By waiting a few days after claimant's no-call, no-show to see if he would produce a doctor's note, the employer did not condone the attendance violation.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 July 22, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 18, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 10, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 is eligible for benefits because the employer condoned the claimant's absences by not immediately terminating the claimant on his final occurrence, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the employer, a chain company, in heat treat, from August 17, 2015 until July 22, 2018. The claimant was paid $22.70 per hour.

2. **[EMPLOYER] RULES OF PERSONAL CONDUCT** states, in part:

Section C: Attendance

Unexcused absence - (1) absence occurrence = (1) Point**:**

The failure of an employee to report to work as scheduled. For the purpose of calculating progressive discipline, each occurrence of absence will count as one attendance point. An employee's schedule includes any overtime the employee volunteers or is required to work. An occurrence is defined as a continuous period of absence in excess of two hours from the standard work day and up to and including the duration of two scheduled consecutive work days. After 2 days of absence each consecutive day is a single occurrence unless a doctor's note is provided.

Disciplinary action will normally progress as follows:

(1) Accumulation of (4) Points: Notification
(2) Accumulation of (5) Points: Written Warning
(3) Accumulation of (6) Points: Final Written Warning
(4) Accumulation of (7) Points: Termination

NO NOTICE / NO SHOW (1) = (1) Point

It is critical that the Company receives notice when an employee will be unable to work. Employees with one no call event, or an employee who calls and indicates he will be late and does not report to work, shall be penalized with one point.

Disciplinary action will normally progress as follows:

(1) Accumulation of (1) Points: Written Warning
(2) Accumulation of (2) Points: Final Written Warning
(3) Accumulation of (3) Points: Termination

Employees should call the employee sick line at xXXXX or email the sick account at xxxxxxxx@xxxxxxxxx.com. (Exhibit 11)

3. The policies are measures to ensure adequate staffing so the employer can operate its business.

4. All employees are subject to the policies.

5. The claimant received and signed for the [**EMPLOYER] RULES OF PERSONAL CONDUCT** on August 17, 2015. (Exhibit 8)

6. As of July 7, 2018, the claimant had accumulated 2 attendance points.

7. On July 8, 2018, the claimant, who had been out of work for 6 months with a right arm/elbow injury, reported his right arm/elbow was again hurt.

8. The claimant left work early. The claimant was told not to report for work until he was physically capable.

9. The claimant used vacation days to remain out of work on July 9, 2018 and July 10, 2018.

10. The claimant was scheduled to work on July 11, 2018.

11. The claimant was absent on July 11, 2018.

12. On July 11, 2018, the Human Resources Supervisor (HRS) called the claimant to tell him he must communicate with the employer and provide a note from his doctor about his condition.

13. The claimant was absent from work without notifying the employer on the following scheduled work days and assessed 1 point for each absence:

    July 11, 2018 1 Point 3 points
    July 12, 2018 1 Point 4 Points
    July 16, 2018 1 Point Total: 5 Points

14. On July 16, 2018, the HRS spoke with the claimant, who told the HRS he would bring in a doctor's note on July 17, 2018.

15. On July 17, 2018, the claimant was examined by his physician and referred to another physician. (Exhibit 13)

16. The claimant's physician would not give the claimant a doctor's note until he saw the referral physician.

17. The HRS waited until the end of the claimant's work week, Saturday, July 21, 2018, for the claimant to bring in a doctor's note.

18. The claimant did not bring in a doctor's note.

19. The claimant was absent from work on the following scheduled work days and assessed 1 point for each absence:

    July 17, 2018 1 Point 6 Points
    July 20, 2018 1 Point 7 Points
    July 21, 2018 1 Point Total: 8 Points

20. The claimant was absent from work without notifying the employer (No Call/No Show) on the following dates and assessed 1 point for each absence:

July 17, 2018 1 Point 1 Points
July 20, 2018 1 Point 2 Points
July 21, 2018 1 Point Total: 3 Points (Exhibit 12, Page 2)

21. On July 23, 2018, the HRS sent the claimant a termination letter which stated, in part:

    Dear [Claimant],

    This letter is sent to notify you that based on your accumulation of points pursuant to the company's attendance policy, your employment is being terminated. As of July 22, 2018 you have accumulated 8 points for full absences and 3 consecutive points for No Call / No Show (See Attached Report). Accordingly, your employment is terminated, effective July 22, 2018. (Exhibit 12)

22. On or about July 30, 2018, after receipt of the termination letter, the claimant called the HRS and stated he would bring in a doctor's note.

