**Although the claimant had been repeatedly warned about his tardiness, the final incidence of tardiness was due to a transportation problem, namely, a dead car battery. Because the final incident was attributable to a mitigating circumstance, he did not engage in deliberate misconduct in wilful disregard of the employer's interest, and is not denied benefits under G.L. c. 151A, § 25(e)(2).**

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**Issue ID: 0032 3527 24**

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 September 26, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 24, 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 December 20, 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 employment. Both parties attended the remand hearing.[1] 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 for violating the employer's policies and expectations about tardiness, was late for the final time due to a dead car battery.

Findings of Fact

[1] The remand hearing was held on January 23, 2020. The case was returned to the Board on April 9, 2020.

The review examiner's consolidated findings are set forth below in their entirety:[2]

1. The claimant worked as a full-time plater for the employer from May 1, 2006, until September 26, 2019, when the employer discharged the claimant.

2. The claimant's regular schedule was 7:00 a.m. to 3:30 p.m., Monday to Friday.

3. The claimant's rate of pay was $21.65 per hour.

4. The employer's Finishing Manager was the claimant's immediate supervisor.

2. The employer maintains an attendance policy that prohibits excessive absences or tardiness. The policy does not state what number of absences or tardiness would be considered excessive.

5. The employer expects employees to report to work as scheduled.

6. On November 19, 2012, the employer discussed with the claimant that his tardiness was an issue. The claimant previously informed the employer that he had transportation issues. The employer notified the claimant that continuous tardiness will result in employment action up to and including termination of employment.

7. On May 8, 2015, the employer issued a written warning to the claimant for unexcused absence on May 7, 2015. The warning states that failure to improve conduct will result in further disciplinary action up to and including termination.

8. From about 2012 through 2015, the claimant was on intermittent FMLA to care for his mother.

9. On August 17, 2018, the employer notified the claimant through a discussion that he had excessive unexcused absences and late arrivals. The claimant arrived late to work 21 times in the past 6 months and had 11 unexcused absences. During the discussion, the employer notified the claimant that he was expected to comply with the employer's attendance policy and improve his attendance. Otherwise the claimant would face additional employment action up to and including termination.

10. On August 16, 2019, the employer issued a written warning to the claimant for continuous violation of the attendance policy. The warning states that failure to improve conduct will result in further disciplinary action up to and including termination.

[2] The error in the numbering of the findings has been retained.

11. From August 17, 2019, through September 25, 2019, the claimant was late to work on September 11, 2019, September 20, 2019, and September 25, 2019.

12. On September 26, 2019, the claimant was 1 hour and 41 minutes late to work due to a transportation issue.

13. On September 26, 2019, the claimant's car battery died as he was leaving for work. The claimant had to wait for his girlfriend to return to his location in order to assist him in starting the battery.

14. The employer discharged the claimant due to tardiness on September 26, 2019.

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. As discussed more fully below, we conclude that the claimant is not disqualified from receiving unemployment benefits.

It is undisputed that the claimant was discharged on September 26, 2019. 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. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996). Following the initial hearing, at which only the employer offered evidence, the review examiner concluded that the employer had met its burden. After reviewing the full record, including the documentary evidence and testimony from the remand hearing, we disagree.

The employer discharged the claimant after he was tardy for work on September 26, 2019. The employer established that it has a written policy prohibiting excessive tardiness and absences. However, the review examiner found that the policy does not define what is excessive. *See* Consolidated Finding of Fact # 2.[3] In her original decision, the review examiner concluded that

[3] There are two Consolidated Findings of Fact labelled "2." The employer policy is noted in the second of these findings.

the policy was "unduly vague," given that it does not define its own terms. We agree with this assessment of the policy. To disqualify under the knowing violation portion of the above-cited statute, at the time of the alleged violation, the employee must have been ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy" at the time of the alleged violation. Still, 423 Mass. at 813. If the policy is not clear as to what is prohibited (excessive absences or tardiness), then the claimant would not know whether he was violating the policy. Therefore, the employer has not shown that the claimant knowingly violated a reasonable and uniformly enforced policy.

We next consider whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. As an initial matter, the employer must show that the claimant engaged in misconduct. If this is shown, the inquiry moves to whether the claimant had the state of mind necessary for disqualification. Here, the employer expected that employees report to work as scheduled. The claimant was given a written policy regarding this expectation at hire, and he had been warned several times over the course of his employment about the importance of his attendance. Nevertheless, he arrived to work late on September 26, 2019. Because he did not report to work on time on that date, he violated the employer's expectation and engaged in an act of misconduct.

In order to determine whether an employee's misconduct is disqualifying under G.L. c. 151A, § 25(e)(2), 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). As indicated above, the employer expected that the claimant work as scheduled. The claimant was aware of this expectation, as he had been informed about it when he was hired and had been repeatedly warned about his attendance. The expectation is reasonable, as it is a rational means of ensuring that all employees timely perform their work and are paid accordingly.

However, mitigating circumstances are present in this case. The claimant was discharged after a final incident of tardiness on September 26, 2019. On that day, the claimant attempted to get to work but was unable to arrive on time due to a problem with his vehicle. His battery died, and he had to wait for his girlfriend to help him before he could leave for work. This caused his delay in arriving at work, not any deliberate intention to disregard the employer's expectation about tardiness. In light of this mitigating circumstance, we cannot conclude that the claimant had the state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2).

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 has not shown that the claimant's misconduct on September 26, 2019, constituted a knowing violation of a reasonable and uniformly enforced rule or policy or deliberate misconduct in wilful disregard of the employing unit's interest.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning September 22, 2019, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF MAILING – April 17, 2020**

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**
**(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until May 4, 2020[4]. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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

[4] *See* Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-1-20.