Because the review examiner credited claimant's testimony that he was absent from work because he did not have childcare, and there is no evidence to suggest it was due to lack of effort to find childcare, held there were mitigating circumstances for his excessive absenteeism. Held the claimant's misconduct was not done in wilful disregard of the employer's interest, and he is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0078 0574 79

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 his position with the employer on July 29, 2022. He filed a claim for unemployment benefits with the DUA, effective July 31, 2022, which was denied in a determination issued on October 5, 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 April 28, 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 additional information regarding the claimant's separation. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest, because the claimant failed to show that his lack of childcare presented as a valid mitigating circumstance, 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 January 8, 2018, the claimant began working as a full-time (40 hours per week) recruiter for the employer, a telecommunication company.

2. The claimant's direct supervisor was the employer's regional human resources (HR) manager.

3. When the claimant was originally offered the job, it was for a senior recruiter position that came with a 10% bonus.

4. When the claimant began working for the employer, the employer had him work in a recruiter position, with no bonus.

5. In or around May 2022, the claimant made an ethics complaint against his supervisor to the employer's director of human resources. The complaint was about how the supervisor offered him a senior recruiter position eligible for bonuses but ended up having him work as a recruiter with no bonuses.

6. On July 14, 2022, the employer offered the claimant a settlement payment agreement, offering him $6,500 if he agreed not to sue the employer for actions arising out of his employment.

7. The claimant rejected the settlement offer because he felt the employer owed him money much more than $6,500 in unpaid bonuses.

8. From the beginning of the claimant's employment with this employer, the claimant adopted a work schedule that allowed him to drop off his children at school in the morning and pick them up from school in the afternoon.

9. The claimant has three children aged 15, 13, and 10.

10. None of the claimant's children suffer from any medical conditions that require specialized care.

11. Two of the claimant's children cannot be left alone without adult supervision because they [sic] "butt heads."

12. In May of 2021, the claimant and his wife separated.

13. On January 25, 2022, a Massachusetts court issued an order allowing the claimant and his ex-wife joint legal and physical custody of the children.

14. Per the court order, the claimant would pick up the children on Monday, and drop them off on Wednesday. Each parent would also have the children every other weekend.

15. Per their divorce agreement, each parent was required to drop off the children at school and pick them up from school on their scheduled days. The claimant

did not look for alternative means of transportation because that would violate their divorce agreement.

16. On Mondays, Tuesdays, and Wednesdays, the claimant dropped the children off at school then headed to the office in [City A].

17. The claimant's two elder children left school at 2:00 p.m.

18. On Mondays and Tuesdays, the claimant would leave the office at about 1:50 p.m. to go and pick up his two elder children from school. The claimant would be back in the office by 2:30 p.m.

19. The claimant's youngest child left school at 3:35 p.m.

20. The claimant would leave the office at around 3:25 p.m. to go and pick up his youngest child from the school.

21. After picking up the youngest child from school, the claimant would not return to the office. Instead, he would continue working from his home, doing tasks such as picking up calls and setting up interviews.

22. The claimant's mother (hereafter, "babysitter") helped the claimant take care of his children, typically from 8:40 a.m. to 5:30 p.m.

23. In the summer of 2022, when schools closed for the summer, the claimant's children were home.

24. The children did not attend an after-school program or a summer camp program.

25. The babysitter helped take care of the children in the summer so the claimant could work.

26. On June 26, 2022, the babysitter notified the claimant that she would be going away on vacation starting on July 1, 2022.

27. When the claimant learnt that the babysitter would be going away, he contacted his neighbor to see if she could watch the children on the days the babysitter would be away. The neighbor stated that she would.

28. On an unknown date close to July 1, 2022, the neighbor notified the claimant that she would not be able to watch the children as previously promised.

29. The claimant attempted to find other people amongst his friends, cousins, and other family members to watch over the children, but no one was available.

30. The babysitter went on vacation from July 1, 2022, to July 17, 2022. She was initially supposed to return on July 7, 2022, but she ended up extending her vacation.

31. The claimant did not have anyone to watch his children on the days they were in his home from July 1, 2022, to July 17, 2022.