23. The claimant did not bring in a doctor's note.

24. Had the claimant submitted a doctor's note concerning his condition the absences resulting in the assessment of attendance points may have been adjusted and the claimant may not have been 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact except as follows. We set aside Finding of Fact #13, as it is unsupported by the record. While the claimant was absent on July 11, 12 and 16, 2018, the undisputed testimony of the parties, as well as Exhibit 14, show that the claimant did contact the employer on those days to notify them of his absence.[1] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, however, we conclude 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

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

> 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 the foregoing section of the law, the employer has the burden of proof. Still v. Comm'r of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The findings establish that the employer maintained a Personal Conduct Policy regarding employee absenteeism. The claimant was aware of this policy and signed for it on his date of hire. The policy is reasonable and was found to be a measure to ensure adequate staffing so the employer can operate its business. This policy provides for termination of an employee who accumulates seven (7) points, with each point representing in excess of two hours from the standard work day. The policy further provides for termination if an employee accumulates three (3) points for being absent without notifying the employer on three (3) occasions (No Notice/No Show).

The review examiner concludes that because the employer did not terminate the claimant until he reached his 8th occurrence (8 points), they failed to adhere to their own policy. We agree. This shows that the employer's attendance policy was not uniformly enforced. For this reason, 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).

We must now analyze whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. In doing so, we must look to the legislative intent behind G.L. c. 151A, § 25(e)(2), which is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, 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, 377 Mass. at 97.

It is apparent that the claimant was aware of the expectation to notify the employer of his absences as he continued to call in to the Human Resources supervisor to report his absences up until July 17, 2018, when he had his first No Notice/No Show. He also knew that the employer was expecting him to produce a medical note regarding his ability to work, as this was communicated directly to the claimant on July 11, 2018, when he spoke to the Human Resources supervisor. When the claimant spoke to the supervisor again on July 16, 2018, he reported that he had a doctor's appointment the next day and would bring in his doctor's note. However, instead of bringing in the note or notifying the employer of his inability to obtain a note, the claimant was a No Notice/No Show for the next three consecutive work days. The employer terminated the claimant after his third No Notice/No Show and his eighth point acquired from all of his absences.

The review examiner concluded that the claimant did not possess the requisite state of mind for disqualification. He reasoned that the claimant did not know what the consequences of his actions

would be because the employer did not terminate the claimant immediately upon accumulating sufficient points to warrant his termination. This was in error. First, his conclusion is partly based on the inaccurate finding that the claimant was a No Notice/No Show on July 11, 12 and 16, 2018, as well as July 17, 20, and 21st. As stated earlier, the record does not support this finding. Exhibit 14 shows that on July 11, 12 and 16, 2018, the claimant called in each day to report his absence to the Human Resources supervisor. Thus, the claimant did not start failing to provide notice of his absences until July 17th.

Second, we think the review examiner unfairly penalizes the employer for waiting a matter of days to see if the claimant would produce the medical note he offered to bring in on July 17, 2018. It is true that, if the employer fails to discipline employees who violate a certain rule, a claimant may over time come to believe that such conduct is acceptable. S*ee* Gold Medal Bakery, Inc. v. Comm'r of Division of Unemployment Assistance, 74 Mass. App. Ct. 1105 (2009), *summary decision pursuant to rule 1:28* (based upon vague and inconsistently enforced attendance policy, claimant could reasonably believe his absence would be excused); and New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 533–535 (2004). However, in the case before us, there is no indication in the record that the claimant, at any point, believed it was acceptable for him to miss work without notifying the employer.

There is also no evidence in the record to suggest that any mitigating circumstances prevented the claimant from calling the employer on July 17, 20, and 21, 2018. Based upon his history of calling in prior to July 17th, the only reasonable inference is that his failure to contact the employer after this was intentional and in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that, under G.L. c. 151A, § 25(e)(2), the claimant's discharge is attributable to deliberate misconduct in wilful disregard of the employing unit's interest.

The review examiner's decision is reversed. The claimant is denied benefits beginning July 22, 2018, and subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019

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.

CAS/jv