

Claimant's final absence was due to illness. This constituted mitigating circumstances for her failure to comply with the employer's expectation that she report to work as scheduled.

**Board of Review
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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 April 30, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 1, 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 July 3, 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 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 give the claimant an opportunity to testify and present other evidence regarding her separation from employment. Both parties 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, which concluded that claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when she called out of work on April 29, 2019, in violation of the policy prohibiting excessive absenteeism, is supported by substantial and credible evidence and is free from error of law, where the claimant was absent from work that day because she was ill.

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 aide for the employer, an adult day program for seniors, from 10/04/01 until 04/30/19.
2. The employer had a written policy prohibiting excessive absenteeism.
3. The purpose of the policy was to ensure adequate staffing for their elderly and disabled individuals.
4. The employer maintained a progressive disciplinary policy in its handbook. The policy states the following:
 - A. First Written Warning - When an employee violates an Employer regulation or deviates from Employer work standards, the supervisor may warn the employee in writing regarding standards, rules, policy, assignment specifications, etc. Mutual understanding and commitment to alleviate the problem should be achieved in this session. A First Written Warning shall remain in effect for a period of one year.
 - B. Second Written Warning - When an employee violates an Employer regulation or deviates from Employer work standards during the period a First Written Warning is in effect, an employee may be counseled and issued a Second Written Warning. A Second Written Warning shall remain in effect for a period of one year.
 - C. Suspension/ Final Written Warning - When an employee violates an Employer regulation or deviates from Employer work standards during the period a Second Written Warning is in effect, an employee may be counseled, issued a suspension up to three scheduled work days and issued a Final Written Warning. A Final Written Warning shall remain in effect for a period of one year.
 - D. Discharge - Any violation of any Employer rule or accepted standard of conduct during the period a Final Written Warning is in effect may result in immediate discharge.
5. Employees who violated the excessive absenteeism policy were subject to the employer's progressive disciplinary policy.
6. The claimant received the absenteeism and progressive disciplinary policies at hire.
7. Based upon the discretion of her supervisor, the claimant received more warnings than prescribed in the progressive disciplinary policy.
8. The employer maintained an expectation that its employees were not excessively absent from work.

9. The employer maintained this expectation to provide adequate staffing to the individuals they served.
10. The expectation was stated in the employer's handbook, which the claimant received at hire, and was also stated on the warnings the claimant received during her employment.
11. The claimant has been a caregiver to a disabled individual for about 6-7 years. The individual is paralyzed. The claimant met the individual at the employer's facility. The individual received services from the employer. The claimant began caring for her after her previous caregiver could no longer do so.
12. The claimant suffers from chronic head colds and allergy related illnesses.
13. On 05/06/17, the claimant received a Written Warning 1 for excessive absences. Absences listed on the warning were: 12/27/16, 01/06/17, 01/09/17, 01/11/17, 03/16/17, 03/28/17, 04/24/17, 05/04/17 and 05/15/17. The employer noted on the warning that the claimant was absent 9 days in 6 months and that she had no sick time on 05/04/17 and 05/15/17.
14. On 10/06/17, the claimant received a Written Warning 2 for excessive absences. The employer noted that the claimant called out sick with no time on 09/25/17 and called out due to caring for a client in her home who was sick on 10/04/17 and 10/05/17.
15. On 12/11/17, the claimant received a 1-day Suspension for excessive absenteeism. The employer noted on the warning that claimant had a pattern of absences on Mondays and that she was absent without sick time. The employer wrote on the warning that attendance must improve or it could result in termination.
16. On 05/10/18, the employer issued the claimant a 2-day Suspension for excessive absenteeism. The employer wrote Write Up #6 on the document and listed that the claimant had been absent on 04/14/18, 04/26/18, and 05/07/18. The employer also wrote on the form that if the behavior was not corrected, possible termination could occur.
17. On 10/15/18, the employer issued the claimant a Written Warning for excessive absenteeism. The employer again wrote Write Up #6 on the document. The employer also wrote that if the behavior is not corrected, further disciplinary action up to and including suspension or termination could occur.
18. On 02/22/19, the claimant injured her left shoulder while pulling a wheel chair off a lift at work. She left work early that day and was out of work for a month.

