The employer effectively discharged the claimant for refusing work assignments when it removed her from its on-call roster. However, the claimant's reasons for turning down work were due to the loss of childcare and school closures brought about by the COVID-19 pandemic. While refusal to accept work may constitute deliberate misconduct, the claimant's actions were not in wilful disregard of the employer's interest, but due to mitigating circumstances. She is not disqualified under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0049 5022 57

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 reverse.

The claimant separated from her position with the employer and filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 28, 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 June 18, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 an opportunity to testify. Both parties attended the remand hearing, which took place over the course of two sessions. 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 is ineligible for benefits because she abandoned her job, 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. In 1919 the claimant was working on-call as needed as a non-union Home Health Aide primarily with another employer's homecare company. To obtain subsidiary additional work, the claimant contacted this employer's home care company.

2. On 10/17/19, the claimant began working variable hours of on-call as needed employment as a Home Health Aide for this employer's homecare company. At hire, the employer knew that the claimant worked primarily for another employer and that the claimant was a single mother and that her availability would be limited.

3. The employer always had many on-call shifts available to the claimant.

4. On 03/06/20, the claimant completed her final shift with this employer when the patient she was caring for became hospitalized.

5. Prior to COVID-19, the claimant was working approximately 22 hours per week with this employer at a rate of $14.00 per hour.

6. Later in March of 2020, the school and the after school childcare center that the claimant's daughter attended closed due to COVID-19. The school switched to remote learning, which required the claimant to be home with her daughter during school hours. Childcare as a single parent had always been a challenge for the claimant, but after the COVID-19 school closures, childcare became much more challenging to find.

7. The claimant's mother-in-law, who had assisted the claimant with childcare, was not available after COVID-19 began in March of 2020, and when the claimant's father-in-law died from COVID-19, her mother-in-law permanently returned to her home country of the Dominican Republic in June of 2020.

8. On 04/13/20, the claimant was called by a nurse, Diana, from the employer's office who informed the claimant that the patient she had been caring for on 03/06/20 was leaving the hospital but no longer required any services from the employer's company so the claimant would no longer be working with this patient.

9. The claimant is a single parent who at the time was raising her then six-year-old daughter alone. The claimant and her daughter resided together in public housing.

10. The child's father saw the child only on occasional visitation weekends and was not available to assist in childcare to allow the claimant to work.

11. During April of 2020 and May of 2020, the claimant was not available to work with any employer during the workweek, as her daughter was in remote learning

and the claimant had no childcare in place due to the COVID-19 school and after school childcare shutdowns.

12. When offered work by the employer, the claimant explained that she could not accept the offered work assignments because she had no childcare in place due to the COVID-19 school and daycare shutdowns. The claimant was also refusing work from her other homecare employer due to COVID-19 related loss of childcare.

13. Although she could not accept any work from any employer, the claimant, in April of 2020 and May of 2020, did continue to attend the instant employer's staff meetings remotely via Zoom. The claimant remained in contact with this employer as she hoped to return to work with the employer when the COVID-19 situation improved and schools and after school childcare centers re-opened.

14. On 06/01/20, the instant employer['s] administrator removed the claimant from this employer's on-call list because of her inability to accept any work due to the loss of her childcare because of COVID-19.

15. On 07/20/20, the claimant filed a claim for unemployment benefits, effective 07/19/20. At the time of her filing, the claimant was not working for any employer due to her COVID-19 related loss of childcare.

Credibility Assessment:

The claimant's testimony that she wanted to continue to work with this employer but could not accept offered assignments after 03/06/20, because she had no childcare due to COVID-19 school closures and after-school daycare closures, was accepted by this review examiner because it was credible.

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. Consolidated Finding # 1 states that the claimant was working for another employer in 1919. Given that this date falls well outside of the relevant timeframe, it is reasonable to infer that the 1919 date amounts to a mere typographical error, especially where the claimant testified, in part, that she was unable to recall her employment start date with the other employer, but remembered that her last day working for that employer was March 4, 2020.[1] In adopting the remaining findings, we deem 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

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first issue we must decide is whether the claimant's separation is to be analyzed as a voluntary or involuntary separation.

