Claimant walked off the job before the end of his shift without talking with his supervisor. Neither his testimony nor medical evidence shows that any stress that he may have been experiencing was so severe that he could not take a moment to explain to his supervisor why he had to stop working. Held the claimant is disqualified for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0047 0152 86

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 June 16, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 8, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 20, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violating 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 afford the employer an opportunity to present evidence. 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 original decision, which concluded that the claimant was eligible for benefits because he had permission from his supervisor to leave work early, 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 forklift operator for the employer, a food manufacturer, from March 2018 until June 16, 2020.

2. The employer's Supervisor supervised the claimant.

3. The claimant worked Monday through Friday, from 2:30 p.m. to 11 p.m.

4. On 03/23/2020, the employer removed temporary employees from its workforce in response to the COVID-19 pandemic.

5. When the COVID-19 pandemic was declared, the employer implemented safety precautions as required by the state. The employer required [sic] employees wear masks at all times and required that employees social distance, remaining at least six feet apart.

6. The employer closed and locked its front doors and removed the receptionist from the front lobby area to prevent the public from entering the building.

7. The employer required its employees to enter the building using the employee entrance after it locked the front doors of the building.

8. The employer assigned employees, including the Director of HR, to take the temperature of each employee when they entered the building, using the employee entrance, before each shift. If an employee's temperature was above 99.9 degrees, the employee was sent home.

9. The employer closed its cafeteria area to prevent employees from congregating within six feet of each other.

10. On an unknown date in 03/2020, the employer gave its employees, including the claimant, a letter informing them that an employee had tested positive for the COVID-19 virus.

11. The claimant became anxious when an employee had tested positive for the COVID-19 virus.

12. The claimant lived with his parents and was concerned he could contract the COVID-19 virus and transmit it to his parents.

13. The claimant addressed his concern to the Director of HR about the employee contracting the COVID-19 virus and the employer allowed him to take two weeks off from work.

14. When the claimant returned to work from his two weeks off, the employer continued exercising the COVID-19 safety precautions.

15. In 05/2020, the employer hired a nurse to take the temperatures of employees.

16. On June 16, 2020, the employer was understaffed, and the claimant and the Supervisor were the only employees assigned to complete their tasks.

17. The Supervisor informed the claimant that the employer was understaffed and they each needed to work on two tasks, one was going back and forth from supplies production with raw material to keep production going and the other was to clear the finished goods.

18. Around 2:45 p.m., the Supervisor told the claimant to let him know if he needed assistance and the claimant agreed.

19. During his shift, the claimant was not responding to calls on his portable radio. The Supervisor approached the claimant and asked if his radio worked and the claimant confirmed his radio worked.

20. After the Supervisor spoke with the claimant about his radio, the claimant continued not responding to calls on his portable radio.

21. The Supervisor realized the claimant was only completing one of the job duties and not both.

22. The claimant told the Supervisor he took it upon himself to do just one task and not both tasks anymore.

23. The Supervisor asked the claimant to meet with him in his office because he wanted to speak with the claimant off the production floor about why he was completing one task and not both parts of his job.

24. The Supervisor believed the claimant was following him to his office, turned around and saw the claimant was not following him.

25. When the Supervisor realized the claimant was not behind him, he called his supervisor, the warehouse manager ("the WM"), and told him the claimant was the only person for his job that day, and that he was doing part of his job and not both parts of his job. The WM asked the Supervisor why and the Supervisor told him there was no reason, that the claimant made the decision himself and that he attempted to speak with the claimant in his office, but the claimant did not follow him to his office.

26. The Supervisor drove a forklift to the area where the claimant was working. When he arrived, the claimant parked his forklift, took his equipment off the forklift, and left.

27. The claimant did not tell the Supervisor he was going home.

28. At around 4:53 p.m., the claimant left work without notice.

29. At 2:17 a.m. on 06/17/2020, the Supervisor sent the Director of HR and the WM an email telling them he told the claimant to notify him if he felt overwhelmed with work, that the claimant had a portable radio and did not respond when he was called. He stated in the email that the claimant took it upon himself not to perform more than one task, that he could tell the WM he was ready to leave any time and he attempted to meet with the claimant. He told them he went to speak with the claimant, the claimant parked his forklift in the middle of the aisle and left.

30. On June 17, 2020, the claimant went to his doctor and obtained a doctor's [sic] stating the claimant was under his care and should be out from June 17, 2020 through August 17, 2020.

31. On 06/18/2020, the claimant arrived at work, at the locked front door, to give the Director of HR the doctor's note.

32. When the claimant met with the Director of HR, she told him that he quit when he left early on 06/16/2020. The claimant told the Director of HR he did not quit and asked for Family Medical Leave Act leave of absence paperwork.

