The claimant failed to prove that she had permission to disregard the employer's requirement to call in her absence for each shift. Held her discharge for no call-no show was a voluntary abandonment and she is disqualified pursuant to G.L. c. 151A, § 25(e)(1). Alternatively, the employer has shown that she is also disqualified due to engaging in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0073 7465 58

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 benefits. Benefits were denied on the ground that the claimant knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on December 3, 2021. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on July 30, 2022. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On January 4, 2023, the District Court ordered the Board to make further findings regarding any disqualification other than knowing violation of a reasonable and uniformly enforced policy. Consistent with this order, we have reviewed the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal to the Board, the District Court's Order, and we affirm on different grounds.

The issue before the Board is whether the claimant's failure to appear for work or notify the employer of her absences for three consecutive days disqualified her from receiving benefits under any provision under G.L. c. 151A, § 25(e), other than as a knowing violation of a reasonable and uniformly enforced policy pursuant to G.L. c. 151A, § 25(e)(2).

Findings of Fact

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

1. The claimant worked full-time for the employer as a machine operator beginning November 12, 2017, to her termination date of November 4, 2021.

2. The claimant earned $16.00/hour.

3. The claimant's last working day was October 25, 2021.

4. The employer has a written attendance policy regarding three consecutive days of no call and no show by the employee (no-call no-show policy) being deemed job abandonment.

5. The discipline for violating the policy is immediate discharge. The employer has discharged all employees who violated the policy.

6. The claimant signed the employer's attendance policy on June 22, 2017.

7. During her employment, the claimant knew she was responsible for having transportation to get to and from work.

8. The claimant had ongoing transportation issues in October, 2021, resulting in the claimant's absences from work.

9. On October 15, 2021, the employer paid for a one-time round-trip ride share service to get the claimant to work.

10. The ride shares service cost over $100 one way and became cost prohibitive for the employer.

11. On October 22, 2021, the employer gave the claimant a gift card to help with transportation expenses.

12. The employer expedited a loan against the claimant's 401k policy to help the claimant obtain a new vehicle.

13. On October 22, 2021, the claimant was told by her supervisor that she needed to be present for scheduled shifts or she would be terminated.

14. On October 22, 2021, the claimant's supervisors helped the claimant locate another vehicle.

15. On October 25, 2021, the claimant put down a deposit and was awaiting inspection of her new vehicle.

16. On October 25, 2021, the claimant contacted the employer regarding the new vehicle.

17. On and after October 25, 2021, the claimant was aware she had to contact her supervisor before her shift, because she called out without a set date of return.

18. The claimant did not call out nor show to work after October 25, 2021.

19. On October 25, 2021, when the claimant messaged her employer, she did not provide a date of inspection or intended return date after finding the new vehicle.

20. The employer notified the claimant she was scheduled to work on October 30, 2021, through November 1, 2021.

21. The claimant did not notify the employer of her absences per the attendance policy between October 25, 2021, and November 2, 2021.

22. The claimant was a no call no show for three consecutive shifts on October 30, 2021, October 31, 2021, and November 1, 2021, for an unknown reason.

23. The claimant did not contact the employer to call out for her shifts on October 30, 2021, October 31, 2021, and November 1, 2021.

24. On November 2, 2021, the claimant messaged her supervisor regarding the inspection on her new vehicle.

25. The claimant was instructed to speak to the Human Resources Representative when she contacted her supervisor on November 2, 2021.

26. The employer discharged the claimant by message on November 4, 2021, for being a no-call no-show on three consecutive dates, October 30, 2021, through November 1, 2021.

[Credibility Assessment:][1]

It is not disputed that the claimant was a no call no show on October 30, 2021, October 31, 2021, and November 1, 2021. It is also not disputed the claimant did not contact or call out for shifts after October 25, 2021. The claimant knew she had scheduled shifts after October 25, 2021. However, the claimant contends the October 25, 2021, call out included the October 30, 2021, to November 1, 2021, period because she said she would be out a week, and that she was told just to stay in touch with her supervisor to [sic] means she did not need to call out for subsequent shifts. The claimant's contention is not reasonable given the record. Specifically, the claimant's own call out history and the supervisor's warning about continued absenteeism on October 22, 2021, negate the claimant's contention. The claimant did not give a set return date on October 25, 2021, and then contacted the employer after seven days. The record supports the employer's assertion that the claimant messaged her supervisor on November 2, 2021, after three consecutive

[1] We have copied and pasted here the portion of the review examiner's decision which includes her credibility assessment.

> no-call no-shows, more than seven days after the claimant's last contact, and the supervisor instructed the claimant to contact Human Resources.
>
> The claimant's assertion that the employer accepted her call out on October 25, 2021, to encompass the entire week is neither reasonable nor consistent with the other evidence in the record. It does not stand to reason, (after the claimant was warned by the supervisor about her absenteeism on her prior shift) that the employer would negate its own policy by allowing a weeklong call out, without a set date of return, after the claimant found new transportation. The claimant's own callout history goes to understanding of [sic] expectation, and further negates the claimant's contention. Since the claimant's testimony is not credible, it cannot be concluded that the claimant was not consciously aware of the policy at the time of her conduct.

