

The claimant believed that she had properly requested time off from work electronically (even though she had not), and her employer discharged her for failing to show up to work for the days she thought she had off. She is not subject to disqualification under G.L. c. 151A, § 25(e)(2), because the claimant did not have a disqualifying state of mind when she was absent for the days in question.

**Board of Review
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Issue ID: 0031 8875 66

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 August 14, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 11, 2019. The claimant 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 November 2, 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 offer evidence regarding her separation from employment. 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 decision to deny unemployment 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 review examiner has found that the claimant, who was discharged for failing to report to work on August 8 and 9, 2019, believed that she had properly requested time off for those days and that she had been approved to have the days off.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. From June 25, 2018, until August 7, 2019, the claimant worked as a full-time (40 hours per week) care coordinator for the employer, a human services agency.
2. The employer maintained an attendance policy, contained within its employee handbook, in order to ensure that its employees report to work for their scheduled shifts. The policy read, in relevant part, "Employees are required to call in for any unplanned absence. [. . .] An employee who does not call and does not report for a shift will receive the following corrective action: 1. The first instance will result in a Final Written Warning. 2. The second instance will result in termination of employment."
3. On June 25, 2018, the claimant signed an acknowledgment of having received the employer's employee handbook, including the relevant attendance policy.
4. Under certain medical circumstances, the employer retains discretion on whether to discipline someone following a no call no show.
5. The claimant was aware, after receiving the attendance policy and as a matter of common sense, that the employer expected her to report to her scheduled shifts and to report any unplanned or unscheduled absences to the employer.
6. The employer maintains an electronic system (the system) in order for its employees to enter time off requests and have that time approved or denied by their supervisors. Employees receive an email whenever a request for time off is approved or denied in the system.
7. The claimant reported directly to the employer's director of drug diversion (the director).
8. Throughout her employment, the claimant had taken multiple days off at the last minute, and not requested them in advance in the system, as a result of various family emergencies.
9. Sometime in February, 2019, the claimant purchased a plane ticket to fly to Puerto Rico via American Airlines on Thursday August 8, 2019 for a bachelorette party.
10. Sometime around mid-June, 2019, the claimant told the director that she wanted to go on a trip and asked her how much time off she had accrued. The director told the claimant that, at the time, she had exhausted all of her paid time off (PTO), but that, on July 1, 2019, she would automatically get 5 personal days. The director told the claimant to wait until July 1, 2019, in order to enter the time-off request in the system, and the claimant agreed.

11. On June 17, 2019, the claimant attended a training, conducted by the director, in which the director explained the process of requesting time off in the system. During the training, the claimant encountered difficulties signing onto the system.
12. At no time has the director seen or received a report from an employee regarding an error message in the system indicating that the system will not accept a submitted request of nonconsecutive days off.
13. Sometime in early July, 2019, the claimant logged into the system and requested time-off for what she believed was August 8, 2019, and August 9, 2019, in order to attend the bachelorette party, and August 30, 2019, in order to attend a wedding.
14. The system accepted the claimant's time-off request but, at the time, unbeknownst to the claimant, only for August 30, 2019.
15. On the same day in which the claimant submitted her request for time-off, the director approved it.
16. On the same day in which the claimant submitted her request and the director approved it, the claimant received an email with the subject line of either "Approved" or "Approval." The claimant, who did not always open company emails as she receives many of them on a regular basis, read the subject line and believed that she had been approved for August 8, 2019, August 9, 2019, and August 30, 2019. Other than reading the subject line, the claimant did not open the email to read its contents.
17. At no time prior had the claimant entered a request for time off in advance in the system.
18. Had the director received a time-off request from the claimant for August 8, 2019, and August 9, 2019, she would have approved them as the claimant had enough PTO to cover the time.
19. Sometime in July, 2019, the claimant realized that the American Airlines ticket she had purchased in February, 2019, had her arriving in Puerto Rico at the incorrect time. The claimant then purchased another plane ticket via Jet Blue for August 8, 2019.
20. The claimant worked until August 7, 2019. At the end of her shift on August 7, 2019, the claimant told the employer's team member (the TM) something along the lines of, "See you on Monday." The TM looked at the claimant but did not say anything. It is unknown what the TM heard the claimant say.