32. On December 7, 2021, the employer placed the claimant on a performance improvement plan (PIP).

33. The employer placed the claimant on the PIP after [it] received complaints from clients that the clients were unsatisfied with the claimant's work, and that the claimant did not respond to client emails.

34. The PIP stated that the claimant was expected to be physically present in the office in [City A] from 9:00 a.m. to 6:00 [p.m.], with a one-hour lunch break, and that any deviation in the schedule or work location had to be pre-approved by the employer.

35. The claimant was on a family and medical leave act (FMLA) leave of absence for about 4 months roughly between December 2021 and May 2022.

36. When the claimant returned to work from the leave of absence, he expected to continue working in the same capacity, i.e., he expected to continue having the same flexibility that allowed him to drop off and pick up his kids at school. The claimant did not request any change in his schedule.

37. The employer maintains an attendance and punctuality policy stating that the employer expects employees to be reliable, punctual, and prepared to begin work at the designated start time.

38. Whenever an employee will be away on an unexpected absence, the policy requires them to notify the employer that they will be absent, and why they will be absent, as soon as possible and before the beginning of the affected shift.

39. Employees who violate the employer's policy "may be subject to corrective action, up to and including termination of employment."

40. The policy states that even absences that may be deemed "excusable" could lead to disciplinary action if they are excessive because they cause "interruptions in productivity and increased costs."

41. The employer expects that employees will not be absent from work excessively.

42. The employer maintains the attendance policies and expectations in order to maintain a productive work environment.

43. The claimant signed off on the employer's policy at onboarding when he was hired.

44. On June 20, 2022, the claimant emailed his supervisor at 7:35 a.m. stating that he was sick and would take a sick day for the morning hours and would work from home in the afternoon if he was feeling better.

45. On June 21, 2022, the claimant emailed his supervisor at 8:35 a.m. stating that he was still feeling unwell and was going to work from home that day.

46. On June 22, 2022, the claimant emailed his supervisor at 9:35 a.m. stating that he was still feeling unwell and would work from home that day.

47. On June 27, 2022, the employer re-issued a PIP to the claimant.

48. The supervisor emailed the PIP to the claimant on June 27, 2022, at 10:25 a.m.

49. The PIP stated that the claimant was expected to be in the Worcester office during work hours, and that working from home was not an option for him during the PIP period.

50. On June 28, 2022, the claimant was away from the office for four hours and stated that he had childcare challenges.

51. On June 29, 2022, the claimant was away from the office for four hours and stated that he had childcare challenges.

52. On June 30, 2022, the claimant was away from the office for three hours and stated that he had a flat tire.

53. On July 1, 2022, the claimant was away from the office for eight hours and stated that he had childcare challenges.

54. On July 5, July 6, and July 13, 2022, the claimant was away from the office for eight hours and stated that he had issues with his car.

55. On July 11, 2022, the claimant was away from the office on an excused absence.

56. On July 14, 2022, the claimant was away from the office for 3.75 hours and stated that he had issues with his car.

57. On July 18, 2022, the claimant was away from the office for four hours and stated that he had issues with his car.

58. On July 22, 2022, the claimant was away from the office for eight hours and stated that he had childcare challenges.

59. On July 25, 2022, the claimant was away from the office on an approved absence because he had a court date.

60. On July 26, 2022, the claimant was absent from the office and gave no reason for the absence.

61. On July 27, 2022, the claimant was away from the office for eight hours and stated that he was expecting a house visit related to child custody issues.

62. On July 29, 2022, the claimant was absent from the office for eight hours and stated that he had childcare and car challenges.

63. On July 29, 2022, the supervisor spoke with the claimant and told him that the employer needed him to be physically present in the office.

64. The claimant told the supervisor that he could not be in the office because he did not have a babysitter, and he could not leave his children without a babysitter.

65. The supervisor told the claimant that it would be better if they "parted ways."

66. The employer discharged the claimant on July 29, 2022, because of the claimant's excessive absences.

Credibility Assessment:

The claimant and the instant employer's regional HR manager i.e., the claimant's supervisor, participated in the initial virtual hearing held on April 10, 2023. Only the claimant participated in the remand virtual hearing held on November 6, 2023. The employer did not attend this hearing. The claimant's testimony particularly regarding his childcare situation was consistent in both hearings, and in his submissions to the DUA. Because of this consistency, this review examiner credits the claimant's testimony as credible. Similarly, the employer's witness's testimony particularly regarding the claimant's multiple absences is credited as credible because it is supported by multiple email conversations between the claimant and the employer.