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 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 findings of fact, except the portion of Finding of Fact # 5, which states that the employer discharged all employees who violated its attendance policy, as it is unsupported by the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the circumstances of the claimant's separation from the employer disqualify her from receiving benefits, but we do so under different provisions of the statute.

As noted in the findings, there is no dispute that the employer had a policy which required all employees to call in their absence from work. Specifically, the policy provided that they were to notify their supervisor at least one-hour prior to their scheduled start time, and failure to do so for three consecutive days results in immediate termination. *See* Finding of Fact # 4 and Exhibit 1.[2] Because the claimant did not report for work or call in her absences on the three consecutive work days of October 30, 31, and November 1, 2021, she was discharged from employment. Findings of Fact ## 22, 23, and 26.

The question before us is whether the claimant is eligible for benefits pursuant to any of the following provisions under G.L. c. 151A, § 25(e):

> [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

[2] Exhibit 1 is a copy of the employer's attendance policy with an acknowledgment of receipt signed by the claimant on June 22, 2017. While not explicitly incorporated into the review examiner's findings, Exhibit 1 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).

> the employing unit or its agent, (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 . . . .
>
> An individual shall not be disqualified from receiving benefits under the provisions of this subsection, 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.

If the claimant's separation is analyzed as a voluntary separation or due to urgent, compelling and necessitous reasons, the statute expressly assigns the burden of proof to the claimant. If it is analyzed as a discharge, the employer has the burden of proof. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

As noted in the review examiner's credibility assessment, the claimant asserts that her October 25, 2021, communication to the employer satisfied the employer's policy expectation that she provide advance notice of her absences. The claimant testified that she had asked if she needed to call every day and was told, "no," that, because it was due to her car situation, she only had to keep them updated. She maintained that her October 25th message communicated to the employer that she would be out at least for the next week. The review examiner rejected this explanation. 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).

We believe the review examiner's assessment is reasonable in relation to the evidence presented. Specifically, the review examiner did not believe that the claimant could have reasonably believed that the employer would tolerate such an open-ended communication about her attendance, as the employer had just warned her that she would be discharged for continued absences, and her October 25, 2021, communication did not provide a set return date. We agree that it is unlikely that the employer would have disregarded its policy expectation of daily notice indefinitely for the claimant. In short, we agree that the claimant has not presented substantial and credible evidence that she had permission to stop calling in.

Given this record, the claimant's separation is more appropriately viewed as voluntary job abandonment. We have held that the failure of an employee to notify her 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). Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950). There is no indication that the employer's actions were unreasonable. Thus, the

resignation was not for good cause attributable to the employer. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (to show good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving).

There is also nothing in the record demonstrating that the claimant's separation was due to urgent, compelling, and necessitous circumstances. Although it is understandable that the claimant could not report for work due to her car issues, she was fired for failing to *report* her absences. Her failure to do so cannot be attributable to this lack of transportation.

Even if the claimant's separation is viewed as a discharge from employment, she does not meet the eligibility requirements under G.L. c. 151A, § 25(e)(2).

Although the employer's witness testified that others have been terminated for failing to call in absences three days in a row, this does not mean that it has discharged all employees for no-call, no-show. In fact, the policy states that management has the right to exercise discretion in determining discipline based upon what it considers extenuating circumstances.[3] For this reason, we decline to accept that portion of Finding of Fact # 5, which provides that the employer has discharged all employees who violated the policy. This also means that the employer has not shown that the claimant's discharge was attributable to a knowing violation of a *uniformly* enforced policy pursuant to G.L. c. 151A, § 25(e)(2), and she may not be disqualified on this ground.

Alternatively, the claimant may 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. 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).

Here, the record shows that the claimant was aware of the employer's requirement to call in her absences before each scheduled shift, as she conceded as much during the hearing. *See also* Finding of Facts ## 4–6, and 17. We agree that the expectation is a reasonable policy to ensure the employer has the employees to perform the work necessary to carry on its business. In this case, there is no suggestion that the claimant forgot to call in on October 30, 31, or November 1, 2021. Thus, we can infer that she acted deliberately.

The question is whether or not the claimant acted in wilful disregard of the employer's interest. A person's knowledge or intent is rarely susceptible of proof by direct evidence but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984). As discussed above, she has failed to prove that she had the employer's permission not to call in. There is also nothing in the record to suggest there were mitigating circumstances for not providing the daily notice. *See* Shepherd v. Dir. of

[3] *See* Exhibit 1.

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).[4]

We, therefore, conclude as a matter of law that the claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), as well as pursuant to the deliberate misconduct in wilful disregard of the employer's interest provision under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning October 31, 2021, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2023

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.

AB/rh

[4] Further evidence indicates that the claimant's failure to call in for the three shifts was not a misunderstanding, but reflected a disinterest in maintaining her employment. When discharged a few days later, the employer invited the claimant to reapply for her position once she had transportation. But, after finally getting her new car, the claimant never reapplied. This is also part of the undisputed testimony in the record. *See* Board of Review Decision 0002 1755 35 (Aug. 6, 2014) ("While we generally do not allow employers to justify disqualifying a claimant for reasons that are not discovered until after the discharge, we do permit such 'after acquired evidence' where it is linked substantively to the issue for which the claimant was discharged.").