21. On August 8, 2019, as she believed that the director had approved her time off, the claimant did not report to work.
22. On August 8, 2019, the director asked the TM where the claimant was. The TM told the director that she was unaware of the claimant's whereabouts.
23. On August 8, 2019, the TM sent the following text message to the claimant, "Hey just checking in – are you coming to work?"
24. The claimant received the TM's text message as she was sitting inside the airplane shortly before takeoff. Believing that the TM was joking, the claimant responded to her by texting her a 3 second video, from inside the cabin of the plane, shaking her head as if to say, "No." The claimant sent the video as a joke in response to what she believed was a joke text from the TM. Other than the video, the claimant did not provide any additional information in the text message.
25. After sending the video via text, the claimant put her phone on airplane mode in preparation for takeoff.
26. On August 8, 2019, after the TM informed the director of the claimant's text message, the director sent the claimant a text, which read, "Hi, [the claimant] – Hope you're ok. I was wondering if you were coming in today, 8/8/19? Or tomorrow 8/9/19? When do you plan to return? – [the director]."
27. The claimant, as she was flying on the plane to Puerto Rico and her phone being on airplane mode, did not immediately receive the director's text message.
28. Later on August 8, 2019, not having heard from the claimant, the director sent her a follow-up message, which read, "Hi [the claimant] – I need you to tell me what is going on. You didn't request time off. You sent a video shaking your head when asked by a staff if you were coming in today yet have not responded to my text. This is not acceptable. Given your video response and lack of contacting management about a needed absence, I will assume you are resigning your position. Please contact me by Friday close of business if you have any questions or wish to discuss."
29. On August 8, 2019, at 1:10 p.m. and after landing in Puerto Rico, the claimant read the director's text messages and responded, in relevant part, "I put in the request for today and Friday. Also the 30th. I was on the plan [*sic*]. Just got off."
30. On August 8, 2019, around 2 p.m., the claimant called the employer's director of clinical services (the DCS), who is the director's supervisor, and explained to her that she believed she had been approved to take time off on August 8, 2019, and August 9, 2019.

31. On August 12, 2019, the claimant reported to work and was interviewed by the employer's human resources manager (the HR manager). Upon being asked as to why she had not reported to work on August 8, 2019, and August 9, 2019, the claimant told the HR manager that she believed the time off had been approved by the director. After the HR manager asked the claimant if she had entered the time off request in the system, and the claimant answered yes, the HR manager went into the system and showed the claimant that there were no time-off requests from her for those days. The claimant then told the HR manager that she had received an email with an "Approved" or "Approval" subject line back in early July, 2019, but that she had not opened the email. The claimant then opened the relevant email with the HR manager and saw that she had only been approved for August 30, 2019. The claimant told the HR manager that she must have made an error when entering the days in the system.
32. The HR manager had never encountered a situation such as the claimant's before.
33. On August 14, 2019, the HR manager met with the claimant and discharged her from her employment effective immediately as a result of being out of work on August 8, 2019, and August 9, 2019, without approval from her supervisors.
34. On August 15, 2019, the claimant filed a claim for unemployment benefits with an effective date of August 11, 2019.

Credibility Assessment:

The director testified that the claimant had requested time off in advance in the system prior to the July, 2019, request. The claimant, who consistently denied having done so, asked the director, during cross examination, when had she requested time off in advance in the system. Where the director testified that she did not know, where the director also agreed that the claimant had experienced many personal emergencies throughout her employment, and where the claimant directly refuted the director's contentions, it is concluded that the July, 2019, time off request was the first time the claimant had requested time off in advance in the system.

During the second remand hearing, both the director and the HR manager testified that the system would not have allowed the claimant to request off August 8, 2019, August 9, 2019, and August 30, 2019 in the same request, as it does not accept nonconsecutive days and would have resulted in an error message. When asked how she was aware that the system would issue an error message and not accept the request, however, the director stated that she had never seen such a message before nor received a report of an employee encountering one. Similarly, the HR manager stated that she had never encountered a situation such as the

claimant's before. Moreover, the director admitted that, although the claimant received training in the system, she observed the claimant encounter difficulties logging onto the system during the June 17, 2019, training. While the employer witnesses contended that the claimant would have had to submit a request for only August 30, 2019 (knowing that August 8, 2019, and August 9, 2019 were not part of that request), where all parties agree that the claimant had sufficient personal days to cover for those days, where the director testified that she would have approved those days, and where the record is devoid of any motivation for the claimant to simply not show up for work without requesting time off, and then initially respond to the TM's text with a joke 3-second video, it is concluded that the system accepted the claimant's request and only logged it as August 30, 2019.

Finally, where neither employer witness refuted the claimant's assertions that she did not initially open the email with the subject line "Approved" or "Approval," where the claimant consistently has stated that she believed that she had been approved for time off, where on August 7, 2019, she told the TM (who did not respond to the claimant at the time and what she heard remains unknown) something along the lines of "See you on Monday," and where, as stated above, there is no clear motivation for the claimant to have intentionally avoided requesting August 8, 2019 and August 9, 2019 and not report to work on those days (when she had sufficient accrued time off which would have been approved), it is concluded that the claimant believed, at the time she did not report to work on August 8, 2019, that she had been approved to take time off in advance.

