Claimant was fired from a subsidiary base period part-time job for his failure to report an absence. He is disqualified pursuant to G.L. c. 151A, § 25(e)(2). Because he was also working full-time for another employer at the time, and he should have known of an impending summer layoff from that full-time employer, his disqualification is limited to a constructive deduction pursuant to 430 CMR 4.76.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0048 1793 60

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 we affirm in part and reverse in part.

The claimant was discharged from his position with the employer on June 1, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 17, 2020. The claimant 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 denied benefits in a decision rendered on February 9, 2021. 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, he 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 obtain additional evidence about the claimant's other employment at the time he separated from the employer. Only the claimant 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 claimant's discharge as a result of failing to call in or show up to work for the employer subjected him to a complete disqualification from receiving any unemployment benefits, 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. The claimant worked for the employer, a mental health care provider, most recently as a direct care worker, a union position, from June 8, 2019, until June 1, 2020. The claimant was paid $16.25 per hour.

2. The claimant initially worked full-time for the employer. In late April 2020, the claimant went to part-time, working 18–24 hours per week.

3. The employer's employee handbook contains a **Code of Conduct** which states, in part:

As an integral member of the [Employer] team, you are expected to accept certain responsibilities, adhere to acceptable business principles in matters of personal conduct and exhibit a high degree of personal integrity at all times.

Whether you are on duty or off, your conduct reflects the Agency. You are, consequently, encouraged to observe the highest standards of professionalism at all times. Types of behavior and conduct that [Employer] considers inappropriate and warranting of disciplinary action, up to and including termination, include, but are not limited to the following:
19. Failure to notify [Employer] of an intended absence or tardiness.

[Employer] has the right to determine the level of discipline appropriate for the infraction or situation, up to and including termination. (Exhibit 8)

---

4. The policy is a measure to ensure the employer has the required number of employees to maintain required staff /resident ratios.

5. All employees are subject to the policy.

6. Discipline imposed for violation of the policy is left to the discretion of the employer.

7. The employer has a disciplinary procedure which consists of: (1) Oral Warning; (2) Written Warning; (3) Suspension; (4) Termination.

8. The claimant received and signed for the employee handbook.

9. It was the employer's expectation [that] employees notify the employer of an intended absence or tardiness.

10. The claimant did not need to be told the employer expected him to notify the employer of an intended absence or tardiness.

11. It was the employer's expectation that an employee who was going to be late or absent to contact the on-call administrator (OCA).

12. On July 31, 2019, the claimant was warned verbally, which was documented. (Referenced in Exhibit 14)

13. On August 27, 2019, the claimant was warned verbally, which was documented. (Referenced in Exhibit 14)

14. On September 25, 2019, the claimant received and signed for a Written Warning for tardiness.

15. On November 13, 2019, the claimant was suspended for 1 day for tardiness. (Exhibit 13)

16. On May 25, 2020, the claimant was 2 1⁄2 hours late for work.

17. On May 31, 2020, the employer intended to suspend the claimant for three days for being late for work on May 24, 2020.

18. On Sunday, May 31, 2020, the claimant was scheduled to work 6:00 a.m. to 2:00 p.m.

19. On May 31, 2020, the claimant overslept and awoke at 8:00 a.m.

20. When leaving for work, the claimant discovered his car had 4 flat tires.

21. The claimant called a coworker (Coworker A) at the [Town A], Massachusetts work location to report he would be in as soon as possible.

22. The claimant requested a telephone number of another coworker (Coworker B) who he wanted to call and ask to cover for him until he was able to report for work. The claimant was given Coworker B's number but he "could not get through."

23. The claimant went to the home of the individual (Individual A) he believed was responsible for the 4 flat tires.

24. The claimant and Individual A had a physical altercation.

25. Individual A called the police.

26. The claimant left.

27. The claimant, who believed his "job was on the line," did not call out or report for work after the altercation because he did not want to be at work if the police went to his place of employment.

28. The claimant thought about calling the OCA A but did not call the OCA.

29. The claimant also had a "few write-ups" and told himself he would deal with the consequences of not calling out or reporting for work.

30. On June 1, 2020, at 6:10 a.m., the claimant texted the Program Manager:

    "Hey, I know I'm in Big trouble but I didn't know what to do yesterday,, I woke up late and I called the job and told [Coworker A] im On my way. When I get outside my car is on 4 flats.. So I call the girl I believe did it n I go over there because I know she has a car n that could be my way to work.. When I get there we're arguing over the car n the girl knees me real hard n my thigh and kicks me in the shin so naturally I kinda shove her and the girl start hitting me and called the cops on me so I got scared and ran off.. I didn't know what to do.. She knows where I work so I didn't want her sending the cops to my job so I just stayed low for the day. I know I'm in big trouble but I never been in that situation before and I was more scared about the cops coming to the job.. I just got home..call me when you get Up".

31. On June 1, 2020, the claimant was terminated for not calling out or reporting for work after having told Coworker A he would be in as soon as possible.

32. On June 24, 2020, the claimant filed his claim for unemployment benefits with the Department of Unemployment Assistance (DUA) with an effective begin date of June 21, 2020 and an effective end date of June 19, 2021.

33. The claimant's weekly benefit amount (WBA) was established at $602.00.

34. The claimant earned $7,763.97 with the instant employer in the last completed quarter prior to filing his claim (January 1, 2020 through March 31, 2020).

35. The claimant worked full-time for [Employer A]. (EAN [X]) beginning April 3, 2019 through May 17, 2020. (Remand Exhibit 12)

36. On May 18, 2020, the claimant was "transferred" to [Employer B]. (EAN [Y]) payroll. (Remand Exhibit 12)

37. On June 1, 2020, the date of the claimant's separation with the instant employer, [Employer C], the claimant was working part-time for [Employer C], 18 to 24 hours per week.

