

**Mitigating circumstances, including the need to care for a brother with mental health and substance abuse issues, was the cause for the claimant's absenteeism, and not wilful disregard of the employer's interest. She is eligible for benefits under G.L. c. 151A, § 25(e)(2).**

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

**Paul T. Fitzgerald, Esq.  
Chairman  
Charlene A. Stawicki, Esq.  
Member  
Michael J. Albano  
Member**

**Issue ID: 0026 3778 67**

## **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 July 20, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 11, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 17, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer, 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 obtain further evidence pertaining to the reason for the claimant's attendance issues, particularly following her disciplinary suspension. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 was disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2), because of her attendance, is supported by substantial and credible evidence and is free from error of law in light of the mitigating circumstances shown in the consolidated findings.

### **Findings of Fact**

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

1. The claimant worked as an emergency medical technician (EMT) for the employer, an ambulance service. The claimant began work for the employer in February 2018.
2. The employer maintains an attendance policy which prescribes progressive discipline for excessive unscheduled absences, tardiness and leaving work early. The warnings include a written warning, a written warning with a suspension and discharge.
3. The purpose of the policy is “to ensure adequate staffing, positive morale, and to meet expected standards throughout the company.” The purpose of the policy is also to prevent “(u)nplanned [sic] absences (that) cause relocation of work crews, unplanned overtime, and loss of productivity.”
4. The claimant was aware of the employer’s attendance policy.
5. The employer uses its discretion in the enforcement of the attendance policy. It will take an employee’s personal circumstances into consideration. The personal circumstances they consider include whether the events resulting in the absence were within the employee’s control.
6. The claimant lives in [Town A], MA. She worked at the employer’s [Town A], MA and [Town B], MA locations.
7. The claimant has a brother who was 25 years old in 2018. He has difficulties with substance abuse and mental health. The claimant was his health care proxy.
8. Between March 2, 2018, and March 26, 2018, the claimant had three unscheduled absences. She was also tardy to work five times. She was late to work and tardy to work because she was caring for her brother and because her car broke down.
9. On March 26, 2018, the employer issued the claimant a written warning for tardiness and a written warning for absenteeism.
10. The claimant informed the employer’s Human Resources Manager (HR Manager) of her difficulties with her brother and her car.
11. The claimant continued to miss work and arrive to work late. Because of her personal circumstances, the employer did not immediately issue additional discipline.
12. The claimant got a new car and began picking up overtime shifts.

13. On July 4, 2018, the claimant's brother was found unresponsive and taken to the emergency room in [Town C], MA. He was admitted and remained in the hospital until July 11, 2018, when he was discharged to a treatment center.
14. The claimant was very tired from working overtime, and visiting and caring for her brother. Because she was very tired, she was often late to work. During a three-week period ending in mid-July 2018, the claimant was tardy 9 times.
15. The employer considered the claimant's continued tardiness to be excessive. On Wednesday, July 18, 2018, the employer issued the claimant a written warning and a 12-hour suspension for tardiness.
16. The claimant served her suspension on July 18, 2018.
17. On Friday, July 20, 2018, the claimant was scheduled to begin work at 7 p.m.
18. At approximately 1 a.m. on July 20, 2018, the claimant received a call from [Hospital A] informing her that her brother's condition had changed and he was being intubated. They told her that his insurance was not covering his care and recommended she come to the hospital.
19. The claimant thought she might not be able to make it to work later that day. At a time between 1 a.m. and 2 a.m., she called the employer and told the dispatcher she would not be at work.
20. The claimant went to [Hospital A] and by 4 a.m. had resolved the issues concerning her brother's care.
21. At 4 about [sic] a.m. the claimant called the dispatcher and said she would be able to work. The dispatcher told the claimant she would have to speak with a manager. The claimant did not immediately call back to speak with a manager.
22. At approximately 9 a.m., a supervisor informed the Chief Operating Officer (COO) the claimant had called out of work. The supervisor did not tell the COO the claimant had called back and offered to work.
23. The COO discussed the claimant's absences with the other managers and owners. They agreed to discharge the claimant.
24. At approximately 9 a.m., the Operations Manager called the claimant and told her that because of her absences she [sic] being discharged. The claimant told him she had called back and offered to work. He told her that the decision had already been made.

