

**The employer expected its employees would allow the employer to set up coverage when employees were going to be absent. This expectation was reasonable because it served to minimize cost and unnecessary overtime. The review examiner reasonably rejected as not credible the claimant's testimony that he had not already secured coverage from another employee prior to calling out. As he had previously been warned about the same misconduct, he understood his actions were contrary to the employer's expectations. Held the claimant is not entitled to benefits due to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0077 6367 75**

### 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 affirm.

The claimant separated from his position with the employer on June 22, 2022. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 13, 2022. 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 March 24, 2023. 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 obtain testimony from the claimant, as he was unable to connect to the initial hearing due to circumstances beyond his control. 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 was discharged for deliberate misconduct because he failed to follow the employer's call out policy when he did not notify his supervisor of his absence, 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. On November 14, 2018, the claimant started working full time for the employer, a nonprofit organization for individuals with mental health issues, as a Resident Support Specialist. The claimant worked at the employer's [City], Massachusetts location.
2. The claimant was paid \$16.00 per hour.
3. The claimant was scheduled to work Monday through Friday from 11 p.m. until 7 a.m.
4. The claimant's supervisor was the Program Supervisor.
5. The employer maintains a 504 Tardiness/Absences from Work/Call Out Procedure policy requiring employees to personally notify their immediate supervisor during business hours or the on-call supervisor during non-business hours in the event employees are going to absent from work. The employer maintains this policy to ensure proper shift coverage. The claimant received this policy.
6. The 504 Tardiness/Absences from Work/Call Out Procedure policy lists in part: "Employees are required to personally notify their immediate supervisor during business hours if they cannot come to work as scheduled. If you are working in a Direct Care capacity, and calling out after hours, you must contact a person at the program and the On Call Supervisor (if required) so coverage can be arranged. The employee must speak directly to another person. Merely leaving a voicemail message or speaking to an answering machine is not acceptable, as there is no guarantee when the message will be received."
7. On October 30, 2020, November 16, 2020, and May 17, 2022, the employer issued the claimant written warnings for not following the Tardiness/Absences from Work/Call Out Procedure policy.
8. The employer's policy does not specifically list that employees are not permitted to arrange for other workers to cover their shift in the event they are going to be absent from work.
9. The employer expects employees not to arrange for co-workers to cover their shifts in the event they will be absent from work. The employer has this expectation to utilize the employer's per diem pool staff coverage instead of having to pay overtime to other employees. The employer also has this expectation to avoid employees making arrangements with co-worker friends to cover shifts they will be absent from work for.

10. On February 10, 2022, the claimant's supervisor issued the claimant a verbal supervision for the claimant not to arrange for other co-workers to cover his shift in the event he has to be absent from work.
11. The employer notified the claimant in the past that it was not excusable for the claimant be absent from work for reasons of finding another worker to cover his scheduled shift. The employer requires supervisors to find adequate shift coverage in the event a worker must be absent from work.
12. The claimant knew that he did not have the authority to arrange for other individuals to cover his work shifts.
13. The claimant was scheduled to work the shift that ran from Monday June 13, 2022 11 p.m. until Tuesday June 14, 2022 at 7 a.m.
14. On the morning of Monday June 13, 2022, the claimant contacted the employer's establishment by telephone during the 1st shift at approximately 8 a.m. and notified the 1<sup>st</sup> co-worker that the claimant was going to be absent from work due to illness, was having the 2<sup>nd</sup> co-worker cover his shift that was starting at 11 p.m. on June 13, 2022, and to inform the supervisor of this information. At the time the claimant initiated the telephone call, the supervisor had not yet reported to work. The supervisor subsequently reported to work at approximately 9 a.m. The 1<sup>st</sup> co-worker subsequently informed the supervisor of this information. The 1<sup>st</sup> supervisor did not reach out to the claimant as the claimant had been warned in the past by the 1<sup>st</sup> supervisor for improper call out procedures and having other workers cover his shifts. The 1<sup>st</sup> supervisor referred the matter to the employer's Human Resources Department. The 2<sup>nd</sup> co-worker did work the claimant's June 13, 2022, scheduled shift.
15. On June 13, 2022, the claimant did not inform a supervisor or a member of management directly that he was going to be absent from work for his shift beginning on June 13, 2022, at 11 p.m.
16. On June 14, 2022, the Human Resources Director had a telephone conversation with the claimant about his improper call out for his shift of June 13, 2022. The Human Resources Director initiated this telephone call to the claimant to collect a statement from the claimant regarding the claimant's absence from work for the shift of June 13, 2022.
17. During the June 14, 2022, telephone conversation, the claimant informed the Human Resources Director that the claimant was absent due to feeling ill and also having some maintenance done on his house. During this telephone conversation, the claimant admitted to the Human Resources Director that the claimant had made arrangements the Saturday prior to the June 13, 2022, shift for another co-worker to cover his Monday June 13, 2022 shift. At this time, the employer placed the claimant on an unpaid suspension.

