

**The claimant was discharged for tardiness. However, the records shows that the claimant fell ill the day before the final tardiness, had taken medication to alleviate her symptoms, and likely the illness or medication caused her to oversleep and miss the start of her scheduled shift the next morning. Held the claimant did not act deliberately in wilful disregard of the employer's interest and she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0067 7388 67**

### 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 was discharged from her position with the employer on April 16, 2021. She filed a claim for unemployment benefits with the DUA, effective April 11, 2021, which was approved in a determination issued on July 2, 2021. 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 November 22, 2022. 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, 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 afford the claimant an opportunity to testify. 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 employer discharged the claimant for deliberate misconduct because she failed to report to work on time or report her tardiness before the start of her shift despite having received multiple warnings, 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 for the employer, a behavioral health organization, from 7/7/18 until 4/8/21, most recently as a medical assistant in a methadone treatment program.
2. The employer maintains a written time and attendance policy which indicates establishing a pattern of tardiness or taking unscheduled days off that interferes with job performance or program operation will result in review and progressive discipline.
3. The purpose of the policy is to provide appropriate staff coverage, not place an unfair burden on fellow workers, and ensure the flow of operations.
4. The employer used progressive discipline for all employees who violate the policy, as follows:
  - a. First occurrence results in supervision.
  - b. First Level is issued with 3 occurrences within a specified period.
  - c. Second Level is issued with 3 additional occurrences within a specific period.
  - d. Third Level is issued with 2 additional occurrences within a specific period.
  - e. Termination results when 2 additional occurrences are within a specific period.
5. The claimant signed off on receipt of the policy at the time of hire.
6. The employer expected employees to report to work on time, and if delayed, to notify the employer prior to the start of their shift.
7. The employer welcomes employees to bring in a doctor's note when sick.
8. In December 2020 and January 2021, the claimant was scheduled to work from 6:00 a.m. – 2:00 p.m., Monday – Friday.
9. The claimant received supervision regarding her unscheduled tardiness on 1/6/21 and reviewed the attendance policy.
10. The claimant was tardy on 1/7/21, 1/27/21 and 1/29/21 and received her first corrective action and reviewed the attendance policy on 2/1/21.
11. The program manager was also concerned with the claimant's failure to notify the employer of her tardiness prior to the start of her shift, and sometimes not at all, and informed the claimant that she needed to call before her shift started.
12. The employer adjusted the claimant's schedule to 7:00 a.m. – 5:30 p.m. to help her get to work on time.

13. The claimant was tardy on 2/12/21, 2/17/21, and 2/18/21 and did not notify the employer prior to the start of her shift and received her second corrective action on 2/18/21.
14. The claimant was tardy on 2/19/21 and 2/24/21. On the first occasion, she notified the employer after the start of her shift. On the second occurrence, she reported to work two hours late and never notified anyone, and received her third corrective action on 2/26/21.
15. The claimant did not share any personal situations that would cause her excessive tardiness and about half of the time indicated she had overslept.
16. The claimant did not show up for work on 3/15/21 and the program manager texted her at 7:36 a.m. The claimant called at 7:43 a.m. and indicated she had overslept. The claimant was again tardy on 3/19/21 due to car trouble. The claimant was not terminated on that date, as the employer gave her the benefit of the doubt concerning her car trouble.
17. The claimant was informed that she would be discharged for another occurrence.
18. On 4/8/22 [sic], the claimant was not feeling well and went to the program manager's office to tell her she was freezing and not feeling good and asked to go home.
19. The program manager told her that she did not have coverage and the claimant worked the remainder of her shift.
20. The claimant did not tell the program manager at the end of her shift that she was still feeling unwell.
21. The claimant arrived home between 6:00 p.m. and 6:30 p.m. and took Motrin PM and NyQuil and went to bed, and when she woke between 2:00 a.m. and 4:00 a.m., took more of both.
22. She did not call or otherwise inform the employer at that time that she was still sick.
23. On 4/9/22 [sic], the claimant was scheduled to work at 7:00 a.m. and called the program manager at 8:29 a.m. to say she overslept and must have over-medicated.
24. The program manager did not recall the claimant asking to go home the day before, and based on the claimant's history, the employer did not accept the claimant's excuse for her tardiness on 4/9/21.
25. The program manager placed the claimant on administrative leave on 4/9/21.

26. The claimant did not follow-up with the employer, test for COVID-19 or see a doctor.
27. The claimant refused to meet with the employer when contacted by human resources and was terminated on 4/16/21 for excessive tardiness in violation of the attendance policy.
28. The claimant did not exercise her right, described in her termination letter, to appeal the termination directly to human resources.

