0028 1696 05 (May 23, 2019) – Claimant was hospitalized with a serious illness and medication made him too sleepy and disoriented to follow the proper attendance policy protocol of contacting his supervisor when he called out of work. Board held mitigating circumstances negated the willfulness of the claimant's misconduct. It is also not a knowing violation of the employer's policy because, at the time, he was not consciously aware that he was violating the policy. Claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review**
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**Issue ID: 0028 1696 05**

# 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 November 24, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 25, 2018. The employer 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 denied benefits in a decision rendered on February 7, 2019. 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, he 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 about the reason for the claimant's absences and the claimant's efforts to notify the employer that he would not be able to work. 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 failed to present sufficient evidence of mitigating circumstances for his failure to abide by the employer's attendance policy, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings now show that he was hospitalized and unable to call in.

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 a Medical Technologist for the employer, a health center. The claimant began work for the employer on October 5, 2018.

2. The employer maintains an attendance policy which includes a section on "Reporting requirements." The section states in part: "A. An employee who will be absent from work must notify his/her immediate supervisor or designee as instructed, but no later than three hours prior to their scheduled start time."

3. The policy also states: "C. Employees who fail to notify their supervisor for three consecutive days of unscheduled absences (no call, no show) will be deemed to have voluntarily resigned, and will forfeit all employment rights."

4. The purpose of the policy is to maintain adequate staffing levels.

5. The claimant was aware of the employer's policies.

6. The employer will always discharge employees for three days of unscheduled absences without notification.

7. The claimant worked a Monday through Friday from 7:30 a.m. to 5 p.m. He earned $32.95 per hour.

8. The claimant last performed work for the employer on Friday, November 9, 2018.

9. On Monday, November 12, 2018, the claimant called out of work. He reported he had car problems. On Tuesday, November 13, 2018, the claimant called out of work and stated he was not feeling well. On Wednesday, November 14, 2018, the claimant did not call or show up for work. On Thursday, November 15, 2018, the claimant called out of work.

10. The claimant's supervisor, the Lab Manager, reported the claimant's absence to the employer. The employer suggested she give the claimant a verbal warning and remind him of the attendance policy.

11. The Lab Manager usually arrived at work between 9:30 and 10 a.m. She also did not work on Fridays.

12. On Friday, November 16, 2018, the claimant had not slept well overnight and was not feeling well. At approximately 8 a.m., he called the employer and spoke with another technologist. He told her he was not feeling well and

would not be at work. The claimant reported his absence to her because his supervisor was not at work.

13. On Saturday, November 17, 2018, the claimant felt very ill.

14. On Sunday, November 18, 2018, the claimant was very dizzy when he woke up. He called 9-1-1 and was transported to [Hospital A] by ambulance at 6 a.m. When he arrived he was unconscious. He was admitted with "suspicion of viral hepatic infection and liver dysfunction and acute pancreatitis." (Remand Exhibit 2, p. 6)

15. On Monday, November 19, [2018], the claimant called the employer and spoke with another technologist. He told the technologist he was in the hospital and that he would call back and speak with their Manager.

16. Because of an enlarged pancreas, the claimant was put on medication which made him sleepy and disoriented for two days. Because he was sleepy and disoriented, he did not call the employer.

17. Also on Monday, November 19, 2018, the Lab Manager reported the claimant's absence and failure to call her to the employer. The employer decided to discharge the claimant for three consecutive days of absence without notification.

18. On Friday, November 23, 2018, the claimant called the employer and spoke with the same technologist he talked to on Monday the 19th. He told him he would be at work on Monday. He did not ask for the Lab Manager because she did not work on Fridays.

19. The claimant was discharged from the hospital on Saturday, November 24, 2018.

20. On Monday, November 26, 2018, the claimant spoke with the Lab Manager on his cell phone as he was commuting to work. She told him he was discharged. He told her he had a doctor's note. She told him it did not matter.

21. Also on November 26, 2018, the employer mailed the claimant a letter informing him he was discharged because he was a no call, no show and was considered to have abandoned his job.

Credibility Assessment:

There were some inconsistencies in the claimant's testimony and some conflicts between his testimony and the employer's. However, the employer witness at the hearing had no direct knowledge of the claimant's separation. The claimant testified he was not able to work and was not able to call-out because of an illness which caused him to be sleepy and disoriented. The claimant's testimony is

> supported by a medical note from [Hospital A]. The note supports the claimant's testimony that he was in the hospital and seriously ill. Because the claimant's testimony was direct and supported by the medical note, it is considered credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. However, based upon the new consolidated findings, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

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 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).

The findings show that the claimant failed to show up or notify his supervisor of his absences on November 14, 2018, November 16, 2018, and Monday, November 19, 2018. *See* Consolidated Findings ## 9, 12, and 15–16. Technically, because these were not consecutive days of work, he did not violate the employer's no-call, no show policy. *See* Consolidated Finding # 3. However, his failure to notify his supervisor of the absences did violate the reporting requirements section of the employer's policy. *See* Consolidated Finding # 2. Because the employer did not decide to discharge the claimant until after his November 19, 2018, absence, we look closely at what happened on that date. *See* Consolidated Finding # 17.

To be a knowing violation pursuant to G.L. c. 151A, § 25(e)(2) at the time of the act, the employee 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, 423 Mass. at 813. Although the claimant was aware of the employer's policy and he made an effort to notify the employer of his absence, he did not actually notify his supervisor. *See* Consolidated Findings ## 5, and 15–16. On November 19, 2018, the claimant called a coworker to report his absence,

but he failed to call back and speak to a manager. The reason for his failure to follow through with the second call to his supervisor, as required under the attendance policy, is important. He was in the hospital, seriously ill, and being treated for an enlarged pancreas with drugs that made him sleepy and disoriented for two days. *See* Consolidated Finding # 16. In this condition, we cannot conclude that at the time, the claimant was consciously aware that he was violating the employer's attendance policy. Thus, he may not be disqualified for a knowing violation of a reasonable and uniformly enforced policy.

We reach a similar result if we analyze the claimant's separation under the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2). 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). 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).

As stated, the findings indicate that the claimant knew that he was expected to call back and report his absence to his supervisor on November 19, 2018. The expectation is reasonable, inasmuch as it helps the employer maintain adequate staffing levels. *See* Consolidated Finding # 4. However, the findings also provide that, on the morning of November 19, 2018, the claimant could not comply with the employer's expectation, because he was under the influence of prescribed medication that made him too sleepy and disoriented to do so. These circumstances meet the definition of mitigating factors that caused the misconduct and over which the claimant had little or no control. Thus, we conclude that his failure to properly call in on this day was not done in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant either knowingly violated the employer's attendance policy or deliberately failed to meet the call-in protocol requirements 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 November 16, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION – May 23, 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

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