The employer had a policy requiring that employees who reported possible exposure to COVID-19 would have to provide a negative test before returning to work. The claimant, a supervisor, allowed an employee to return to work without a negative test after she had stated that her daughter was ill and may have been exposed to COVID-19. Held he acted deliberately in willful disregard of the employer's interest and is ineligible for benefits under G.L. c. 151A, § 25(e)(2).

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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 reverse.

The claimant separated from his position with the employer on April 29, 2020. He reopened an existing claim for unemployment benefits with the DUA, which was approved in a determination issued on May 5, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on December 18, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, 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 clarification about the circumstances surrounding the claimant's separation. Only the employer 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 decision, which concluded that the employer did not meet its burden to show that the claimant was discharged for either a knowing violation or deliberate misconduct when he allowed a subordinate to return to work without the required medical note, 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 are set forth below in their entirety:

1. On 02/17/20 the claimant was hired as a non-union Supervisor by his employer's cleaning company.

2. At hire the claimant was told that as a new hire he was in a 90-day probation period.

3. The claimant's job was to supervise Cleaners working in several buildings.

4. 04/20/20 was a holiday. If clients wanted the employer's cleaners to work on the holiday, the cleaners would receive holiday pay and the cost would be passed on to the clients.

5. When clients informed the employer that they did not want the cleaners working on the holiday, Managers and supervisors had the responsibility to inform the workers who are usually scheduled that they are off for the 04/20/20 holiday.

6. Supervisors, including the claimant, were given lists of employees to call to tell Cleaners not to report to work on 04/20/20.

7. The claimant contacted all the cleaners that he understood he was to contact. The claimant did not contact cleaners for the "[client]" client building because the Vice President [A] had specifically told the claimant that he and not the claimant was handling that particular building in all matters.

8. The claimant was told by Vice President [A] that he should drop off chemicals for the workers at the [client] building but all other matters pertaining to this building would be handled by the Vice President [A].

9. On 04/20/20 Vice President [A] called the claimant at his home early in the morning and he was angrily yelling and swearing at the claimant because two Cleaners had arrived to work at the [client] Building that morning because no one in management had notified them not to report to work that day.

10. The Vice President [A] was angry because these workers who arrived at work had to be paid holiday pay that could not be charged to the client. The claimant explained that he understood the [client] building was not on his list to call given what Vice President [A] had told him regarding this building.

11. After being notified that the Vice President [A] had not notified the Cleaners for the [client] building to not report to work, the claimant immediately notified the remaining Cleaners for that building telling them to stay at home for the holiday.

12. On Friday, 04/24/20 a Cleaner (employee) called the claimant to report her need to not report to work that day, initially not offering a reason why. The claimant denied the request to be off because workers were needed that day. The employee then asked to take a personal day off and the claimant denied the

request saying there was not enough notice to be off and she was needed at work.

13. The employee then told the claimant that she had to take the day off because she needed to take her young daughter because of illness following possible "exposure to Corona" ([COVID]-19).

14. The conversation between the employee and the claimant was in Spanish as the employee [ ] does not speak English.

15. The claimant notified his supervisor, Vice President [B], of the situation.

16. The employer follows the recommended CDC guidelines for allowing workers to return to work following possible exposure to [COVID]-19.

17. On 04/24/20 Vice President [B] had the claimant call the employee at the employee's home from her office so that the claimant could translate into Spanish what the employee [ ] needed to present before returning to work.

18. Only the claimant spoke directly with the employee as he spoke with her in Spanish.

19. On 04/24/20 during the telephone call from her office to the employee, Vice President [B] told the claimant to tell the employee that because of the possible [COVID]-19 exposure, the employee could not return to work without a negative [COVID] test result or a doctor's note showing the employees daughter had tested negative for [COVID]-19.

20. On Monday 04/27/20 when the [employee] returned to work, she provided a doctor's note to the claimant for her daughter's medical visit, but the note did not indicate that the daughter had tested negative for [COVID]-19. The employee provided no doctors note for herself and she provided no [COVID]-19 negative test result for her daughter or herself.

21. The claimant forwarded the doctor's note to his supervisor Vice President [B] who rejected the note because the note had the daughter's name on it and not the employee's name. The claimant was also told the employee should provide a negative [COVID] test.

22. The claimant explained that the employee was never sick; she had called out because her young daughter needed to be taken to urgent care for a stomach issue that was not [COVID] related.

23. Despite the claimant's explanation, Vice President [B] said the employee could not return to work without providing test results or medical notes showing that the employee had tested negative for [COVID]-19, or her daughter had tested

negative for [COVID]-19 as the employee had initially reported that [COVID]-19 was suspected as the cause of the daughter's illness.

