

**Claimant bank customer service manager was discharged for a knowing violation of the employer's attendance policy, where he was absent without calling out for three consecutive days. Where the claimant's testimony conflicted with his prior statements to the DUA, the review examiner credited the employer's testimony that the claimant had not called the employer for the three days.**

**Board of Review  
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**Issue ID: 0033 6918 33**

### 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 affirm.

The claimant became separated from his position with the employer on February 3, 2020. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 14, 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 July 14, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 allow the claimant to provide testimony and evidence. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 was discharged for a knowing violation of a reasonable and unfirmly enforced policy of the employer, after being absent from work without contacting the employer for three consecutive business days, 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 full-time as a member services representative for the employer's credit union business from 11/4/19 until 1/30/20. The claimant worked 40 hours per week and was paid \$18 per hour.
2. At the time of hire, the claimant received an employee personnel manual that contains the employer's workplace policies. On 11/5/19, the claimant signed an acknowledgment form, confirming his completion of new employee orientation and receipt of the personnel manual.
3. Contained in the employee personnel manual is a policy number 704 that addresses attendance and punctuality. The policy reads in part: "To maintain a safe and productive work environment, (Employer) expects employees to be reliable and to be punctual in reporting for scheduled work. Absenteeism and tardiness place a burden on other employees and on (Employer). In case of illness or other emergency that will delay or prevent you from reporting to work, you must notify your immediate supervisor no later than your scheduled starting time...If you are absent for more than one day, you are required to call your supervisor at the beginning of each workday after the first day's absence to keep him/her apprised of your condition and plans for returning to work. If you are absent from work for three consecutive days without having notified your supervisor of the reason for your absence, you will be deemed to have voluntarily resigned from your position." The employer's policy is intended to ensure employees report to work and there is adequate staffing to provide for members' needs. The employer has not retained any employee who was absent from work without notice for three consecutive days.
4. During the term of the claimant's employment, the employer became dissatisfied with the claimant's attendance. During a monthly meeting with his immediate supervisor, the claimant was told that his attendance was unsatisfactory and that he needed to register in upon his arrival at the workplace. The claimant was late for work due to traffic.
5. Sometime in December, the claimant notified his supervisor that he would need one or two days off in January because he was scheduled to have a procedure performed on one of his eyes on 1/20/20. The supervisor suggested the claimant request three days off to ensure he had adequate recovery time. The claimant subsequently notified the Branch Manager, who arranges employees' work schedules, that he would need three days off for a medical procedure. The claimant was removed from the work schedule for the period of 1/20/20 through 1/22/20; he was scheduled to work on 1/23/20. The claimant subsequently notified the Branch Manager on 1/22/20 that he was unable to return to work and would need additional time off. The Branch Manager told the claimant that he would need to provide a medical note clearing him to return to work because his absence was longer than three days.
6. The claimant was never scheduled to undergo a medical procedure on 1/20/20. The claimant scheduled an eye exam for 1/20/20. The claimant initially

- planned to request a second day off, 1/21/20, in order to choose eyeglass frames. The claimant requested three days off after his supervisor suggested he may need the additional day in order to recover from a medical procedure. The claimant did not inform the supervisor that he was not scheduled for a medical procedure.
7. The claimant attended visits with an eye doctor on 1/22/20, 1/23/20, 1/24/20, 1/27/20. The claimant was treated for an ulcer. The claimant was advised during the 1/22/20 and 1/23/20 visits to return for a follow-up with the physician on the following day. On Friday, 1/24/20, the claimant was advised to return for a follow-up with the physician on Monday, 1/27/20.
  8. The claimant did not call the employer to provide notice of his absences on Thursday, 1/23/20 and Friday, 1/24/20 because he was told during the 1/22/20 call with the Branch Manager that he needed to obtain a medical note in order to return to work. The claimant contacted the employer on Monday, 1/27/20 to provide notice that he was medically cleared and would return to work on Thursday, 1/30/20.
  9. On 1/30/20, the claimant returned to work. Shortly after arriving, the claimant spoke with the Assistant Manager, telling her that he was not sure he could continue working because the office lighting and glare from his computer were bothering his vision. The Assistant Manager asked the claimant if he was able to drive himself home; the claimant stated that he was. The claimant asked the Assistant Manager if she thought the Branch Manager would have an issue with him wearing dark glasses or an eye patch; the Assistant Manager responded "No" and told the claimant that he needed to ask the Branch Manager. The claimant told the Assistant Manager that he was going to call his physician and see if he could get an appointment that morning. The Assistant Manager responded words to the effect "Fine, keep us posted." The claimant left the workplace.
  10. After leaving work on Thursday, 1/30/20, the claimant contacted the employer's Benefits & Payroll Administrator at approximately 9:00 a.m. for the purpose of obtaining information related to vision plan benefits.
  11. On 1/31/20, the claimant did not report to work or contact the employer.
  12. The claimant was scheduled to work on Saturday, 2/1/20. The claimant did not report to work or contact the employer.
  13. On 2/3/20, the claimant did not report to work or contact the employer. At approximately 12:00 p.m., the employer's Vice President of Human Resources (VP) telephoned the claimant. The VP told the claimant that because he failed to contact the employer for three days, his employment was terminated. The VP told the claimant that he failed to contact the Branch office to request time off or provide an update, after leaving on 1/30/20. The

