

The employer fired the claimant, who had a history of tardiness and absenteeism, when he failed to call-in until 10 minutes before his shift, making it difficult to run the small café. The findings show that the claimant laid down to rest for a few hours when he got home from work the day before, intending to let the manager know that night if he would be able to work the next day, but slept through the night because he was sick. Held he was discharged due to the mitigating circumstances of his illness and not deliberate misconduct in wilful disregard of the employer's interest.

Board of Review
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Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on February 24, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 24, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 7, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not 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 employer's appeal, we remanded the case to the review examiner to obtain further evidence about the employer's attendance policy and the circumstances surrounding the incident which triggered the claimant's discharge. 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 original decision, which concluded that the claimant did not have the requisite state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest or to knowingly violate the employer's policy, 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. On 12/18/18, the claimant began full-time employment working as a non-union \$14.00 per hour Grill Cook for this employer's corporate café.
2. The employer issues discipline on a case-by-case basis at the discretion of employer management.
3. During his term of employment, the claimant had received several disciplinary warnings for tardiness and attendance issues. The claimant relied on public transportation to get to work and because of problems with public transportation, the claimant was frequently late for work.
4. When the claimant began working for the employer, he was initially working at the employer's [Town A], Massachusetts location. All of the claimant's written disciplinary warnings that he read and signed (prior to his separation) were issued to him at the [Town A] location.
5. On 06/06/19, the claimant was issued a verbal warning for tardiness that the claimant signed acknowledging receipt. On 08/29/19, the claimant was issued a written warning for tardiness. On 08/30/19, the claimant was suspended from 08/30/19 to 09/05/19 due to his tardiness issues. After his suspension, the claimant's manager in [Town A] told the claimant his job was in jeopardy due to his attendance issues.
6. After his suspension in [Town A], the claimant was transferred to the employer's location in [Town B], Massachusetts.
7. The employer expects workers to give the employer one hour of notice usually if unable to attend work. At the [Town B] location, the claimant and other workers scheduled to work the earliest shifts were asked to give three hours of notice if they are going to be absent so that a temporary help agency can send someone to cover the shift. The claimant did sign the employer policy and he did agree to give three hours of notice if calling out sick to allow his Manager time to bring in work coverage staff.
8. Ideally, the café where the claimant worked would be staffed by three people, but sometimes only two people are assigned to work the café.
9. When only two people are assigned to work, if a person calls out with little notice, it is difficult for the one remaining worker to run the café.
10. When the claimant began working the early morning shift in [Town B], he was late to work 3-4 times each week due to ongoing problems with the public transportation that the claimant relied upon to get to work for his early morning shift.

11. Since his transfer to [Town B], the claimant was given verbal warnings (with no written record of the verbal warnings) by his Manager ([X]) 3-4 times per week due to tardiness. Although the late arrival was not the claimant's fault, it was negatively impacting the workplace and the Manager [X] was frustrated with the claimant's attendance problems.
12. On 02/19/20, while at work, the claimant began to feel sick, but he remained working to not have the café run short-staffed.
13. On 02/19/20, the claimant was tardy arriving and his Manager ([X]) told the claimant he intended to issue the claimant a written warning for his tardiness. The claimant told his Manager that he was sick and had a bad headache and he would prefer to discuss the warning the next day on 02/20/20. The Manager agreed to discuss the intended written warning later.
14. On 02/19/20, while working, the claimant spoke with his Manager ([X]) about the fact that he was sick and may not be able to work his shift the next day on 02/20/20.
15. On 02/19/20, the claimant worked from 7:37 a.m. until 3:00 p.m.
16. On 02/19/20, the Manager [X] told the claimant to call him later to let him know if the claimant would be working or not the next day. The Manager asked the claimant to notify him by midnight if he was not coming in for his early morning shift on 02/20/20.
17. The claimant had sick time available to him, but he hoped that he would feel well enough to work after getting some rest.
18. On 02/19/20, the claimant, as soon as he got home (around 3:30 p.m.), laid down to rest for a few hours intending to call his Manager [X] (with a decision regarding his ability to work) later that night prior to midnight.
19. The claimant, due to his illness, did not wake up later on 02/19/20 as planned, but slept through until ten minutes prior to the start of his shift on the morning of 02/20/20. The claimant was too ill to work.
20. On 02/20/20, as soon as he awoke, the claimant called his Manager [X] and explained that, due to his illness, he had overslept and was not able to call out sick sooner. [X] the Manager was aggravated by the last-minute call out and he told the claimant that he was being suspended and that the District Manager ([Y]) would be contacted regarding the last-minute call out that morning.
21. On 02/20/20, the claimant was seen at [Hospital A] Emergency Department for treatment of his illness. The claimant was treated by [Medical Provider Name]

NP and the claimant was provided with a medical note excusing the claimant from work from 02/20/20 through 02/24/20.