#### Credibility Assessment:

The credible testimony of the claimant and the employer witness during each hearing was largely free of disagreement or conflict regarding the facts of the claimant's attendance record and disciplinary actions. The one discrepancy is whether the claimant informed the program manager that she was feeling sick on 4/8/22 and was denied her request to go home. Although the claimant's testimony was more specific and detailed, neither party's testimony stood out as being more credible. The claimant testified that her tardiness on 4/9/22 was not deliberate, and the employer testified that even if the claimant's tardiness was due to a medical issue, she did not take any steps to preserve her employment by presenting a medical note or exercising her appeal rights.

#### 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact, except those portions of Consolidated Findings ## 18 and 23 that appear to contain scrivener's errors, because they reference dates in April, 2022, and there is unrefuted evidence in the record that the events leading to separation occurred in April, 2021. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was discharged from her employment, her eligibility 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. . . .

“[The] 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 maintains a time and attendance policy, which states that an employee's pattern of tardiness or taking unscheduled days off that interfere with job performance or program operations will result in progressive discipline. Consolidated Finding # 2. The review examiner did not make any findings as to whether this employer policy was reasonable. However, where the review examiner found that the purpose of this policy was to provide appropriate staff coverage, not place an unfair burden on other staff and ensure the flow of operations, we believe it is reasonable. *See* Consolidated Finding # 3. The review examiner also found that the claimant was aware of the employer's policy against excessive tardiness, because she had acknowledged and received a copy of the policy upon hire and had reviewed the attendance policy during a supervision on January 6, 2021. Consolidated Findings ## 5 and 9. However, as the employer appears to retain some level of discretion in its progressive discipline, there is insufficient evidence in the record for us to determine whether the policy is uniformly enforced. *See* Consolidated Finding # 16. Therefore, the Board cannot conclude that the claimant knowingly violated a reasonable and *uniformly enforced* policy under G.L. c. 151A, § 25(e)(2).

We next consider whether the employer has shown the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectation. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged. In this case, the claimant was discharged for excessive tardiness. Consolidated Finding # 27. Specifically, the employer discharged the claimant because she was late for her scheduled shift on April 9, 2021, which was after she had been tardy on March 19, 2021, and the employer had informed her that she would be discharged for another occurrence of tardiness. Consolidated Findings ## 16–17.

The claimant did not dispute that she understood that her employer expected her to arrive on time for her shift, nor that she was late to her shift on multiple occasions, including on April 9, 2021. Consolidated Findings ## 2, 5, 9, 10, 14, 16, and 23. We do not question the employer's decision to discharge the claimant. The only issue before us is whether she is eligible for unemployment benefits.

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with “intentional disregard of [the] standards of behavior which [her] employer has a right to expect.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). Thus, “the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause [her] discharge.” *Id.* Thus, our inquiry is focused on the event which triggered her discharge. In this case, that is her failure to report to work on time on April 9, 2021.

The review examiner found that the claimant, after completing her shift on April 8, 2021, arrived home between 6:00 p.m. and 6:30 p.m., took Motrin PM and NyQuil, went to bed, and when she woke between 2:00 a.m. and 4:00 a.m., took more of both. Consolidated Findings ## 18, 19, and 21. The review examiner also found that the claimant was scheduled to work the next day, April 9, 2021, beginning at 7:00 a.m. and called the program manager approximately ninety minutes later to say she overslept and must have over-medicated. Consolidated Finding # 23. Although the review examiner stops short of explicitly finding that the claimant did oversleep due to over-medication on April 9, 2021, we nevertheless conclude that the consolidated findings do not show the claimant deliberately reported to work late.

During the remand hearing, the claimant explained that she decided to go home and try to resolve her symptoms using over-the-counter medications to ensure she was able to arrive to work on time the next day, and that, although she had also set an alarm to wake her at 6:00 a.m., she did not hear it ring.<sup>1</sup> Nothing in this record suggests the claimant was intentionally oversleeping. Rather, it shows that, on April 9<sup>th</sup>, the claimant was sick. We can reasonably infer that either the illness or the medication caused her to oversleep. *See* Consolidated Findings ## 18, 21, and 23. Accordingly, the claimant did not take deliberate action that caused her to arrive late to her shift on April 9, 2021.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy 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 April 11, 2021, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 29, 2024**



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)**

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<sup>1</sup> This portion of the claimant's testimony, while not explicitly incorporated into the review examiner's consolidated findings, is part of the unchallenged evidence introduced at the remand 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 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](http://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