The claimant's decision to take vacation during the week of July 4th even though his manager told him he had not been approved was deliberate misconduct in wilful disregard of the employer's interest. The claimant is not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0071 7117 43

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 July 9, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 23, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 15, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or 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 obtain subsidiary findings of fact relevant to the reason for the claimant's separation. 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 conclusion that the claimant's decision to go on vacation, even though his manager had not approved his request for time off, was not deliberate misconduct in wilful disregard of the employer's interest, 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 as a blender for the employer, the manufacturer of plastics.

2. The claimant began working for the employer in approximately early May of 2021.

3. The claimant had quit a job in February of 2021 because he had been working weekends in that job and no longer wanted to be working weekends.

4. The claimant's goal at the time of his hiring by the employer was not to work weekends because he wanted to be available to have his daughter then.

5. At the time of his hiring, the claimant notified his supervisor that he had family vacation plans for the week of July 4, 2021.

6. The supervisor told the claimant that the vacation plans did not present a problem because the plant would be closed that week.

7. The claimant did not submit any formal request to take vacation time because he thought he would not be working that week anyway and therefore did not need to request time off from work.

8. The claimant worked nights and typically alternated between working Monday through Wednesday nights one week and Monday through Thursday nights the following week.

9. The claimant also worked Friday nights every other week for additional money.

10. The claimant had specifically arranged his schedule to accommodate his having his daughter on weekends, beginning either Friday afternoons (if he did not work Friday nights) or Saturday mornings (if he did work Friday nights).

11. The claimant thought that working Fridays was optional since the employer never suggested otherwise until July 2, 2021.

12. In mid-June of 2021, the employer announced that the plant was going to stay open during the week of the July [4th] holiday.

13. During a worker gathering in the parking lot soon after the announcement, the claimant reminded his supervisor that he had vacation plans the week of July [4th].

14. The supervisor told the claimant in response that the vacation time would not be a problem because the claimant had asked about it prior.

15. When the claimant reported to work on July 1, 2021, his regular supervisor was on vacation, and the replacement supervisor alerted the claimant that the claimant's manager did not know the claimant was going to be on vacation the following week.

16. At the end of his shift that night, the claimant, at 5:54 a.m. on July 2, 2021, texted the manager as follows: "[The replacement supervisor] told me you did not know about [my girlfriend] and I not being here next week. We are going to be camping in Maine. . . .We have had the reservations for a long time. I told [regular supervisor] when we started and at the meeting we had in the lot, and I would like to know how to proceed from here."

17. The manager responded as follows:

> Sorry, [claimant], but [regular supervisor] told me everyone was going to be here next week, and I was never notified about anyone being off next week. I gave [your girlfriend] time off when she first started, and nothing was ever said about July. You have a missed a lot of time already on Thursday and Fridays since you started. I cannot approve you guys taking next week also.

18. The claimant responded on Friday July 2, 2021, at 12:43 p.m. as follows:

> I'm very sorry. I don't know how to proceed, [manager]. We are picking up the kids tomorrow and going to Maine for the week. We thought everyone was aware. Again, I am sorry.

19. As he asserted that he would do, the claimant went to Maine the following week and missed work Monday, July 5, 2021, through Friday, July 9, 2021.

20. On Friday, July 9, 2021, the manager texted the claimant saying that, "as we have not seen you all week . . . we are releasing you as of today."

21. The manager called the situation a "no-call, no-show."

22. By Notice of Disqualification dated March 23, 2022, the Department informed the claimant that he was not eligible for benefits beginning July 4, 2021.

23. The claimant appealed the Notice of Disqualification.

[Credibility] Assessment:

At the hearing, the claimant testified he sent a text message to his manager stating that he would be going to Maine during the week of July 4, 2021, and asking the manager how to proceed in regard to his time off. The claimant's testimony is credited since he had the text message in front of him and read it into the record as he testified. The underlying substance of the text message is also credited since it was part of a consistent narrative that included that the claimant had asked for the time off before he started his employment and that he had reminded his immediate supervisor of his unavailability in mid-June of 2021 when he learned that the plant was going to remain open during the holiday week. The employer's witness, who had not yet been hired at the time of the events at issue and had not received direct

knowledge of the events, was without sufficient knowledge or information to rebut the claimant's testimony. The employer's witness had no knowledge of the discussion between the claimant and his supervisor at the time of hiring. The claimant's testimony in this regard is accepted as undisputed.