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 not eligible for benefits.

Because the claimant was terminated from his employment, his 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. . . .

"[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).

Following the initial hearing, the review examiner concluded that the employer had met its burden. After reviewing the record, we disagree. However, in doing so, we must reiterate what the Board's role and standard of review is at this stage of the administrative process. The "inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited . . . to determining whether the review examiner's findings are supported by substantial evidence." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979). To satisfy the substantial evidence requirement, the review examiner's findings, conclusion, and decision "need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon reasonable evidence, that is, 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Gupta v. Deputy Dir. of Department of Employment and Training, 62 Mass. App. Ct. 579, 582 (2004). Since the Board did not hold a hearing in this matter, we cannot make findings of fact. We also cannot set aside the review examiner's credibility determination unless it is unreasonable or unsupported by the evidence before her. In unemployment proceedings, "[the] responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985). In other words, even if the Board could have viewed the circumstances surrounding the claimant's separation differently from the review examiner, and even if the Board would have made *different* findings of fact than the review examiner's findings, we cannot substitute our judgment for the review examiner's view of the evidence. Keeping in mind our standard of review, we now address the case before us.

The consolidated findings show that the employer maintained discretionary authority in the form of discipline for any violation of its attendance policy. *See* Consolidated Findings ## 37–39. Since the employer failed to provide any evidence showing that it discharged all employees who violated its attendance policies under similar circumstances, it has failed to meet its burden to show that the claimant violated a reasonable and *uniformly enforced* policy. Alternatively, the employer may show that the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest.

To meet its initial burden, the employer is required to show that the claimant engaged in misconduct. The employer fired the claimant for taking excessive absences in violation of its attendance policy. *See* Consolidated Findings ## 41 and 40. After the June 27, 2022, performance improvement plan was instituted, the claimant was absent all or part of the workday on 15 separate occasions. *See* Consolidated Findings ## 50–62. Thus, we agree that he engaged in misconduct, as so many absences in a single month were excessive.

The employer is also required to show that the claimant's actions were deliberate. We note that the claimant's termination was the result of many absences over a period of one month and not specifically as a direct result of the final instance that occurred on July 29, 2022. *See* Consolidated Finding # 66. On each of his absences, the claimant testified that he contacted the employer and informed them that he would not being going into the office as scheduled. *See* Consolidated Findings ## 50–62. Thus, by giving advance notice of his absence, there is no question that the claimant's actions were deliberate acts.

We next consider whether the claimant's misconduct was done 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). 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) (citation omitted). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Id. at 95.

The claimant does not dispute that he was aware of the employer's expectation that prohibited excessive absenteeism. *See* Consolidated Findings # 41 and 43. We believe that expectation to be reasonable considering the employer's need to maintain a productive working environment. *See* Consolidated Finding # 42.

Nonetheless, the claimant will not be disqualified if his misconduct was attributable to mitigating circumstances. 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).

Here, the claimant has maintained that he was unable to report for work due to circumstances beyond his control. *See* Consolidated Finding # 42. We believe that the record supports that assertion. The findings reflect that the claimant has three minor children, and that he shares joint physical and legal custody with his ex-wife. *See* Consolidated Findings ## 9 and 13. The review examiner credited the claimant's testimony that he could not report for work in the office because he did not have a babysitter for his children. *See* Consolidated Finding # 64. As the record reflects that the claimant was experiencing childcare issues during this period, and there is no evidence to suggest that it was due to lack of effort in securing childcare arrangements, the review examiner's view of the evidence and testimony is reasonable despite evidence in the record which might support a different conclusion. *See* Board of Review Decision 0031 9373 66 (May 14, 2020). In light of this credibility assessment, the claimant has met his burden to show that his actions were

not done in wilful disregard of the employer's interest but due to the mitigating circumstance of lacking childcare.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interests as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 6, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 9, 2024

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Pau 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.

DY/rh