Claimant may not be disqualified for deliberate misconduct under G.L. c. 151A, § 25(e)(2), where she has shown that the final incident of tardiness which triggered her discharge was due to mitigating circumstances, a flare-up of a chronic stomach condition, and not wilful disregard of the employer's interest.

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Issue ID: 0029 2002 14

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 January 28, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 14, 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 10, 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, 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 make further subsidiary findings from the record concerning the final instances of tardiness, which triggered the claimant's discharge from employment. 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, which concluded that the claimant had not established mitigating reasons for being late to work after she had been placed on her last final warning, is supported by substantial and credible evidence and is free from error of law, in light of the consolidated findings, which indicate that her final tardiness was due to the flare up of a chronic stomach ailment.

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 an administrative assistant for the instant employer, a retail company, from 07/10/12 until 01/28/19.

2. The employer maintains a Tardiness policy that states in part:

   A non-exempt Associate who, without valid reason or authorization, arrives to work after his/her scheduled starting time more than twice in a thirty-day period is excessively tardy.

   Excessive tardiness will lead to Corrective Action up to and including a written warning and repeated violations will lead to termination of employment, unless otherwise provided by applicable law.

3. The purpose of the policy is to ensure adequate staffing so that business needs are met.

4. The claimant acknowledged the policy at the time of hire on 07/10/12 and again most recently on 03/07/17.

5. All employees are subject to the policy.

6. Disciplinary action for being in violation of the policy is at the employer's discretion based on the nature and severity of the incident.

7. 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.

8. The purpose of the expectation is to ensure adequate staffing so that business needs are met.

9. The claimant acknowledged the handbook at the time of hire and again on 03/07/17.

10. The claimant had a stomach surgery on or about 2015 or 2016 due to illness. The claimant was periodically sick after having the surgery.

11. The claimant's work schedule was from 8 a.m. until 4 p.m. The claimant's immediate supervisor was the Vice President of Human Resources Operations (VPHRO).

12. On 06/25/18, the claimant was issued a "Verbal Counseling and Action Plan" for attendance because she had been tardy 10 times between 04/11/18 and 06/05/18.

13. The claimant's immediate supervisor asked the claimant if anything was going on with her health or personal life because he felt that a pattern had developed.

14. The VPHRO told the claimant about her ability to apply for FMLA, a leave of absence and about the employee assistance program (EAP).

15. The claimant signed and acknowledged the warning.

16. The claimant looked into applying for FMLA but her doctor had left the practice and she did not have a new primary care physician to get the paperwork completed.

17. On 07/24/18, the claimant was issued a "Formal Written Warning and Action Plan" for attendance because she had been tardy 9 additional times since the 06/25/18 warning.

18. The VPHRO asked the claimant if she wanted to change her work schedule to 8:30 a.m. until 4:30 p.m. The claimant agreed to the schedule change.

19. The claimant signed and acknowledged the warning.

20. On 09/26/18, the claimant was issued a "Final Written Warning and Action Plan" for attendance because she had been tardy 5 additional times since the last warning and the schedule change.

21. It was explained to the claimant that if she had one additional unexcused absence or 2 additional unexcused tardys [sic] that it would be reviewed by Human Resources (HR) for termination

22. The VPHRO was clear that any additional violations will result in immediate termination.

23. The claimant signed and acknowledged the warning.

24. On 12/06/18, the claimant was issued a "SUMMARY OF EXPECTATIONS – ADDENDUM TO FINAL WRITTEN WARNING."

25. The VPHRO decided to issue this to the claimant because she was having additional problems other than tardiness such as length of meal breaks and notifying her supervisor in advance if she was flexing her schedule and the employer wanted to make sure that their expectations of the claimant were clear going forward.

26. The VPHRO told the claimant that her improvement needs to be "immediate" and one more issue and she would be terminated.

27. On 12/13/18, the claimant was scheduled to arrive at work at 8:30 a.m.

28. On 12/13/18, the claimant arrived at work at an unknown time beyond at [sic] 8:30 a.m.

29. The claimant doesn't recall the reason that she arrived to work late.

30. On 01/22/19, the claimant was scheduled to arrive at work at 8:30 a.m.

31. On 01/22/19, the claimant arrived to work at an unknown time beyond 8:30 a.m.

32. The claimant had been out sick during the week.

33. The claimant was late because she wasn't feeling too good and couldn't leave the house because she would need to use the restroom.

34. The claimant did not give the VPHRO a specific reason as to why she was late on either date.

35. The VPHRO travels frequently and is the only person who can review the claimant's attendance records and determine what additional disciplinary action needs to be taken.

36. On 01/28/19, the VPHRO and another HR representative informed the claimant that she was discharged for attendance.

Credibility Assessment:

The employer witness gave direct testimony that he reviewed the claimant's attendance record and that she arrived late on 12/13/18 and 01/22/19. The employer's testimony coupled with the claimant's prior history of tardiness makes the employer's testimony credible. The claimant testified that she always notified the VPHRO or another manager if she was going to be late and the employer testified that he wasn't directly notified on every occasion. Therefore, the claimant's testimony that she notified the employer is credible based on the fact that she may have notified another manager on the day in question.

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, 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 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).

The consolidated findings provide that the employer discharged the claimant because she was late for work following her December 6, 2018, final warning about attendance. Consolidated Findings ## 24, 27–31, and 36. Because the review examiner found that the employer exercised discretion in imposing disciplinary action for policy violations, we agree that the employer had not met its burden to show that the claimant knowingly violated a *uniformly* enforced policy. *See* Consolidated Finding # 6.

Alternatively, the employer may meet its burden under G.L. c. 151A, § 25(e)(2), if it shows that the claimant 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). 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).

There is no question that, by December of 2018, the claimant knew that her job was in jeopardy if she continued to be tardy for work. She had received three written warnings, and her supervisor had make it clear that, if there was not improvement with tardiness and other time and attendance issues, she would be terminated. *See* Consolidated Findings ## 17, 20–22, and 24–26. The employer's expectation for the claimant to report to work on time was reasonable in light of its staffing and business needs. *See* Consolidated Finding # 8. The findings further show that, after the December 6, 2018, final written warning, the claimant was tardy again on December 13, 2018, and January 22, 2019. Consolidated Findings ## 28 and 31.

The question that we must decide is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied

under the circumstances. Garfield, 377 Mass. at 95. In this case, because the employer's discharge follows the claimant's last instance of tardiness on January 22, 2019, we must consider whether she was late on this date deliberately and in wilful disregard of the employer's interest or whether it was due to mitigating circumstances. 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 the claimant has a stomach illness, which required surgery in 2015 or 2016, and which periodically continues to cause her to be sick. Consolidated Finding # 10. During the week of January 21, 2019, she had been out sick and, on the morning of January 22, 2019, she could not leave her house because she would need to use the restroom. Consolidated Findings ## 32 and 33. Although the claimant's supervisor did not get a specific reason for the claimant's tardiness that day, the review examiner found that she had notified the employer that she would be late. *See* Consolidated Finding # 34 and the review examiner's credibility assessment. Based upon these findings, we can reasonably infer that the claimant's tardiness on January 22, 2019, was caused by flare-up of a chronic stomach condition and not wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant's discharge from employment was not for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), but due to mitigating circumstances.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 27, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 18, 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