 02/28/18, the claimant received the letter informing her that she was terminated.

Credibility Assessment:

At the initial hearing, which the claimant did not have a chance to testify at due to a late start, the employer testified that the claimant told the HRG on 02/24/18 that she didn't have a medical note and that the HRG called the claimant on 02/26/18 but that the claimant did not return her call and that is why the employer prepared the termination letter on 02/27/18.

At the remand hearing, the claimant directly testified that she told the HRG on 02/24/18 that she would be unable to get a medical note until 02/26/18 and that she did not receive a phone call or message from the HRG on 02/26/18, because she would have called her back and spoke to her if she had.

> Based on the testimony and evidence presented, the claimant's direct testimony is accepted over the employer's hearsay testimony.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. Based upon the new consolidated findings, we reject the review examiner's original legal conclusion that the claimant is ineligible for benefits, as outlined below.

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 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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

In her decision, the review examiner had concluded that the employer did not show that the claimant knowingly violated a reasonable and uniformly enforced policy, because the employer's attendance policy stated that violations "may be grounds for corrective action, up to and including termination of employment." *See* Consolidated Finding # 2. Because the policy allowed for flexible enforcement and the employer did not present evidence demonstrating that it treated all policy violations uniformly, we agree that it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, we consider whether the evidence after remand shows that the claimant's discharge was due to deliberate misconduct in wilful disregard of the employer's interest. 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).

In the present case, there is no question that the claimant was frequently absent from work and that before her termination, she had already received multiple coachings and warnings about her attendance. *See* Consolidated Findings ## 10, 17, 18, and 21. The consolidated findings show that the majority of her absences were due to mental health conditions, that the employer knew of her conditions, and, in fact, had granted the claimant a leave of absence for several weeks during the fall. *See* Consolidated Findings ## 19 and 24. We must decide what prompted the employer to terminate the claimant's employment on February 27, 2018, and whether it was due to deliberate misconduct in wilful disregard of the employer's interest.

The employer's termination letter refers to the claimant's conversation with the Human Resources Generalist on February 24, 2018, and indicates that the reason for her termination was that her recent absences were unexcused. *See* Exhibit 9.[2] The review examiner found that the conversation with the Human Resource Generalist actually took place on Friday, February 23, 2018. She further found that in that conversation, the Human Resource Generalist advised the claimant to bring in medical documentation by the next day to substantiate those recent absences, the claimant assured her that she would, but that she could not get a note until she saw her nurse practitioner on Monday, February 26, 2018. Consolidated Findings ## 26 and 27. Despite what the claimant said, the Human Resource Generalist repeated that she expected the claimant to bring the note in on Saturday, February 24, 2018. Consolidated Finding # 28.

Whether or not the Human Resource Generalist's directive to bring in a medical note on a Saturday was reasonable, or it would have been more reasonable to wait for it until the claimant's next scheduled work day after the medical appointment, the claimant knew the employer expected a note and she got one. *See* Consolidated Finding # 33. It may be that the employer simply had enough of the claimant's frequent absenteeism and decided to terminate her regardless. However, the question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield, 377 Mass. at 95.

The consolidated findings show that the claimant's final series of absences were attributable to her mental health condition and that she could not bring in the requested medical note before her appointment, as directed. Given these findings, we believe the claimant's unexcused absences were due to mitigating circumstances and not in wilful disregard of the employer's interest. *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); *see also* Nantucket College Hospital v. Dir. of Division of Employment Security, 388 Mass. 1006 (1993) (rescript opinion) (where discharge was for cumulative deficiencies in the claimant's work performance, but the final incident was attributable to her uncontrollable emotional and physical illness, the claimant may not be disqualified for deliberate misconduct in wilful disregard of the employer's interest).

[2] While not explicitly incorporated into the review examiner's findings, the content of Exhibit 9, the employer's termination letter, 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).

We, therefore, conclude as a matter of law that the employer has not shown that it discharged the claimant for a knowing violation of a uniformly enforced policy or for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning February 25, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 30, 2018

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

AB/rh