

**The claimant did not engage in deliberate misconduct pursuant to G.L. c. 151A, § 25(e)(2), where he was discharged for a no-call no-show, but was instructed by a coworker that his shift was being covered and that he should instead contact a supervisor. The claimant also did not engage in deliberate misconduct by being arrested on criminal charges, where the review examiner's findings indicate that the claimant did not commit the crimes alleged.**

**Board of Review  
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**Issue ID: 0032 6619 01**

### 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 November 7, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 6, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer via telephone, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 15, 2020. 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 provide the claimant an opportunity to testify and offer other evidence. The review examiner conducted a remand hearing via telephone over two sessions; the claimant participated in both sessions, while the employer only participated in the latter session. 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 engaged in deliberate misconduct in wilful disregard of the employer's interests by being a no-call no-show and by being subject to pending criminal charges, is supported by substantial and credible evidence and is free from error of law.

### 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 a full-time Recovery Specialist for the employer, a substance abuse recovery home, from 01/20/2019 to 11/07/2019, when he separated.
2. The claimant's immediate supervisors were the Program Director (Director) and the Clinical Supervisor (Supervisor).
3. The claimant worked from 3:00 p.m. to 11:30 a.m. every Sunday through Thursday.
4. The claimant's last physical day of work was 10/31/2019.
5. The employer maintains an "Attendance and Punctuality" policy which requires that employees notify the employer if they were not going to report to work for a scheduled shift.
6. Violation of the "Attendance and Punctuality" policy is considered job abandonment and results in termination.
7. The purpose of the "Attendance and Punctuality" policy is to ensure the proper staffing for each shift as required by the Department of Public Health.
8. The employer maintains a "Code of Conduct" which requires that employees, amongst other items, refrain from engaging in illegal conduct and follow all state and federal laws.
9. Violation of the "Code of Conduct" results in immediate termination.
10. The purpose of this provision of the "Code of Conduct" is to ensure that employees refrain from engaging in illegal behavior.
11. The claimant was made aware of the "Attendance and Punctuality" policy and the "Code of Conduct" during new hire orientation when he signed an acknowledgement of receipt of each, during staff meetings, and through observing other employees who received discipline for violating the "Attendance and Punctuality" policy and the "Code of Conduct."
12. In or around May, 2019, the employer terminated one (1) employee for a violation of the "Attendance and Punctuality" policy because they did not report for their scheduled shift and did not notify the employer.
13. In July, 2019, the claimant did not report to work for a scheduled shift and did not notify the employer prior to the shift because he was in the hospital. The claimant contacted the employer the following day and explained why he did not report to his shift. The claimant did not incur any disciplinary actions because he did not report to his shift on that day.

14. In October, 2019, the claimant did not report to work for his scheduled shift but found coverage for his shift.
15. The employer expects employees to notify the employer if they are going to miss a scheduled shift and to not engage in illegal behavior.
16. These expectations were communicated to the claimant during new hire orientation, during staff meetings, and through observing other employees who received discipline for violating these expectations. The disciplinary actions the claimant observed where employees being taken off of the schedule for a few shifts and suspension after several no call no shows.
17. The claimant was aware that the employer expected him to notify them if he was not going to report for a scheduled shift.
18. The claimant resided at a home run by the employer.
19. On 11/02/2019, the claimant heard someone knocking on the first-floor resident's (resident) door repeatedly and yelling his name. The claimant did not hear the resident answer his door.
20. At 2:00 a.m., the claimant exited the home and walked past the resident's window, located in a central area outside of the home where resident [sic] congregate to smoke, take out the trash, and enter and exit the home. The claimant noticed that the window was open and the screen to the window was on the ground.
21. The claimant was aware that the resident and his girlfriend were visiting their friend a few streets away from the home.
22. The claimant began walking to the friend's home to notify them that the window screen was on the ground and the window was open.
23. The claimant met the resident on the street as he was walking to find him.
24. The claimant informed the resident that someone was banging on his door repeatedly, calling his name repeatedly, and the window screen was on the ground.
25. The claimant turned and headed back to the home.
26. As the claimant was walking toward the home, the police stopped him and informed him that he needed to go back to the home with them and that he was going to be charged with breaking and entering.

27. The police informed the claimant that the suspect was reported as a black male dressed in all black. The claimant is a black [male] and was wearing a black sweatshirt and black sweatpants.
28. When the claimant and the police arrived at the home, the police requested that the resident inventory his personal belongings.
29. The resident reported that some of his medication was missing.
30. On 11/02/2020, the claimant was arrested for allegedly breaking and entering into the resident's room and theft of the missing medication.
31. The claimant did not break into the resident's room.
32. The claimant did not steal the medication the resident reported missing.
33. On 11/03/2019, the claimant called the employer while being held and spoke with Recovery Specialist A. The claimant stated that he had been arrested, that he would not be able to report to his scheduled shift and that the employer would have to find coverage for his shift.
34. The claimant believed that he may be placed on suspension because he was unable to find coverage for that shift.
35. On 11/04/2020 at 12:30 p.m., the claimant was released from incarceration.
36. On 11/04/2019, the claimant called the employer and spoke to Recovery Specialist B. The claimant was told that he was unable to come into work until he spoke with the Supervisor or the Director. The claimant asked to speak with both the Supervisor and the Director. Recovery Specialist B transferred the claimant to each of their lines and did not receive an answer. The claimant did not leave a message for either individual.
37. The claimant called the employer a second time one (1) hour later. The claimant was informed by a Recovery Specialist B that his shifts for the rest of the week were covered. The claimant asked to speak with the Supervisor and the Director, neither of whom were available. The claimant left a voicemail message for the Supervisor. The claimant did not leave a voicemail message for the Director.
38. The claimant did not report to work on 11/04/2019 because he was told by Recovery Specialist B that his shifts were covered for the remainder of the week.
39. Recovery Specialist B sent the Director a text message indicating that the claimant called and stated he was reporting for work on 11/04/2019. The

Director told Recovery Specialist B to tell the claimant to see her prior to beginning his shift.