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 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, in view of the review examiner's new findings of fact, we conclude that the claimant is eligible to receive unemployment 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. . . .

Under this section of law, the burden is on the employer to show that the claimant is not entitled to receive unemployment benefits. *See Still v. Comm’r of Department of Employment and Training*, 423 Mass. 805, 809 (1996). After the initial hearing, at which only the employer offered evidence, the review examiner concluded that employer had carried its burden. Following our review of the entire record, including the testimony from the remand hearing and the review examiner’s consolidated findings of fact, we disagree.

The parties did not dispute that the employer discharged the claimant on August 14, 2019. Although the claimant disagreed with the employer’s decision to terminate her, there was no dispute that the underlying reason for the discharge was the claimant’s failure to report to work on August 8 and August 9, 2019, without prior notice to the employer. The employer maintained policies and expectations that employees report to work for their scheduled shifts and properly notify and request time off as needed. *See Consolidated Findings of Fact ## 2–5*. These attendance policies and expectations are reasonable, as the employer needs its employees to report to work in order to serve its clients. The employer also has a strong interest in knowing if and when an employee is not going to report to work. The claimant was aware that she should report to work as scheduled, and that she should notify the employer if she was going to be out. *Consolidated Findings of Fact ## 3 and 5*. As the claimant was scheduled to work on August 8 and 9, 2019, and did not go to work on those days, she arguably violated the employer’s attendance expectations. *See Consolidated Findings of Fact ## 21, 30, 31, and 33*.

The principal factual dispute between the parties was whether the claimant had requested time off (and, thus, notified the employer that she would not be in) for August 8 and 9, 2019. The employer offered that the claimant had only requested time off for August 30, 2019, and that the claimant was approved for that day. The employer argues that the claimant was deliberately, intentionally, and knowingly absent from work on August 8 and 9, 2019, and that she disregarded the employer’s interests by being absent without notice. The claimant countered that she had requested time off for August 8, August 9, and August 30, believed that she had done so properly, and further believed that all three days had been approved. The claimant argues that she believed that she could be absent on the two days in question, because she had been approved for the time off, and denies that she was disregarding the employer’s interests when absent.

In discharge cases, whether the situation is viewed under the knowing violation or the deliberate misconduct provision, the claimant’s state of mind at the time of the conduct is critical. Specifically, “‘knowing’ implies some degree of intent, and . . . a discharged employee is not disqualified unless it can be shown that the employee, at the time of the act, was 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 813.¹ In cases decided under the deliberate misconduct standard, to determine if the conduct was deliberate and done in wilful disregard of the employer’s interest, we 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).

¹ In light of our discussion about the claimant’s state of mind at the time of the policy violation, we need not delve into whether the employer’s policy was uniformly enforced.

As to the claimant's state of mind, the review examiner found that, in July of 2019, the claimant attempted to request time off for August 8, 9, and 30, 2019. The review examiner also found that the employer's electronic system accepted the claimant's time-off request. Consolidated Findings of Fact ## 13 and 14. When the claimant received an e-mail later in the day with a subject line stating "Approval" or "Approved," the claimant believed that she had been approved to have all three days off. Consolidated Finding of Fact # 16. The claimant did not realize that she was only approved to have August 30, 2019, off. Consolidated Finding of Fact # 14. The claimant then did not report to work on August 8 and August 9, 2019, believing she had been approved to have the time off. Consolidated Finding of Fact ## 21, 29, 30, and 31.

These findings of fact show that the claimant did not have the state of mind necessary to disqualify her under G.L. c. 151A, § 25(e)(2). The claimant did not know that her request for time off for August 8 and 9, 2019, had not been approved. When she received her e-mail response showing approval for her time requests, she mistakenly believed she had been approved for all three days. Her communications with the employer on August 8 and August 12, further suggest that she genuinely thought that she had properly requested the time off, and that her apparent failure to do so was an unintentional error rather than a deliberate act. *See* Consolidated Findings of Fact ## 29 and 30. The review examiner's credibility assessment, which we have accepted as being reasonable, also suggests he could find no reason for the claimant to disregard the employer's attendance expectations and policies, especially where the claimant had available time off to use. The consolidated findings of fact reflect the credibility assessment and lead to a conclusion that the claimant did not knowingly violate the employer's policies or deliberately engage in misconduct that she knew to be in wilful disregard of the employer's interest.

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 the employer failed to show that the claimant had a disqualifying state of mind when she was absent from work on August 8 and 9, 2019.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning August 11, 2019, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – February 5, 2020



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