19. On 03/21/19 and 03/22/19, the claimant was out sick from a head cold and allergies. The claimant returned to work on 03/25/19.
20. On 03/26/19, the claimant's physician recommended she remain out of work until 04/01/19. The claimant provided the employer with a medical note substantiating this information.
21. On 04/08, 04/09, and 04/10/19, the claimant called out of work because the disabled individual she cared for was suffering from a head cold and migraines and could not be home alone. The individual was not seen by a physician; however, the claimant called the physician and he recommended that the claimant provide the individual with rest, fluids and medication.
22. On 04/12/19, the employer issued the claimant a Written Warning 3 and 2-day Suspension for excessive absenteeism for her 04/08-04/10/19 absences. The employer wrote on the document that the next violation of any company policy will result in immediate termination.
23. On 04/28/19, at 11 p.m., the claimant began to experience stomach issues. She also had a fever and shoulder pain. The claimant's condition worsened throughout the night.
24. On 04/29/19, at 5 a.m., the claimant called the employer and left a message advising them she was not feeling well and would be absent.
25. The claimant took Pepto Bismal and Tylenol and her symptoms began to subside later that afternoon. The claimant did not see a physician for her medical condition.
26. The following day, on 04/30/19, the employer terminated the claimant for violation of the absenteeism policy.
27. Between 04/30/18 and 04/30/19, according to the information in the written warnings, the claimant was absent from work on 04/24/18, 04/26/18, 05/07/18, 10/02/18, 04/08/19, 04/09/19, 04/10/19, and 04/29/19 (8 times). The claimant may have been absent additional days during this time. The exact total of absences and whether the absences were covered by sick time is unknown.
28. Between 04/30/18 and 04/30/19, the claimant received three warnings (05/10/18, 10/15/18, 04/12/19).
29. Warnings issued prior to 04/30/18 no longer counted against the claimant as of her termination date.
30. The employer only counted absences not covered by sick time when determining whether to issue the claimant a warning.

31. The employer did not rely on a set number of absences when issuing attendance warnings. The employer issued warnings for absences after routine audits were completed by the Human Resources Representative during every other pay period and/or when a department head requested an audit.
32. The claimant was absent from work when the disabled individual she cared for was sick. According to the 10/06/17 Written Warning 2, the claimant called out of work on 10/04/17 and 10/05/17 due to the individual's medical condition. The claimant also was absent from work on 04/08/19, 04/09/19, and 04/10/19, because the individual had a head cold.

Credibility Assessment:

The claimant's testimony is deemed credible because it was largely supported by the documentation in the record (medical note, notes on the warnings) and by the employer witness' testimony. Both parties confirmed that the claimant was absent multiple days throughout the years and that the bulk of her absences were related to either her own illness or that of the disabled individual she cared for. The employer believed the absences were excessive regardless of the reason.

Ruling of the Board

In accordance with our statutory obligation, we review 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 believe that the consolidated findings support an award of benefits to the claimant.

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 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

"[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 review examiner concluded, based on the sole testimony of the employer during the hearing, that its burden had been met.

In her original decision, the review examiner found that the claimant received a final written warning for excessive absenteeism, which stated that the claimant's next infraction would result in the immediate termination of her employment. The review examiner further found that approximately two weeks after receiving that warning, the claimant once again called out of work and subsequently was discharged from her employment.

Because the employer did not consistently apply progressive discipline, as stated in its own policy, the review examiner concluded that the employer did not show that the claimant knowingly violated a reasonable and *uniformly* enforced policy pursuant to G.L. c. 151A, § 25(e)(2). We agree. Alternatively, the claimant will be denied benefits if the employer can show that she engaged in deliberate misconduct in wilful disregard of the employer's interest.

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant not only committed the act but did so with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Director of Div. of Employment Security, 377 Mass. 94 at 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause [her] discharge." Id. When evaluating a 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." Id.

The review examiner originally concluded that no mitigation was established to excuse the claimant's failure to comply with the employer's expectation that she report to work as scheduled. However, after hearing the claimant's testimony during the remand hearing and reviewing the documentation in the record related to the claimant's absences, the review examiner found that the claimant called out of work during the final incident because she was ill. 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). In our view, becoming ill was not something within the claimant's control. Therefore, the illness that triggered her discharge mitigated her failure to comply with the employer's expectation that she report to work as scheduled.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct 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 ending May 4, 2019, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 15, 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.

SVL/rh