In his original hearing decision, the review examiner deemed the claimant to have voluntarily quit her job by abandonment. We have held that, where a claimant is fired for failing to notify the employer of the reason for absence, the separation is to be treated as a voluntary resignation. Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1)). Accordingly, the review examiner analyzed her separation under the following provisions of G.L. c. 151A, § 25(e)(1):

> 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express language of the above sections of law places the burden of proof upon the claimant.

Because the claimant did not participate in the initial hearing, she did not testify or provide any evidence that explained the circumstances leading up to her separation from the instant employer.

After the remand hearing, the review examiner found that the claimant had explained to the employer that she could not accept work assignments because she had no childcare in place due to the COVID-19-related shutdowns of schools and daycare centers. Consolidated Finding # 12. The review examiner also found that the claimant had remained in contact with the employer after her last assignment ended, because she had hoped to return to work once the schools and daycare centers re-opened. Consolidated Findings ## 8 and 13. We believe that these findings show that the claimant did not abandon her job.

Instead, they show that it was the employer's decision to end the employment relationship. On June 1, 2021, the employer removed the claimant from its on-call list because of her inability to accept any work. Consolidated Finding # 14. In effect, the employer discharged the claimant when it removed her from its on-call employee roster. Consequently, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which states, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter 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, . . .

Under the foregoing provision, it is the employer's burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy or for deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) ("[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.") (citations omitted).

The employer has maintained that it removed the claimant from its on-call roster only after she refused to accept work assignments. Because the claimant turned down suitable work, the employer could reasonably decide to terminate her employment for doing so. However, the only question before us is whether the claimant is entitled to unemployment benefits. The employer has not presented any policy which this conduct violated. Therefore, we cannot conclude that the claimant knowingly violated a reasonable and uniformly enforced policy. Alternatively, we consider whether 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). 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).

In this case, there is no question that the claimant deliberately turned down suitable work. By doing so, we must consider whether she acted in wilful disregard of the employer's interest, or whether her actions were due to mitigating circumstances. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control).

The claimant notified the employer of her reasons for being unable to work. Her reason was lack of childcare. *See* Consolidated Finding # 12. Specifically, she was unable to work starting in March, 2020, when she lost her childcare due to the COVID-19 public health emergency. Her child's schools closed, forcing her daughter to be at home doing remote learning, and her mother-in-law was no longer available to provide childcare. *See* Consolidated Findings ## 6 and 7. The claimant could not work because she had to stay home with her daughter. *See* Consolidated Finding # 11.

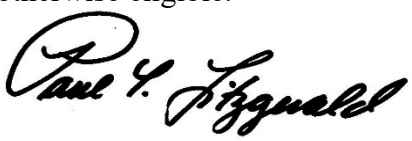
Also in March, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA) which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an

emergency temporary basis as needed to respond to the spread of the COVID-19 pandemic.[2] The U.S. Department of Labor (DOL) also advised states that they have significant flexibility in determining the type of work that is suitable given an individual's circumstances.[3] Pursuant to this federal guidance, the DUA stated that, as a matter of policy, a claimant had good cause to refuse suitable work if, due to age, another individual requires the claimant's full-time care and no alternate care is available due to COVID-19. DUA UI Policy and Performance Memorandum (UIPP) 2020.12 (Oct. 8, 2020), pp. 2–3.

Thus, for purposes of unemployment benefit eligibility, the claimant had good cause to turn down the employer's otherwise suitable work. The school closures and consequent loss of childcare due to the COVID-19 pandemic constituted mitigating circumstances. She was not acting in wilful disregard of the employer's interest but in response to these circumstances that were beyond her control.

We, therefore, conclude as a matter of law that the initial conclusion that the claimant voluntarily separated from the employer under G.L. c. 151A, § 25(e)(1), is not supported by substantial evidence. We further conclude that the employer did not carry its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy or 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 entitled to receive benefits for the week beginning July 19, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - December 30, 2021

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

[2] *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).
[3] See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

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.

JMO/rh