claimant told the VP that he was leaving his physician's office with a note to return to work. The claimant acknowledged that he did not call the employer on the three days of 1/31/20, 2/1/20, and 2/3/20. The claimant did not offer an explanation for his failure to contact the employer on these dates. The claimant told the VP that he planned to call her that day. The claimant became angry with the VP and raised his voice when speaking with her.

14. The employer discharged the claimant for violating its attendance and punctuality policy by failing to report for work or provide notice of his absences on three consecutive workdays.
15. The claimant filed an initial claim for unemployment insurance benefits, effective 1/26/20.
16. On 5/29/20, the claimant informed a DUA adjudicator that he was cleared to return to work on 1/30/20 and was sent home that day due to being in pain. The claimant stated that he was told to return to work after the weekend with a medical note.

#### Credibility Assessment:

The claimant notified the employer in December that he needed two days off in order to undergo a medical procedure. The claimant acknowledged in his direct testimony that no such procedure was ever scheduled. The claimant testified to having requested one day off to attend an eye exam appointment and a second day off to select eyeglass frames. The claimant requested a third day off after his supervisor suggested he may need the additional time to recover from the medical procedure. The claimant did not correct the supervisor; he never informed anyone at the employer's business that he was not scheduled for a medical procedure. Instead, the claimant requested an additional day off for no reason. The claimant misrepresented the reason and need for time off.

The claimant testified during the hearing that he did not contact the employer on the three workdays of 1/31/20, 2/1/20, and 2/3/20 because he did not think it was necessary, since he was not required to call out on each individual day of his absence during the period of 1/20/20 through 1/22/20. The claimant's explanation is not reasonable or logical. During the first absence (1/20/20 through 1/22/20), the claimant was approved for the entire period of absence in advance of the days. Thus, the employer was aware that the claimant would not be at work on 1/20/20 through 1/22/20. After leaving the workplace on 1/30/20, the claimant did not inform the employer of the need for any additional time off. The claimant contended that he telephoned the Branch office after leaving on 1/30/20 and that he left a voice message for the Assistant Manager, stating that he was going to see a specialist on Friday, 1/31/20, and that he hoped to be cleared to return to work. The claimant's testimony on this point was not credible. The claimant never informed the VP during their call on 2/3/20 that he left a message for anyone on 1/31/20. Likewise, the claimant's testimony is in conflict with his previous

statements to the DUA, in which he claimed that the Assistant Manager told him to return after the weekend with a medical note. The claimant did not make any claim to the DUA adjudicator of having left a message for the Assistant Manager or anyone else at the business on 1/30/20. In his appeal to the Board of Review, the claimant discussed the 1/30/20 leaving and wrote: "I was out of work until I returned on 1/30/20. On that day I went to work and experienced severe headache and sensitivity to the lighting and I could not see out of my eye and expressed this to my manager. I was instructed to go home and come back to work when I had another note clearing me for work. I contacted human resources explained what had occurred and that I would get another note to return to work..." The claimant made no contention of having left a voice mail at the Branch on or after 1/30/20.

In view of the above, the claimant's overall credibility was diminished, and no weight was given to his testimony in disputed areas.

### 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.

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).

The consolidated findings provide that the employer discharged the claimant after he was absent from work for three days without providing notice of his absences. We consider first whether the employer has shown that the claimant's conduct was a knowing violation of a reasonable and uniformly enforced policy.