24. The claimant was told that he could not just choose to believe what he had been told by the employee; test results and medical documentation were required. At that point, the claimant told Vice President [B] that he had already permitted the employee to return to her work duties that day (04/27/20) because he had believed her explanation that the daughter and the employee had no [COVID]-19 issues, so it was safe for the employee to return to work.

25. The employee never provided the requested negative [COVID]-19 test results.

26. Vice President [B] decided to issue the claimant a second written warning for not insisting that the employee provide a negative [COVID] test result before returning to work or medical documentation that the daughter had tested negative for [COVID]-19.

27. The warning regarding the [client] building cleaners not being called was drafted on 04/26/20 and presented to the claimant on 04/28/20. The warning regarding the [employee] who called out due to her daughter's emergency medical situation was drafted and presented to the claimant on 04/28/20.

28. When the claimant received the two warnings on 04/28/20, he indicated that he thought the warnings were unfair as he had acted in good faith and had attempted to address these work tasks properly to the best of his ability.

29. The claimant at all times denied any intentional wrongdoing. Despite the claimant's explanation for his actions and inactions, he was told that the decision to issue both warnings was final and that he was expected to sign the warnings. The claimant signed the warnings with the understanding that he would try to avoid any such issues in the future.

30. After the claimant received the two warnings on 04/28/20, there was no final incident that triggered a discharge.

31. After the 04/28/20 meeting, the two Vice Presidents decided that because the claimant was still in his new hire probation period, and he had received two warnings that he was not a good fit for the company.

32. On 04/29/20, the claimant while working was called to a meeting with the Vice Presidents and he was told that his "services were no longer needed". The claimant thanked the employer for the opportunity and left without incident.

33. Effective on 04/26/20, the claimant filed to reopen an existing unemployment claim that he had filed new on 10/18/19 effective 10/13/19.

34. On 05/05/20, the parties were sent a Notice of Approval effective 04/26/20 noting that the separation was due to the claimant failing to meet the job performance standards of the employer.

35. The employer requested a 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding # 30 as inconsistent with the evidence of record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the employer failed to show that the claimant was discharged for a knowing violation or deliberate misconduct.

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 . . . .

"[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).

As an initial matter, there is insufficient evidence in the record for us to conclude that the claimant took action that violated a uniformly enforced policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

At the outset, the employer must show that the claimant engaged in the behavior which ultimately led to the discharge. While claimant received two warnings during his employment, it is clear from the record that the final incident that led to his discharge was his decision to allow a subordinate employee to return to work without the required medical documentation. On April 24, 2020, an employee requested the day off as her daughter was ill and may have been exposed to COVID-19. Consolidated Findings ## 12 and 13. Accordingly, the claimant was instructed that this employee could not return to work until she provided the employer with a negative COVID test. Consolidated Finding # 18. Despite never receiving a negative test from this

employee, the claimant allowed her to return to work on April 27, 2020. Consolidated Findings ## 20–24. Therefore, there was no question that the claimant acted contrary to the employer's expectations regarding its COVID-19 safety precautions.

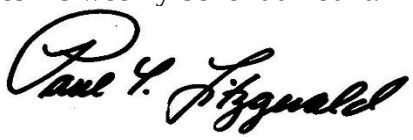
While the claimant acknowledged that he allowed the employee to return to work without a negative test, the dispositive issue in this case whether his actions constituted deliberate misconduct. In order to ascertain an employee's state of mind at the time of the misconduct, we must "take into account 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 the claimant was explicitly instructed not to allow the employee to return to work without a negative COVID test, it is clear from the record that he was aware of the employer's expectation. Consolidated Finding # 18. Moreover, this expectation is reasonable as it serves to mitigate the risk of inadvertently exposing employees or clients to COVID-19.

As nothing in the record indicates that the claimant inadvertently allowed the employee to return, we can reasonably infer that he did so deliberately.

There are also no mitigating factors present which, in some way, show that the claimant did not act in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*. The claimant maintained that he believed that the documentation supplied by the employee was sufficient to meet the employer's expectations, because it made no mention of COVID-19. *See* Consolidated Finding # 20. However, the employer's instructions were explicit about affirmatively requiring proof of a negative COVID-19 test where she reported a possible exposure to the virus. *See* Consolidated Finding # 19. Nothing in the record indicates that it allowed any exceptions to its requirement that employees who may have been exposed to COVID provide a negative test before returning to work. That the employee told him that the daughter was not sick, merely exposed to COVID, does not rise to a mitigating factor. Because there is no indication from the record that the claimant had any other reason to believe he could disregard the employer's safety protocols, we conclude he acted in wilful disregard of the employer's expectations by allowing the employee to return on April 27, 2020, without providing a negative COVID test.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week of April 26, 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 - May 6, 2022

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

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