

After a final warning for absenteeism, the claimant was tardy two more times due to mitigating circumstances. Therefore, he may not be disqualified for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0028 5535 60

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 December 21, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 12, 2019. 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 March 15, 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, was disqualified pursuant to the provisions of 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 make further subsidiary findings from the record and a credibility assessment. 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 failed to show mitigating circumstances for the final two instances of tardiness that led to his discharge, 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 and credibility assessment are set forth below in their entirety:

1. The claimant worked full time as a forklift operator for the instant employer, a packing company, from 06/27/16 until 12/19/18.
2. The employer maintains a Lateness/Tardiness policy that states:
3. [“]An employee is late/tardy, when the employee punches in for his/her shift after the start time, including any shifts of scheduled overtime. If an employee arrives to work more than three (1) [sic] hours after the start of his/her scheduled shift, without having notified his/her supervisor, it will be treated as job abandonment as defined below unless the time off is otherwise excused by applicable law.[”]
4. The purpose of the policy is to ensure that business needs and customer requirements are met.
5. The claimant acknowledged the handbook most recently on 04/02/18.
6. All employees are subject to the policy.
7. Disciplinary action for being in violation of the policy is at the employer’s discretion based on the nature and severity of the incident.
8. The employer expects employees to report to work on time and to notify their supervisor in advance if they are going to be late or absent.
9. The purpose of the expectation is to ensure that business needs and customer requirements are met.
10. The claimant acknowledged the handbook most recently on 04/02/18.
11. Employees are allowed a 7-minute grace period for tardiness. If an employee arrives more than 7 minutes late it is considered an unexcused tardiness.
12. Employees attendance is tracked on a calendar year. Each employee is given a “clean slate” after December 31st of each year.
13. On 12/04/18, the claimant was issued a written warning for attendance because he had been tardy 5 times that were unexcused since 01/01/18.
14. A union member or steward and the claimant’s manager were present when the warning was issued.
15. On 12/10/18, the claimant was issued a final written warning for attendance because he had been tardy 2 additional times since the 12/04/18 warning.
16. A union member or steward, the claimant’s manager, and the HR manager were present when the final warning was issued.

17. It was explained to the claimant that if he had one additional unexcused absence or 2 additional unexcused tardys [sic] that it would be reviewed by Human Resources (HR) for termination.
18. The claimant was also told that if he goes 45 days without an occurrence a point would be deducted.
19. On 12/14/18, the claimant arrived late for his scheduled shift. The claimant was scheduled to start at 5 a.m. and he clocked in at 5:10 a.m.
20. The claimant was late because his “power went out” and his alarm “didn’t go off.”
21. On 12/19/18, the claimant arrived late for his scheduled shift. The claimant was scheduled to start at 5 a.m. and he clocked in at 5:17 p.m.
22. The claimant was late because he “couldn’t find his keys.”
23. On 12/19/18, the claimant was informed by his manager that he was being sent home and his employment was being reviewed for termination.
24. On 12/21/18, the HR manager called the claimant and told him that he was discharged for attendance.
25. The claimant has the right to file a grievance regarding his termination.
26. At the time of hearing, the claimant had not grieved his termination.

Credibility Assessment:

The claimant’s testimony is deemed credible.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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. However, as discussed more fully below, 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 consolidated findings show that the employer discharged the claimant for his attendance. Consolidated Finding # 24. Specifically, it had warned the claimant on December 10, 2018, that, if he had one more unexcused absence or two instances of unexcused tardiness, he would be terminated. Consolidated Findings ## 15 and 17. Subsequently, the claimant was tardy again on December 14 and 19, 2018. Because he was terminated from employment for these two offenses, we can reasonably infer that they were not excused by the employer.

Based upon the review examiner's finding that discipline for a policy violation is discretionary, the policy on its face shows that it not uniformly enforced. Thus, we agree that the employer has not met its burden to show that the claimant knowingly violated a reasonable and *uniformly* enforced policy of the employer 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 he engaged in 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). 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 review examiner found that during the meeting on December 10, 2018, the claimant was made aware that if he were tardy two more times, he could be terminated. *See* Consolidated Findings ## 15 and 17. The expectation set forth in this final warning was reasonable given the claimant's history of attendance problems and prior warnings, and in light of the employer's need to run its business and meet its customer's requirements. *See* Consolidated Finding ## 3, 13, and 15. Thus, the employer has shown that the claimant knew of the employer's expectation, it was reasonable, and the claimant failed to meet it.

The question before us is not whether the employer was justified in terminating the claimant's employment, but whether he is eligible for unemployment benefits. The purpose of the unemployment statute is to provide temporary relief to persons who are out of work and unable to secure work through no fault of their own. *See* Connolly v. Dir. of Division of Unemployment

Assistance, 460 Mass. 24 (2011) (further citations omitted). If the claimant's unemployment was due to mitigating circumstances, he may not be denied 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). Here, we must consider whether the last two instances of being late were due to mitigating circumstances.

The review examiner found that the claimant was late on December 14, 2018, because his alarm failed to go off as a result of a power outage. Consolidated Findings ## 19 and 20. Certainly, the claimant had no control over a power outage. On December 19, 2018, he was late because he had misplaced his keys. Consolidated Findings ## 21 and 22. The review examiner's decision alludes to the claimant losing the keys somewhere in his couch.¹ Arguably, the act of losing one's keys can be viewed as being less mitigating, as the placement of keys remains more in the claimant's control. However, there is no suggestion in the findings or the record of this case to indicate that the act of misplacing his keys was purposeful or done in wilful disregard of reporting to work on time.

Since the record indicates that the claimant did not act willfully in disregard of the employer's expectation to report for work on time on either December 14 or 19, 2018, we conclude that the misconduct for which the claimant was fired was due to mitigating circumstances.

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to show that the claimant knowingly violated a uniformly enforced policy or engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

¹ See the last sentence beginning on page three of the Conclusions & Reasoning section in the review examiner's decision.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 23, 2018, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 20, 2019



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.

AB/rh