

The claimant was tardy to his shift on multiple occasions because his narcolepsy had worsened. As the claimant had set multiple alarms, slept in the parking lot, and requested an increased dosage of his narcolepsy medication, his actions show that he did not intend to be late to work and therefore did not have the requisite state of mind to engage in deliberate misconduct. He is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0075 6603 69

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 his position with the employer on February 28, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 25, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 27, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 was discharged for deliberate misconduct because he overslept and was late to his shift on multiple occasions but declined his supervisor's offer to temporarily switch to a later shift, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On April 15, 2015, the claimant began working for the employer, a coffee chain, part-time as a barista, and later, a shift manager. He worked 30–35 hours per week. He was supervised by the store manager. He earned \$20.09 per hour.

2. The claimant suffers from depression, anxiety, post-traumatic stress disorder, and narcolepsy.
3. The claimant takes medication for his narcolepsy.
4. One of the claimant's duties as shift manager was opening the store at 4:30 am.
5. The employer maintains an attendance policy requiring employees to arrive on time for their shifts, or to call out of work if they cannot come to their shift or arrive on time.
6. The purpose of this policy is to ensure that the employer is staffed and can run their business.
7. Employees who violated the policy are subject to discipline, up to and including termination.
8. The policy is contained in the employee handbook.
9. The employee handbook also contains the employer's leave of absence policy.
10. The claimant received the employee handbook upon his date of hire and every time it was updated.
11. The employer expects employees to show up on time because they need to have enough staff to operate their business.
12. The claimant was aware of this expectation.
13. On January 1, 2022, the claimant was diagnosed with COVID-19 and quarantined for ten days. He returned to work on January 11, 2022.
14. After getting COVID-19, the claimant's narcolepsy medication began to lose effectiveness. He had difficulty waking up in the morning and staying awake in the afternoon.
15. The claimant's medical provider increased the claimant's dosage. The claimant had to wait until the end of February of 2022, when he had finished his current prescription, before he could fill the new prescription and begin the higher dose.
16. In February of 2022, the claimant began having difficulty waking up in time for his shift.
17. He started setting five different alarms with five different tones on his phone, and sleeping in his car in the parking lot.

18. On February 4, 2022, the claimant punched into work at 5:10 am for a 4:30 shift. He was late because he overslept. He did not inform the employer that he was running late.
19. On February 10, 2022, the claimant punched in at 4:35 am for a 4:30 shift and provided no explanation to the store manager.
20. On February 11, 2022, the claimant punched in at 4:45 am for a 4:30 am shift. He was late because he had overslept. The store manager called the claimant, which woke the claimant up, and asked where he was, the claimant responded that he was sorry and that he was on his way.
21. On February 11, 2022, the claimant told the store manager about his medical condition and why he was oversleeping.
22. On February 11, 2022, the store manager offered to switch the claimant's shift to the evening.
23. The claimant declined the offer because he was concerned about who would open the store if he were to take a later shift and he did not know how the schedule would work. He did not express his concern to the store manager.
24. The store manager also offered the claimant a leave of absence until he could begin the new medication.
25. The claimant never requested a leave of absence.
26. The claimant never applied for any accommodations for his medical condition.
27. On February 15, 2022, the claimant punched in at 4:50 am for a 4:30 shift. He was late because he had overslept. The store manager called the claimant, which woke him up, and he left for work immediately. When the claimant arrived, the store manager spoke to the claimant about his tardiness.
28. On February 17, 2022, the claimant punched in at 4:48 am for a 4:30 shift was late for his shift because he had overslept. He did not call the employer before arriving to work.
29. On February 18, 2022, the store manager spoke to the district manager to discuss the claimant's attendance issues and to begin the termination process.
30. On February 22, 2022, the claimant punched in at 4:44 am for his 4:30 am shift.
31. On February 28, 2022, the claimant was discharged in person by the store manager for violation of the employer's attendance policy by being late on five occasions in February of 2022.

32. If the claimant had not been late on February 17, 2022, he would not have been terminated.
33. On March 25, 2022, the Department of Unemployment Assistance (hereinafter DUA) issued a Notice of Disqualification denying the claimant benefits under Sections 25(e)(2) of the Law commencing the week beginning February 13, 2022 and until he has had eight (8) weeks of work and has earned an amount equivalent to or in excess of 8 times his weekly benefit amount. The claimant appealed the Notice of Disqualification.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Because the claimant was discharged from his 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

Under this provision of the statute, “[T]he 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 policy requiring employees to arrive on time for their shift or otherwise inform the employer that they are going to be tardy or absent. Finding of Fact # 5. While the claimant acknowledged that he was aware of this policy, there is insufficient evidence in the record for us to determine whether the policy is uniformly enforced. Therefore, the Board cannot conclude that the claimant knowingly violated a uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

The claimant was discharged because he had been late to his shift on five different occasions in February, 2022. Finding of Fact # 31. Specifically, the employer explained that they chose to discharge him because he was late to his 4:30 a.m. shift for the 5th time on February 17, 2022.

Finding of Fact # 32. Accordingly, we must consider whether the claimant's failure to arrive on time on that day constituted deliberate misconduct in wilful disregard of the employer's interest.

The claimant did not dispute that he understood that his employer expected him to arrive on time for his shift, nor that he was late to work on multiple occasions. Findings of Fact ## 11, 12, 18–20, 27, and 28. However, he maintained throughout both hearings that he never intended to be late to work.

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 his discharge.” Id.

After being diagnosed with COVID-19 in January, 2022, the claimant's narcolepsy medication lost its effectiveness, and, as a result, he was encountering substantial difficulty waking up in the morning. Findings of Fact ## 13 and 14. Given the claimant's extensive efforts to ensure that he arrived at work on time for his shift despite this change in his medical condition, we conclude that there is nothing in the record to suggest the claimant was intentionally oversleeping. *See* Findings of Fact ## 15 and 17. Accordingly, we believe the record demonstrates that the claimant did not take deliberate action that caused him to arrive late to his shift on February 17, 2022.

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.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of February 20, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 18, 2022



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)**

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