40. On 11/04/2019, the Director waited for the claimant to arrive for his shift. The claimant did not report to work.
41. The Director did not inform any employee that the claimant's shifts were covered for the remainder of the week.
42. The Director had planned to suspend the claimant pending the results of an investigation into his arrest.
43. On 11/05/2019, the claimant attempted to contact the Supervisor and Director by calling the main telephone number. The claimant was informed that neither individual was available and was transferred to their voicemails. The claimant did not leave a voicemail.
44. On 11/05/2019, the claimant attempted to email the Director but was unable because his company email had been shut off.
45. The Program Director has a direct line that can be called to leave a message for her. The claimant did not call the direct line and did not leave a message for the Director.
46. The claimant was scheduled to work on 11/05/2019 and 11/06/2019. The claimant did not report to work on both days because he was informed by Recovery Specialist B that his shifts were covered for the week.
47. On 11/05/2019, the Program Director contacted the Human Resources Department to obtain approval to terminate the claimant because he did not report to work his scheduled shift on 11/04/2019. Human Resources approved his termination because he did not report to his scheduled shift and because of his arrest.
48. On 11/07/2019, the claimant was discharged in person by the Director and the Supervisor because he did not report to work for his scheduled shift on 11/04/2019 and because of his arrest.
49. The employer would have terminated the claimant solely for not reporting to work on 11/04/2019 and not notifying the employer of such.
50. The employer would have terminated the claimant solely because of his 11/02/2019 arrest.

Credibility Assessment:

The claimant's testimony regarding the fact that Recovery Specialist B told him that his shifts were covered for the remainder of the week is deemed to be more credible than that of the Director. The claimant provided direct specific detailed testimony of his conversation with Recovery Specialist B. It is reasonable for the claimant to believe that his shifts were covered for the remainder of the week given that he testified about the specificity of his conversation with Recovery Specialist B, the specificity of his account of the events in his attempts to contact both the Director and the Supervisor, and the claimant's belief that he was suspended because he did was unable find coverage for his 11/03/2019 shift. The Director provided testimony regarding the instructions she gave Recovery Specialist B to tell the claimant but was unable to testify to what Recovery Specialist B specifically told the claimant. Additionally, Recovery Specialist B was not presented to testify to the information that was stated to the claimant.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests. Rather, after remand, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is eligible for unemployment benefits.

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 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). Here, the employer presented no written policies and offered no evidence that it uniformly enforced any of its rules. Thus, it cannot be concluded that the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

Pursuant to the deliberate misconduct standard, the employer must show that the claimant breached the employer's expectations and that he did so intentionally in wilful disregard of the employer's interest. The focus of this analysis is on the claimant'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).

Here, the employer maintained that the claimant was discharged for two separate reasons, the first of which was that he failed to report to work as scheduled on November 4, 2019. The claimant maintained he did not report to work because he was told by a Recovery Specialist that his shift was being covered, that he was instructed to speak to the Program Director or the Supervisor before returning to work, and that he unsuccessfully attempted to contact them that same day. The employer maintained that the Recovery Specialist was not instructed to tell the claimant his shift was being covered, but rather she was instructed to inform the claimant that he should speak to the Program Director at the start of his shift. The review examiner's consolidated findings of fact credit the claimant's version of events, and her credibility assessment cites the fact that the employer's version of events constituted hearsay. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of 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). A review examiner's credibility assessment is within the scope of the fact finder's role and unless the findings are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Based upon the record before us, the review examiner's credibility assessment and consolidated findings are reasonable. And where the claimant reasonably believed — erroneously or not — that he was not expected by the employer to work his shift, it cannot be concluded that he deliberately engaged in the misconduct of failing to report for work.

The employer maintained that the second reason for the claimant's discharge was his arrest and pending criminal charges. While the mere fact that he was facing criminal charges cannot constitute misconduct unto itself, an underlying criminal act for which he was charged could constitute misconduct. However, in this case, the review examiner's consolidated findings of fact indicate that the claimant committed no wrongdoing and was essentially arrested for being at the wrong place at the wrong time. In light of the nature of the employer's services, it is understandable that the employer would not wish to continue to employ an individual facing criminal charges, particularly a drug-related offense. However, the question 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.

We, therefore, conclude as a matter of law that the claimant's discharge was not 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 pursuant to 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 November 9, 2019, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**

Stawicki, Esq.

**DATE OF DECISION - May 29, 2020**

Charlene A.

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 July 1, 2020<sup>1</sup>. 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](http://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.

JRK/rh

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<sup>1</sup> See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.