Credibility Assessment:

The claimant's testimony regarding her brother's health concerns was specific and detailed. Her testimony was also supported by hospital notes she provided at the hearing. Her testimony is credible.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and the record 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Insofar as Consolidated Finding # 21 indicates that the claimant could have called back right away and spoken to a manager, it is misleading, as the claimant provided undisputed testimony that the dispatcher told her she would have to wait to speak with a manager until the manager came into work.<sup>1</sup> In adopting the remaining findings, we deem 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. However, based upon the new consolidated findings, we reject the review examiner's legal conclusion that the claimant is not eligible for benefits.

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).

As a basis for disqualifying the claimant from receiving benefits, the review examiner originally concluded that the employer had proven that the claimant knowingly violated the employer's reasonable and uniformly enforced attendance policy. After remand, Consolidated Finding # 5 provides that the employer exercises discretion in enforcing this policy by taking into account the employee's personal circumstances. Given this discretion and flexibility, we cannot conclude that the attendance policy was uniformly enforced. As such, the employer has not met its burden

---

<sup>1</sup> While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony 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).

to show that the claimant's termination from employment was due to a knowing violation of a reasonable and *uniformly* enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the claimant will be disqualified under G.L. c. 151A, § 25(e)(2), if the employer can show that she engaged in deliberate misconduct in wilful disregard of the employer's interest. In order to determine whether an employee's actions constitute deliberate misconduct under G.L. c. 151A, § 25(e)(2), 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).

The consolidated findings show that the claimant was aware of the employer's attendance policy, which required employees to avoid excessive unscheduled absences and being tardy. *See* Consolidated Findings ## 2 and 4. The attendance policy is reasonable in light of its objective to ensure adequate staffing. *See* Consolidated Finding # 3. Nonetheless, the claimant had numerous unscheduled absences and instances of being tardy between March and July, 2018, for which she had received both written warnings and a disciplinary suspension. *See* Consolidated Findings ## 8–9, 11, and 14–15.

We form no opinion about whether the employer was justified in terminating the claimant's employment as a result of her attendance. At issue is whether there were mitigating circumstances for the claimant's attendance violations. If so, she is entitled to unemployment benefits. 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).

The consolidated findings provide that, while working for the employer, the claimant was highly involved in dealing with her brother's substance abuse and mental health care, as she was his health care proxy, and that this responsibility was, at least in part, the reason for many of her attendance problems. *See* Consolidated Findings ## 7–8 and 13–14. The employer decided to end the claimant's employment because she called out again on July 20, 2018. *See* Consolidated Findings ## 19 and 22–24. Thus, we consider what transpired on July 20<sup>th</sup> to cause the claimant to call out of work.

As the review examiner found, early that morning, the hospital had called her to come in because her brother's condition had become serious, and that he was being intubated. *See* Consolidated Finding # 18.<sup>2</sup> As a result, she called in because she believed that she might not be able to report for work later that day. Consolidated Finding # 19. We believe that this was a reasonable judgment call, because, at that point, the claimant could not know how long she would be needed

---

<sup>2</sup> At the end of the remand hearing, the review examiner held the record open for the claimant to obtain and submit additional hospital records and a document showing that she was her brother's health care proxy. It is unknown if such additional documentation was received by the review examiner before he issued his consolidated findings. Nonetheless, such further evidence is not critical to our decision, inasmuch as the review examiner could appropriately rely upon the claimant's testimony in support of Consolidated Finding # 18, as the credibility assessment indicates.

at the hospital. It is self-evident that the brother's health condition was a circumstance over which the claimant had no control. As such, we conclude that, when the claimant called into work on July 20, 2018, she was not acting in wilful disregard of the employer's interest but responding to mitigating circumstances.

We, therefore, conclude as a matter of law that the employer has failed to meet its burden to show that it discharged the claimant for either a knowing violation of a uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest pursuant to 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 July 20, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – May 22, 2019**



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](http://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