**The claimant's failure to report a COVID-related symptom to the employer, as required by the employer's policy, was not done in wilful disregard of the employer's interest, where the claimant failed to report her symptom because she had reason to believe that it was caused by something other than COVID-19. The claimant's failure amounts to a lapse in judgment and nothing more. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**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: 0067 0771 90**

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 her position with the employer on December 18, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 19, 2021. 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 March 2, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated 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 afford the employer the opportunity to testify and present other 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 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, is supported by substantial and credible evidence and is free from error of law, where the employer fired the claimant for not reporting a headache, which she believed it was caused by her menses and not COVID-19.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant worked as a Receptionist for the employer, a service business, from 9/4/18 until 12/18/20, when she became separated.

2. The claimant was hired to work full-time, 40 hours a week, earning approximately $18.21 an hour.

3. The claimant was discharged over the phone by the Human Resource Manager for coming to work with [COVID] symptoms. The employer has no written rule or policy with specific consequences which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the Directors at the corporate office.

4. The employer expected employees under their [COVID-]19 Safety Policy not to come to work if they have symptoms of [COVID].

5. The claimant was aware of the [COVID] policy as she acknowledged her receipt of such on 7/7/20 and 12/2/20.

6. On 12/4/20, when the claimant arrived to work, she was symptom free. While at work, the claimant developed a headache. The claimant believed her headache was a migraine brought on by her menstrual period. The claimant suffers with menstrual migraines. She seeks medical treatment by her doctor for this condition.

7. The claimant took some medication that was given to her by a coworker for her headache and finished out her day.

8. Over the weekend of 12/5/20, the claimant started experiencing other symptoms. She had the chills and started developing mucus.

9. On Sunday, 12/6/20, the claimant informed the employer that she was not feeling well and would not be in on Monday, 12/7/20. She told the employer she was going to get a [COVID] test as advised by her doctor. The claimant was not able to get tested until Tuesday, 12/8/20.

10. On Wednesday, 12/9/20, the claimant was informed her test was positive. The claimant notified the employer of her positive results and informed them she would need to quarantine for two weeks.

11. The Human Resources Manager commenced an investigation into the matter. The Human Resources Manager did not speak to the claimant during the investigation.

12. On 12/18/20, the claimant called the employer to inform them she was cleared to return to work on 12/20/20. The claimant stated to the employer that she had completed her quarantine and was ready to return to work.

13. The claimant was told in this telephone conversation that because she came to work with [COVID] symptoms and did not report it to the employer, her employment was being terminated for safety issues.

14. The claimant was a dedicated and valued employee.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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.

Because the claimant was terminated from her employment, her 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).

On the record before us, we do not believe that the employer has met its burden to establish that the claimant knowingly violated a reasonable and uniformly enforced policy. This is because, although the employer has established the existence of a policy instructing employees not to report to work and to inform the employer if they have certain symptoms that could be caused by COVID-19, the policy does not delineate the consequences for violating it and, thus, uniform enforcement has not been established. *See* Consolidated Findings ## 3-4 and 13. The remaining question before us is whether the employer has established 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).

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).

The review examiner found that, on December 4, 2020, the claimant developed a headache after arriving to work and believed it was caused by her menses, as she suffers from menstrual headaches. *See* Consolidated Finding # 6. Although the claimant was aware of the employer's reasonable expectation that she immediately report symptoms, such as a headache, to the employer because it could be caused by COVID-19, the claimant did not report her headache that day and finished working her shift.[1] *See* Consolidated Findings ## 5 and 7. The claimant's failure to comply with the employer's expectation by choosing to remain at work on December 4th and not reporting her headache constitutes deliberate misconduct.

However, the employer has not met its burden to show that the claimant's actions were in wilful disregard of the employer's interests. While the claimant was aware that one of the COVID-related symptoms she was to report to the employer was a headache, she believed that her headache was caused by her menses, and this is the reason why she did not report her symptom to the employer. Although the better course of action may have been to report her headache to the employer because this occurred during a pandemic, and it was imperative to be cautious, the claimant's failure to do so appears to be due to a lapse in judgment and nothing more. "When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield, 377 Mass. at 97.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, nor did she knowingly violate a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

[1] The COVID-related symptoms listed in the employer's policy, while not explicitly incorporated into the review examiner's findings, are 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).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning December 20, 2020, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - November 29, 2022**

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

SVL/rh