18. On June 22, 2022, the employer's Human Resources Director informed the claimant during a telephone conversation that the claimant was discharged from work.
19. The claimant subsequently filed an initial claim for unemployment benefits.
20. On a questionnaire that the claimant submitted to the Department of Unemployment Assistance (DUA) for consideration regarding the employer's establishment, the claimant reported the following: "yes, i called [supervisor] on her phone the night before to notify her that I was going to be out. I left her a voice message. I did not hear back and called the house i work at the morning of to notify [supervisor] but she was late for work that morning, so i left a message with my co-worker [1<sup>st</sup> coworker] to let [supervisor] know that [2<sup>nd</sup> co-worker] was going to be working for me."
21. The primary reason the employer discharged the claimant from work was because the claimant failed to follow the employer's calling out procedures by arranging to have a co-worker cover his scheduled Monday June 13, 2022, shift starting at 11 p.m., which the claimant was absent from work due to a combination of illness having maintenance performed on his home.

#### Credibility Assessment:

During the hearing, the claimant contended that he did not arrange for a co-worker to cover his scheduled Monday June 13, 2022, shift and did not admit to the Director of Human Resources during a telephone conversation on June 14, 2022, that he had had made arrangements the Saturday prior to the June 13, 2022, shift to have a co-worker cover his shift. However, the Human Resources Director's testimony to the contrary is assigned more weight where the Human Resources Director's testimony was specific, consistent and adamant that the claimant admitted during the June 14, 2022, telephone conversation that he had made arrangements the Saturday prior to the June 13, 2022, shift for another co-worker to cover his Monday June 13, 2022, shift. During the hearing, the claimant initially testified that he did admit during a telephone conversation with the Human Resources Director that he had made arrangements for a co-worker to cover his June 13, 2022, shift. However, the claimant subsequently testified that he did not admit during a telephone conversation with the Human Resources Director that he had made arrangements for a co-worker to cover his June 13, 2022, shift. The claimant's testimony is also not deemed credible where on a questionnaire that the claimant submitted to the DUA for consideration, the claimant reported in part: "...so i left a message with my co-worker [1<sup>st</sup> co-worker] to let [supervisor] know that [2<sup>nd</sup> co-worker] was going to be working for me." These inconsistencies in the claimant's testimony and information the claimant provided to the DUA causes the Human Resources Director's testimony to the contrary to be assigned more weight.

The overall testimony of the employer is assigned more weight than the overall testimony of claimant where the employer's testimony was more specific and easier to follow compared to the testimony of the claimant during the hearing.

### 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 decision 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. As discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is not entitled to benefits.

As the claimant was discharged, 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 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).

The employer did not provide evidence demonstrating that other employees who violated the employer's attendance policy under similar circumstances were discharged. Therefore, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must show that the claimant engaged in the misconduct for which he was discharged. In this case, the employer discharged the claimant, because he had failed to follow proper call-out procedure when he arranged to have another co-worker cover his shift prior to calling out. Consolidated Findings ## 9 and 21. After assessing the testimonial and documentary evidence presented by the parties at both hearings, the review examiner rejected as not credible the claimant's contention that he had not secured coverage for his June 13, 2022, shift before calling out. The review examiner found this testimony not credible, because it contradicted statements that the claimant had previously provided to the DUA and was inconsistent with other parts of his testimony in the remand hearing. *See* Consolidated Finding # 20. 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). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Consistent with her credibility assessment, the review examiner found that the claimant had arranged coverage for his shift on June 13, 2022. Consolidated Finding # 14. As the claimant necessarily needed to take proactive steps to contact a co-worker and ask them to cover his shift, his actions in so doing were self-evidently deliberate.

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. 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). 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). 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).

The employer expected its employees would not independently seek coverage for their shifts because it prevented the employer from utilizing an on-call system it created in an effort to limit unnecessary overtime and minimize costs. Consolidated Finding # 9. We believe that this expectation to be facially reasonable. As he had already been disciplined for failing to adhere to this expectation on February 10, 2022, the claimant understood that the employer expected him not to arrange for other employers to cover his shifts. Consolidated Findings ## 10 and 12. Thus, we believe the record supports a conclusion that the claimant was aware his decision to secure coverage prior to reporting his absence for his shift on June 13, 2022, was inconsistent with the employer's expectations.

We finally consider whether the record indicated the presence of mitigating circumstances. At the remand hearing, the claimant maintained that he had not secured coverage for his shift prior to calling out on June 13, 2022. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See Lagosh v. Comm'r of Division of Unemployment Assistance*, No. 06-P-478, 2007 WL 2428685, at \*2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found). As the review examiner reasonably rejected the claimant's testimony that he had not already secured coverage when he called out, the claimant's continued denial precludes him from asserting mitigating circumstances for 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 affirmed. The claimant is denied benefits for the week of June 19, 2022, 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.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 15, 2023**



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](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.

LSW/rh