

The claimant was discharged for missing work on two consecutive days. As he was snowed in and could not get to work safely, his misconduct in missing work was due to mitigating circumstances beyond his control. It was not done in wilful disregard of the employer's interest.

**Board of Review
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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 separated from his position with the employer on December 4, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 4, 2020. 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 June 30, 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 afford the claimant the opportunity to provide evidence relevant to the circumstances surrounding his discharge. 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 the claimant committed deliberate misconduct in wilful disregard of the employer's interest when he failed to notify the employer that he would be absent from work on two consecutive days, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings establish that the claimant was unable to report to work due to inclement weather and advised a co-worker of his unavailability on the relevant day.

Findings of Fact

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

1. In 2015, the claimant started working for the employer, a machine shop for metals, as a machine worker and a programmer.
2. The claimant initially worked full time for the employer until about 2016, when the claimant left his full time job with the employer for employment elsewhere. The claimant continued to work part-time for the employer after leaving his full time role with the employer.
3. On August 25, 2019, the claimant started working full time again for the employer.
4. The claimant was most recently scheduled to work for the employer Monday through Friday from 6 a.m. – 2:30 p.m. The claimant was paid \$48.00 per hour. The claimant usually worked onsite for the employer. The claimant sometimes performed work tasks from home.
5. The claimant's Supervisor was the President.
6. The employer maintains an Attendance and Punctuality Policy within the Employee Handbook requiring workers to report to work as scheduled and not to be tardy for work.
7. The policy also lists: "If you are absent for two days without notifying the corporation, it is assumed that you have voluntarily abandoned your position with the corporation, and you will be removed from the payroll."
8. The employer maintains the Attendance and Punctuality Policy to ensure proper customer service.
9. The claimant received the Employee Handbook containing the Attendance and Punctuality Policy. The Employee Handbook was provided to the claimant upon hire.
10. In the past, the employer verbally warned the claimant two times for attendance issues involving absenteeism and tardiness. The last time the employer warned the claimant about attendance issues was about 4 – 5 years ago. The claimant was warned by a previous manager. The President did not warn the claimant in the past about attendance issues.
11. The claimant and his co-worker usually communicated with each other about schedules at work. The President was aware of this arrangement.
12. The claimant was involved in a motor vehicle accident with his personal truck on November 25, 2019. The truck was towed for repair.

13. The claimant also owns Dodge Neon which is a car. This car is not dependable in snow like conditions.
14. The claimant's last physical date of work was on November 27, 2019.
15. The claimant was scheduled to work on December 2, 2019 and December 3, 2019. The claimant was absent from work on both of these dates.
16. On December 2, 2019, the claimant had 15 inches of snow accumulation in his driveway. The claimant had more snow accumulation in his driveway on December 3, 2019.
17. The claimant was absent from work on December 2, 2019, and December 3, 2019, as the claimant could not drive out of the driveway of his home to report to work on these days due to snow accumulation. The claimant could not use his Dodge Neon to get out of his driveway as the Dodge Neon is not dependable in the snow. The claimant did not have anyone available to bring him to work on these dates.
18. On December 2, 2019, the claimant sent his co-worker the following text message at 4:33 a.m.: "Hey man im [sic] buried in snow and don't have my truck back yet the neon sucks in the snow i [sic] shoveled it out but cant get out of my driveway." The claimant did not specifically write in this text message to the co-worker that he was going to be absent from work. The claimant assumed the co-worker understood the claimant was going to be absent from work by sending this text message.
19. On December 2, 2019 at 7:58 a.m., the co-worker sent the claimant the following text message: "Ok, not to [sic] many people her [sic] today. The jeep is a beast in this shit."
20. On December 3, 2019, the claimant sent the co-worker the following text message at 5:47 a.m.: "We got more snow last night than we did the day before." The claimant did not specifically write in this text message to the co-worker that he was going to be absent from work. The claimant assumed the co-worker understood the claimant was going to be absent from work by sending this text message.
21. On December 3, 2019, the claimant sent the President the following text message at 9:07 a.m.: "Is [co-worker] there? I talked to him this morning and i [sic] talked to xometry guy he said to ship the last plate [co-worker] said he would package it."
22. The claimant did not notify the President that he was going to be absent from work on December 2, 2020, and December 3, 2020, as in the past the President allowed the claimant and the co-worker to coordinate their schedules.

23. The claimant was also scheduled to work on December 4, 2019.
24. On December 4, 2019, the claimant sent the co-worker the following text message at 7:35 a.m.: "Hey [co-worker] just wanted to ket [sic] you know im [sic] picking my truck up in a few then heading in they yold [sic] me last night it would be ready this morning."
25. The President informed the claimant to contact the President before he reported to work on December 4, 2019. The claimant reported late to work on this date as the claimant went to retrieve his truck from the auto repair shop.
26. On December 4, 2019, the President discharged the claimant from work during an in-person meeting.
27. The employer discharged the claimant from work because the claimant was absent from work on December 2, 2019, and December 3, 2019.
28. The employer would have discharged the claimant from work for being absent from work on December 2, 2019, and December 3, 2019, regardless of whether the claimant notified the employer about his absences on these dates.
29. On December 4, 2019, the claimant filed an initial claim for unemployment benefits.

Credibility Assessment:

The overall testimony of the claimant is assigned more weight than the overall testimony of the employer where the claimant's testimony was more specific and easier to follow compared to the testimony of employer during the hearing.

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's failure to notify the employer's president of his absences on December 2nd and 3rd constituted deliberate misconduct in wilful disregard of the employer's interest.

Because the claimant was discharged from employment, we analyze his eligibility for benefits under 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).

While the employer presented its attendance policy, we do not have sufficient evidence to show that the employer discharged other employees for this type of behavior under similar circumstances. Therefore, we cannot determine whether the claimant engaged in a knowing violation of a uniformly enforced policy.

We next consider whether the employer has met its burden to show that the claimant was discharged for 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).

The claimant was aware that the employer expected its employees to show up for work as scheduled and notify the employer if they were going to be absent. *See Consolidated Findings ## 7, 9, and 10.* This expectation is reasonable. However, as the claimant would have been discharged regardless of whether he notified the president of his absences, we need only consider whether his failure to work as scheduled on December 2, 2019, and December 3, 2019, constituted deliberate misconduct in wilful disregard of the employer's interest. Consolidated Finding # 28.¹

There is no dispute that the claimant missed work on those two days. Consolidated Finding # 17. However, we believe 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). Fifteen inches of snow had accumulated in the claimant's driveway on the morning of December 2nd, and even more had accumulated by the morning of December 3rd. Consolidated Finding # 16. The claimant was unable to get his vehicle out of his driveway on either day and had no other viable means of getting to work. Consolidated Finding # 17. As such, the record shows that the claimant was

¹ Although we need not reach the issue of whether the claimant abided by the employer expectation that he communicate any absence, the findings and record before establish that he did meet this expectation. The findings indicate that, prior to both relevant absences, the claimant sent texts to a co-worker. The findings further establish that the employer's President was aware that the claimant communicated past absences to the co-worker.

unable to get to work on December 2, 2019, and December 3, 2019, due to circumstances beyond his control and not due to wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has failed to meet its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy or engaged in 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 beginning December 15, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - December 8, 2020



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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 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.

LSW/rh