The claimant further testified that the manager responded to the claimant's text message stating that he was not informed that any employee would be absent during the week of July 4, 2021, and that he could not approve of the claimant taking the time off because he had already missed a lot of time. The claimant's testimony regarding this second text message is likewise credited since the claimant had the text message in front of him as he read it into the record.

The manager's contention that the claimant had already missed a lot of work time is not credited. The claimant testified that he typically worked Monday through Wednesday one week, Monday through Thursday the following week, and Friday nights every other week. He also testified that he thought working Fridays was optional. The claimant testified that his goal at the time of hiring was not to work weekends and that he had quit a job in February because he had been working weekends in that job. The claimant's testimony in this regard was supported by his assertion that, in order to accommodate time with his daughter, he had specifically sought to avoid working weekends.

Aside from the conclusory text message asserting that the claimant had missed a lot of work, the employer offered no evidence that the claimant had missed work. The claimant testified that the first time the employer suggested that he was supposed to be working both Fridays was July 2, 2023, i.e., the day of the text message exchange. The claimant's testimony that he understood that working Fridays was optional is accepted as undisputed.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to benefits.

Because the claimant was discharged from his employment, his 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).

While the employer maintained that it discharged the claimant for violation of its attendance policy, it did not provide any evidence showing that it discharged all other employees who violated the employer's attendance policies under similar circumstances. Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. We, therefore, consider only whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged. As the claimant confirmed that he failed to report to work between Monday, July 5, 2021, and Friday July 9, 2021, there is no dispute that he engaged in the misconduct for which he was discharged. Consolidated Finding # 19. Further, as the claimant informed his manager on July 2, 2021, that he was choosing to go on vacation during that week, his actions were self-evidently deliberate. *See* Consolidated Finding # 18.

However, the Supreme Judicial Court (SJC) has stated, "[deliberate] misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). In order to determine whether an employee's actions were in wilful disregard of the employer's interest, 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). When evaluating 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).

While the claimant conceded that his manager had informed him that he was not approved to take time off during the week of July 4, 2021, he asserted that his absences were justified, because his request for vacation time had been approved in May, 2021. Consolidated Findings ## 2, 5–6, and 16–17. However, the issue is not whether the claimant believed that his acts were justified, "[it] is whether the Legislature intended that certain unemployment benefits should be denied in the circumstances of a case such as this." Goodridge, 375 Mass at 436. Accordingly, the claimant's eligibility for benefits in this case depends on whether absences during the week of July 4, 2021, were "intentional conduct . . . which the employee knew [were] contrary to the employer's interest." Id.

As the claimant had not put in a formal request for vacation time, his manager was unaware that he intended to be absent from work the following week. Consolidated Findings ## 7 and 15. Upon

learning of this issue, the claimant reached out to his manager directly and learned that his manager had not received nor approved his request for time off during the week of July 4, 2021. Consolidated Findings ## 16 and 17. As text messages that the claimant read into the record confirm that he acknowledged his manager's directive, the record demonstrates that the claimant understood his decision not to report to work during the week of July 4, 2021, was contrary to the employer's expectations. *See* Consolidated Findings ## 17 and 18.

An employer needs its employees to report for their scheduled shifts in order to continue operating its business. As such, we believe the employer's expectation that employees will report to work as scheduled is facially reasonable.

We next consider whether the record contained sufficient evidence to conclude that mitigating circumstances prevented the claimant from adhering to the employer's expectation. 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).

We recognize that the claimant had provided one of his supervisors advance notice that he was planning to take time off during the week of July 4, 2021. In this instance, however, taking time off for a camping trip was not a circumstance beyond his control that prevented him from reporting to work. *See* Consolidated Findings ## 5–6, 13–14, and 16. Instead, the claimant's absences during that week were a result of his volitional choice to go on vacation. *See* Consolidated Findings ## 17–19. Accordingly, the claimant has not shown mitigating circumstances for his misconduct.

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to 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 of July 4, 2021, 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 - December 22, 2023

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.

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.

LSW/rh