38. On June 1, 2020, the date of the claimant's separation with the instant employer, [Employer C], the claimant was also employed full-time, 40 hours per week, as a para/interventionist, with [Employer B].

39. The claimant was a 10-month employee with [Employer B].

40. On June 22, 2020, the claimant was sent an email notifying him he was being furloughed effective June 19, 2020 from [Employer B]., with a recall date of Monday, August 24, 2020. (Remand Exhibit 3)

41. On June 24, 2020, the claimant filed his claim for unemployment insurance benefits because he was "furloughed" by [Employer B] on June 19, 2020.

42. On June 1, 2020, when the claimant separated from the instant employer, [Employer C], the claimant was aware the school year with [Employer B] was coming to an end but he did not know he would be "furloughed" for the summer by [Employer B].

43. The claimant had been asked and agreed to work the summer of 2019 with [Employer A].

44. On September 4, 2020, the claimant returned to work with [Employer B].

45. The claimant's [Employer B] 2020 tax year Form W-2 indicates the claimant earned $12,094.89 in 2020. (Remand Exhibit 11)

46. Documentation of the claimant's earnings with [Employer A] dated February 23, 2021 indicates a last payroll direct deposit on May 20, 2020. (Remand Exhibit 3)

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 the portion of Consolidated Finding # 42, which states that the claimant did not know that he would be furloughed, as explained below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. While we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is disqualified due to his discharge from this employer, we believe that he is subject to a constructive deduction, rather than a complete disqualification of 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 fired the claimant for not calling the employer or reporting for work on May 31, 2020. *See* Consolidated Findings ## 19–22, 27–28, and 31. This is a violation of the employer's written policy. *See* Consolidated Finding # 3. However, because the level of discipline imposed for violating this policy is discretionary and we do not have information about other employees who committed this infraction, the employer has not demonstrated that its discharge was for a knowing violation of a reasonable and *uniformly enforced* policy within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the claimant will be disqualified under G.L. c. 151A, § 25(e)(2), if the employer shows that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. We believe it has done so.

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) (citation omitted).

Consolidated Finding # 8 states that the claimant received the employee handbook with this attendance policy and Consolidated Finding # 10 states that the claimant did not need to be told of the employer's expectation to notify it of an intended absence. Moreover, he had already received prior warnings for attendance, and he knew that his job was in jeopardy. *See* Consolidated Findings ## 14, 15, and 27. The purpose of the policy, which is to ensure that the employer maintained sufficient staff, is reasonable. *See* Consolidated Finding # 4. Even though the claimant was aware that he was expected to call in to report his absence on May 31, 2020, he decided not to in order to avoid being at his workplace if the police came there to look for him that day. *See* Consolidated Finding # 30. This establishes that his failure to call in was deliberate.

We consider whether the claimant has shown 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). Although we can reasonably infer that the claimant had no control over whether the police showed up at his workplace, the claimant has not presented sufficient information for us to know why having the police appear at this location required him to avoid calling in his absence. For this reason, the claimant has not presented substantial evidence that there were mitigating circumstances for his misconduct. Absent such circumstances, we must infer that he acted 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*.

Since the employer has met its burden to demonstrate that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), the claimant is subject to a disqualification from receiving benefits.

However, our inquiry does not stop here. The review examiner's original decision subjects the claimant to a full disqualification from receiving any benefits. However, the consolidated findings show that, at the time the claimant separated, his job with the employer was part-time, and he was working full-time for another employer, [Employer B] (School A). *See* Consolidated Findings ## 37 and 38. This suggests that the claimant may be subject to a constructive deduction pursuant to 430 CMR 4.71–4.78.

DUA regulation 430 CMR 4.76 provides, in relevant part, as follows:

> (1) A constructive deduction, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under M.G.L. c. 151A, § 25(e), in any of the following circumstances:
>
> a. if the separation is:
>
> 1. from subsidiary, part-time work during the base period and, at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work. . . .

In the present case, the claimant's separation from the employer was a separation from subsidiary part-time work, meaning employment worked contemporaneously with full-time work. 430 CMR 4.73. Although technically not in his base period, the period April 1, 2019, through March 31, 2020, the separation was within the last four weeks before he filed his claim, and it is treated as part of the base period for purposes of this regulation. *See* DUA Adjudication Handbook, Chapter 6, p. 13.

Consolidated Finding # 42 states that the claimant did not know he would be furloughed by School A at the end of the school year. In rendering this finding, the review examiner reiterates and accepts as credible what the claimant stated at the remand hearing. 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.) Based upon the record before us, we cannot accept this finding because it is unreasonable in relation to the evidence presented.

During the hearing, the claimant testified that, as a 10-month employee, he had a choice whether to work for School A over the summer. He further stated that, although he had worked the prior summer at a different school and was expecting to work again during the summer of 2020, the 2020 summer work had not been offered.[1] As a 10-month employee, he should have known that he was not entitled to continued work after the school year ended. Thus, we believe he had reason to know of the impending separation from his primary job with School A, (*i.e*., his summer layoff). Pursuant to 430 CMR 4.76(1)(a)1, the claimant is subject to a constructive deduction, rather than a complete disqualification from benefits.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and is disqualified under G.L. c. 151A, § 25(e)(2). We further conclude that the disqualification imposed must be a constructive deduction pursuant to 430 CMR 4.76.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning June 21, 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. However, his disqualification is limited to a reduction of his weekly benefit amount, as calculated under the constructive deduction regulations at 430 CMR 4.78, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 31, 2021

Paul T. Fitzgerald, Esq.
Chairman

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 apply at: https://ui-cares-act.mass.gov/PUA/_/. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT

[1] While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

(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