22. The claimant's memory of the events of 02/19/20 and 02/20/20 is vague because he was so sick at that time.
23. The claimant, due to his illness, was not well enough to work for the next several days after 02/20/20 and on 02/24/20, the claimant was notified of the decision to discharge him for poor attendance and the final incident of failing to call out with proper notice to his Manager [X] on 02/20/20.
24. The claimant, on 02/24/20, offered the medical note to the employer Manager [X] but the claimant was told that the decision to discharge was not related to any alleged misconduct by the claimant but rather the negative impact the claimant's poor attendance was having on the employer's business.
25. The claimant's Manager ([X]) personally understood that the claimant's failure to contact him with proper notice on the evening of 02/19/20 or within three hours of the start of his shift on 02/20/20 was not done intentionally by the claimant. The claimant was sick and unintentionally overslept.
26. Management's decision to discharge was made to protect the employer's business needs by discharging the claimant to hire a more dependable replacement worker.

Credibility Assessment:

The testimony regarding his problems with public transportation and the medical documentation provided by the claimant regarding his health issues at the time of the 02/20/20 final incident, was accepted as credible. The employer witness Manager ([X]) supported the claimant's contention that the claimant's frequent attendance problems were not intentional acts or due to deliberate misconduct by the claimant. They did still negatively impact the employer business and caused the claimant to be replaced by the employer with a more dependable worker.

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. As discussed more fully below, we agree with the review examiner's original legal conclusion that the claimant is eligible for 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).

The employer terminated the claimant's employment because he failed to provide his manager with sufficient notice that he would be out sick on February 20, 2020. Consolidate Finding # 23. Specifically, he called in about 10 minutes before the beginning of his shift. *See Consolidated Findings ## 19 and 20.* The employer's written policy requires at least an hour's notice. *See Consolidated Finding # 7.* However, because the employer issues discipline on a case-by-case basis at the discretion of management, there is no way to determine whether it treats similar policy violations by other employees in the same way. For this reason, it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may prove that the claimant engaged in 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 “[T]ake 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) (citation omitted).

The record shows that the claimant's manager was aware that the claimant was not feeling well on February 19, 2020. Consolidated Finding # 14. Before the claimant left work, they spoke, and it was communicated that the claimant would call that night if he could not come into work the next day. Consolidated Finding # 16. It is apparent from the consolidated findings that the need for advance notice was to give the manager of this small operation time to get coverage for the claimant's absence. *See Consolidated Findings ## 7–9.* This is a reasonable business need. Although this request was different from the café's usual work rule to call in an absence three hours ahead, the change in expectation does not affect our decision. *See Consolidated Finding # 7.* In this case, the claimant's failure to call in his absence until 10 minutes before his shift not only failed to comply with the manager's specific instructions from the previous day, but also violated

the one-hour notice required in the employer's written policy and the usual three-hour notice expectation for this local café. *See Consolidated Findings ## 19 and 20.*

The question is whether this failure to provide the expected notice was deliberate and in wilful disregard of the employer's interest. Consolidated Finding # 18 states that the claimant had intended to call his manager later that night. This shows that he was not deliberately failing to meet his manager's expectation.

Rather, the consolidated findings show that mitigating circumstances caused the claimant's misconduct. 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). Here, the review examiner found that when the claimant got home on February 19, 2020, he laid down to rest for a few hours, but due to his illness, he slept through the night. *See Consolidated Findings ## 18 and 19.* Even the manager understood that it was not intentional, but because the claimant was sick that he overslept. *See Consolidated Finding # 25.*

Because the claimant's failure to timely call in his absence on February 20th was due to mitigating circumstances, we conclude as a matter of law that the claimant was not discharged for 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 affirmed. The claimant is entitled to receive benefits for the week beginning March 1, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS

DATE OF DECISION - September 11, 2020



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

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.

AB/rh