33. The Director of HR told the claimant that because he left early on 06/16/2020, he quit his employment. The claimant told the Director of HR she was evil, that she was going to rot in hell and called her a fucking bitch. He said he was overstressed, that the employer abused its employees and paid low wages.

Credibility Assessment:

At the original hearing, the claimant testified he was not feeling safe at work because the employer was not enforcing social distancing, mask wearing, and he felt the employer was not taking the COVID-19 pandemic seriously. He further testified at the original hearing that he felt anxious and told the Supervisor he was leaving early that day because he was not feeling well. He also testified at the original hearing that when he met with the Director of HR, she told him he quit, asked him to leave, and he left. However, at the remand hearing, the claimant admitted the employer enforced COVID-19 restrictions, including mask wearing. He also testified at the remand hearing that when he left work, he told the Supervisor he was leaving because the employer abused its employees, not because he did not feel well. The claimant also testified that he called the Director of HR evil and told her she was going to burn in hell when they met on 06/18/2020, not just that she told him he quit and to leave.

The Supervisor rebutted the claimant's testimony, saying that the claimant left early without permission on 06/16/2020. He corroborated his testimony with the email he sent to the WM and the Director of HR before he left work on 06/17/2020. The Director of HR also rebutted the claimant's testimony, providing detailed testimony about the precautions the employer took to keep its employees safe from the

> COVID-19 virus. She also provided detailed testimony about her final meeting with the claimant on 06/18/2020.
>
> The claimant's testimony changed and was inconsistent from the original hearing to the remand. Both the Director of HR and the Supervisor directly rebutted the claimant's testimony. The employer's witnesses provided documentation to support their testimony in the form of an email from the Supervisor dated 06/17/2020. Therefore, the testimony of the claimant cannot be considered to be "substantial" as required by the Law. The employer offered more credible testimony that the claimant quit his employment when he left work without permission on 06/16/2020.

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. Based upon the consolidated findings, we reject the review examiner's original conclusion that the claimant is eligible for benefits, as discussed more fully below.

The first question we must decide is whether to analyze the claimant's separation from employment as a voluntary resignation, applying G.L. c. 151A, § 25(e)(1), or an involuntary termination, applying G.L. c. 151A, § 25(e)(2). In this case, the determination is a mixed question of law and fact, which is for the Board to decide. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979).

After listening to only the claimant's testimony at the original hearing, the review examiner concluded that the employer discharged the claimant and analyzed his separation under G.L. c. 151A, § 25(e)(2). Following the remand hearing, the consolidated findings show that the claimant walked off the job early without permission on June 16, 2020, and that when he returned two days later to seek a leave of absence, he was informed that he had been deemed to have quit. *See* Consolidated Findings ## 26–29 and 31–34. Regardless of how the employer characterized the claimant's separation, it is apparent from his request for a leave of absence that the claimant meant only to take some time off, not quit. *See* Consolidated Finding # 32. In our view, it was the employer's decision to terminate the claimant's employment because he walked off the job.

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).

Since there is no evidence that the claimant was fired for violating any written policy, the employer has not met its burden to show a knowing violation of a reasonable and uniformly enforced rule or policy. Alternatively, we consider whether the record shows 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).

There is no dispute that the claimant left work early on June 16, 2020. The review examiner found that the claimant's supervisor asked the claimant to meet with him in his office to discuss why the claimant had taken it upon himself to perform only some of his assigned tasks. *See* Consolidated Findings ## 21–23. When the claimant did not follow him into his office, the supervisor called the warehouse manager, then drove a forklift to see the claimant. *See* Consolidated Findings ## 23–26. Given the claimant's decision to perform only some of his assigned work, we believe the expectation to meet with his supervisor was reasonable. However, instead of meeting with the supervisor, the claimant abruptly left the jobsite in the middle of his shift. *See* Consolidated Findings ## 26–28.

In rendering these findings, the review examiner accepted the employer's version of events, rejecting the claimant's testimony that he had obtained permission from his supervisor to leave early. "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). 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.) We believe her assessment is reasonable in relation to the evidence presented.

Lacking permission to leave, we can only assume that the decision to walk off the job was a deliberate choice to stop working. We next consider whether there were mitigating circumstances for this 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).

During his testimony, the claimant indicated that, at the time, he was stressed. To be sure, he did return two days later with a medical note seeking a two-month leave of absence. *See* Consolidated Findings ## 30 and 31. However, nothing in the medical note (Exhibit 5) or in the claimant's testimony indicates that his condition was so severe that he was not able to take a moment to explain to his supervisor why he could not finish his shift on June 16, 2020. Thus, he has not established circumstances to mitigate actions that willfully disregarded the employer's interest.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant 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 denied benefits for the week beginning June 14, 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 - April 29, 2021

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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 apply at: https://ui-cares-act.mass.gov/PUA/_/. The claimant may also call customer assistance at 877-626-6800 (press #1 for English, then press #2 for PUA).

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