The employer's Attendance and Punctuality policy is reasonable, as it communicates the employer's expectation that employees notify their supervisors when and why they are absent. *See Consolidated Finding # 3 and Remand Exhibit 7.* The review examiner found that the employer's policy is uniformly enforced. *Id.* The claimant was aware of the policy, as he signed an acknowledgment that he received a copy. *See Consolidated Finding # 2 and Remand Exhibit 9.*

The issue before us is not whether the employer was justified in terminating the claimant's employment, but whether she is eligible for unemployment benefits. The purpose of the unemployment statute is to provide temporary relief to "persons who are out of work . . . through no fault of their own." *Cusack v. Dir. of Division of Employment Security*, 376 Mass. 96, 98 (1978) (citations omitted). Thus, the employer must prove that the claimant intentionally violated the policy on April 16, 2017. *See Still*, 423 Mass. at 813.

The Supreme Judicial Court has directed that to establish a knowing violation, the employer must show that "at the time of the act, [the employee] was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." *Id.* An employer does not meet its burden if the conduct was "unintentional by virtue of being involuntary, accidental, or inadvertent." *Id.*, quoting *Still v. Comm'r of Department of Employment and Training*, 39 Mass. App. Ct. 502, 510 (1995).

The review examiner found that in December of 2019, the claimant told his supervisor he would need one or two days off in January to have a procedure performed on his eyes. The supervisor suggested requesting three days, to allow adequate recovery time. The claimant subsequently secured approval from the branch manager for three days off for a medical procedure, from January 20 through 22, 2020. Although he was initially scheduled to return to work on January 23, the claimant notified the branch manager that he was unable to return to work and needed additional time off. The branch manager told him he needed to provide a medical note clearing him to work because he would be absence more than three days. *See Consolidated Finding # 5.*

The claimant did not contact the employer about his absences on January 23 or 24 because the branch manager had told him he needed to obtain a medical note before returning to work. On Monday, January 27, the claimant contacted the employer to say that he was medically cleared to return to work on Thursday, January 30, 2020. *See Consolidated Finding # 8.*

The claimant returned to work on January 30, 2020. However, shortly after arriving, he told the assistant manager that he did not think he could continue working because the office lighting and glare were bothering his vision. The assistant manager asked if he was able to drive himself home, and the claimant replied that he could drive and said that he was going to try to get a medical appointment that morning. The assistant manager told him, "Fine, keep us posted," and the claimant left the workplace. *See Consolidated Finding # 9.*

The review examiner found that the claimant did not report to work or contact the employer on January 31, February 1, or February 3, 2020. *See Consolidated Findings ## 11–13.* On February 3, 2020, the employer's vice president of human resources called to tell the claimant that because he had been absent without contacting the employer for three consecutive work days, his employment had been terminated. During the call, in which the claimant became angry and

raised his voice at the employer, the claimant acknowledged that he had not called the employer on those three days. *See Consolidated Findings ## 13–14.*

The review examiner noted that, during the hearing, the claimant claimed that he had not contacted the employer for the three days in question because he did not think it was necessary, since he had not called the employer each day he was out from January 20–22, 2020. Subsequently, the claimant claimed that he had left a voicemail message for the assistant manager after he left the workplace on January 30, saying he was going to see a specialist the next day and that he hoped to be cleared to return to work. The review examiner did not credit the claimant's testimony, finding it neither reasonable nor logical, and noting it was inconsistent with prior statements he made to the DUA.

In finding the claimant's testimony not credible, the review examiner's detailed credibility assessment pointed out the inconsistencies in his statements both during the hearing as well as previously to the DUA. Such assessments are within the scope of the fact finder's role, and, unless they 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).*

Where the review examiner's consolidated findings show that the employer always discharges employees who are absent for three consecutive days without calling, and the claimant was absent for three consecutive days without contacting the employer about his absences, the employer has met its burden. We also note that the claimant's discredited and inherently inconsistent claims, alternately, that he did not contact the employer for the three days at issue because he claimed he had not had to call each day when he was absent earlier in the month, and that he had called to inform the assistant manager that he had scheduled a medical appointment on January 31, underscore his awareness that the employer's policy required employees to remain in contact with the employer about their absences. We, therefore, conclude as a matter of law that the employer has established that the claimant knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2). Having satisfied its burden of proof as to a knowing violation, we need not address whether the employer has also established deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending February 8, 2020, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 28, 2021**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, 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 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](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.

JPCA/rh