Although the employer asserted that the claimant, who had a history of attendance issues, was a no call/no show during the final incident, the claimant presented phone records to show that he called out for his shift due to illness. Because he called out, and because the absence was due to medical circumstances beyond his control, the claimant is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0028 8422 29

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 27, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 2, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 9, 2019.

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 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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding his separation from work. Only the claimant 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 decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant, who was discharged by the employer for attendance issues, called out from work on December 24, 2018, due to illness.

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 EMT for the employer, an ambulance company, from 2/6/17 until 12/27/18 when he became separated.

2. The claimant was hired to work full time, 40 hours a week, earning $18.97 an hour.

3. The claimant was discharged for his attendance. The employer has no written, uniformly enforced policy or rule, accompanied by specific consequences or a particular number of occurrences which triggers discipline, which addresses this behavior. Whether an employee is discharged for their attendance is left to the discretion of Human Resources and Operations.

4. The employer expects employees to report for work regularly as scheduled or call the employer if they are going to be absent. This is necessary to prevent other employees from having to work short-staffed.

5. The claimant received the employer's expectations in this regard through the policy which he received on 5/19/16 and again on 2/6/17. He was made further aware of the employer's expectations regarding attendance through verbal warnings and finally through written warnings, a 90 day improvement plan and suspension. The claimant was absent 25 times and tardy 11 times in 2018. A majority of his attendance infractions were a result of him leaving early because he had no partner to work with. If he did not have a partner he could not work.

6. On 12/24/18, the claimant called out sick to the Dispatcher. (Remand Exhibit 5) He informed the Dispatcher that he was sick and would not be in for his 11 PM to 7 AM shift. The Dispatcher told the claimant to get better soon. The claimant was vomiting and had diarrhea. He did not go to the doctors for his symptoms. He treated his condition with over the counter medication.

7. The claimant came in for his shift the next day. During his shift he received a call from Dispatch telling him to go to headquarter before his next shift. The claimant told Dispatch he had to work and Dispatch told the claimant don't worry to just attend the 8 AM meeting.

8. On 12/27/18, the Director of Operations met with the claimant and informed him he was being terminated for his attendance.

Credibility Assessment:

The claimant's testimony is deemed more credible than the employer's since the employer did not participate in the remand hearing to provide further documentation or testimony as requested by the Board. In addition, the claimant

> provided copies of his phone records for 12/24/18 in support of his testimony that he did in fact call out sick to the employer on the day in question and was not a no call no show as the employer had originally testified to.

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 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. As discussed more fully below, we conclude that the claimant is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

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 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 this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits.[1] Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

During the first hearing, which the claimant did not attend, the employer offered testimony that the claimant had a history of attendance issues. The final incident prior to the separation occurred on December 24, 2018, when the claimant was allegedly a no call/no show for his 11:00 p.m. shift. Without any evidence or testimony from the claimant, the review examiner found this testimony to be credible and concluded that the employer had carried its burden to show that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2).

At the remand hearing, however, the claimant offered evidence that he called the employer on December 24, 2018, to notify it of his absence for that day. The review examiner found credible the claimant's testimony that he was ill on December 24, 2018, and she credited his phone records, finding that he "called out sick to the Dispatcher" on December 24, 2018. Consolidated Findings of Fact # 6. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of

[1] The employer failed to offer into the record any applicable written policies or rules. Therefore, there is insufficient evidence to show that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer. The review examiner's decision applied the deliberate misconduct standard.

Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Given that the claimant presented documentation to support his testimony, the review examiner's assessment crediting the claimant's testimony was reasonable. Therefore, we decline to disturb it or the consolidated findings of fact on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

In finding the claimant to be more credible than the employer, the review examiner no longer has found that the claimant was a no-call/no-show on December 24. Indeed, by calling out, the claimant complied with the employer's expectation that he "call the employer if [he was] going to be absent" from work. Consolidated Finding of Fact # 4.

To the extent that the claimant committed an act of misconduct simply by being absent on December 24, we cannot conclude that it was 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 presence of any mitigating factors. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). 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 claimant's December 24 absence and subsequent discharge were attributable to the claimant's need to be absent due to illness. It is self-evident that the claimant's condition of vomiting and diarrhea on December 24 was a circumstance over which he had no control. Thus, his absence was due to mitigating circumstances and not wilful disregard of the employer's interest that he report for work.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because, rather than being a no-call/no-show for his final shift on December 24, 2018, the claimant called out from his shift due to illness.

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.

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 14, 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.

SF/rh