

Where the employer required a written note from a medical provider to verify the medical reason for an absence, and the claimant instead provided a photograph that showed a facial rash, the Board ruled that the claimant did not act in wilful disregard of the employer's interest. Held he was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0078 1644 20

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 affirm.

The claimant was discharged from his position with the employer on August 31, 2022. He filed a claim for unemployment benefits with the DUA, effective August 28, 2022, which was denied in a determination issued on September 28, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 10, 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, he 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 further evidence about the claimant's reason for his final absence. Only the employer 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 did not understand that his absence would result in discipline, 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 full time cleaning operating rooms at a hospital for the employer, an environmental cleaning business, from 1/19/2022 to 8/31/2022.

2. The claimant worked a schedule of 37.5 hours per week, at \$16.50 per hour.
3. The claimant's shift was from 7:00 a.m. to 3:00 p.m.
4. The employer had an attendance policy (policy) requiring employees to present at work when scheduled and on time, and to notify the employer in advance if they could not work as scheduled.
5. The policy assigned points for tardiness and absences, called "occurrences." Accumulating 3 points results in a written coaching, 6 points in a written warning, and 7 points in termination.
6. The policy requires employees to provide written verification from their medical providers of their illness for leave to be approved.
7. The claimant signed off on receipt of the policy and the employee handbook.
8. The written warnings the claimant received for attendance described the policy's point system.
9. The claimant's first language is Spanish, but the claimant was proficient in spoken and written English.
10. The claimant understood that points would be assigned for unapproved tardiness and absence occurrences. The claimant did not understand how the policy's point system worked with his accrued sick time.
11. The claimant accrued sick time at a rate of 1 hour per every 30 hours worked.
12. Accrued sick time allows the employee to be paid whether or not an absence or an attendance occurrence is approved.
13. The availability of sick time does not excuse an unapproved absence.
14. The employer expected the claimant to work as scheduled, and to notify the employer ahead of his shift if he could not do so.
15. The claimant was told he should not report to work when sick.
16. Prior to his separation, the claimant received attendance points/occurrences on the following dates: 6/13/2022 tardy; 6/30/2022 no call-no show; 7/1/2022 no call-no show; 7/5 to 7/7/2022 absence; 7/18/2022 tardy; 7/19/2022 tardy; 7/20/2022 tardy; 8/5/2022 no call-no show.

17. The employer issued the claimant a written coaching on 7/11/2022 when the claimant accumulated 7 points. The employer issued the claimant a final written warning on 8/11/2022 when the claimant accumulated 11.5 points.
18. The claimant called out on 8/17/2022 at 8:00 a.m. or 9:00 a.m., after the start of his scheduled shift.
19. On 8/17/2022, the claimant called out of his scheduled shift because his face was peeling, and he believed he was sick with monkey pox, which was a virus that was spreading largely in the gay community at this time.
20. The claimant is gay.
21. When the claimant called out of his shift on 8/17/2022, he did not believe he would be disciplined because he had accrued sick time available that he believed he could use for his absence.
22. On 8/17/2022 at about 9:45 a.m., the employer's human resources manager spoke with the claimant by phone and notified him he was being suspended while an investigation was done concerning his absence that day.
23. The claimant sent a text message to the human resources manager. The text message was a photo of the claimant's face with a rash.
24. The claimant did not provide the human resources manager with a medical note of the condition on his face referenced in the 8/17/2022 texts.
25. The human resources manager classified the claimant's absence on 8/17/2022 as unapproved.
26. The employer paid the claimant for 8/17/2022 using his accumulated sick time.
27. On or about 8/18/2022, the claimant's doctor diagnosed his condition as a type of facial herpes virus.
28. On 8/31/2022, the human resources manager discharged the claimant for being absent from his shift on 8/17/2022.

Credibility Assessment:

The human resources manager credibly testified in detail in the remand hearing about the events of 8/17/2022 based on his own first-hand knowledge. The human resources manager was deemed credible because he was able to provide exact information about the claimant's attendance points and disciplinary history along with direct testimony concerning what happened on 8/17/2022.

The claimant's testimony from the original hearing that he believed he was sick on 8/17/2022 was credible. The claimant originally testified that he provided a photo of his face to the human resources manager showing the rash. During the remand hearing, the human resources manager corroborated the claimant's testimony from the original hearing, testifying about and submitting this photo as an exhibit. The claimant's belief that he may have had monkeypox was reasonable given his forthcoming and detailed testimony that this was spreading largely in the gay community at this time and that he is gay.

At the original hearing, the claimant detailed that he visited his doctor on or about 8/18/2022 and was diagnosed with type of facial herpes virus. While the employer did not submit medical documentation to corroborate the claimant's testimony on this point, this was reasonable given the human resources manager's testimony that the claimant did not submit a medical note to them. Despite the fact that the claimant did not participate in the remand hearing and did not upload a medical note, the claimant's testimony alone about visiting his doctor and receiving a diagnosis was nonetheless deemed credible. The facial diagnosis seemed reasonable and plausible in light of the rash the claimant had on his face at the time, the photo of which is in the record.

In summary, the employer presented credible evidence showing that on 8/17/2022, it received text messages and a photo from the claimant and although the claimant did not follow up with the required medical documentation to confirm his condition, his testimony about the rash was credible and the photo showed a rash on his face.

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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant was discharged from employment, his eligibility for benefits must be analyzed pursuant to G.L. c. 151A, § 25(e)(2), which states, in relevant 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).

Here, the employer discharged the claimant for his absence on August 17, 2022. Consolidated Finding # 28. Because the claimant did not provide the employer with a medical note to explain the reason for missing work, the absence was not approved. As such, the absence was misconduct. *See* Consolidated Findings ## 24 and 25. We can reasonably infer that this misconduct was deliberate, because the claimant called the employer to notify it of his absence, and nothing in the record indicates that the claimant was unable to obtain, or forgot to provide, a medical note on August 17, 2022. *See* Consolidated Findings ## 18 and 19.

However, a showing of deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer’s interest. Deliberate misconduct in wilful disregard of the employer’s interest suggests intentional conduct or inaction which the employee knew was contrary to 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). 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) (citation omitted). 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).

Consolidated Findings ## 19 and 23 indicate that the claimant was absent on August 17, 2022, because of a rash. Apparently, he had a type of facial herpes. *See* Consolidated Finding # 17. When its employees needed to be absent due to illness, the employer expected them to provide written verification from a medical provider. Consolidated Finding # 6. We believe that the expectation is a reasonable measure to ensure that employees do not call out sick when they are not sick. Here, the claimant did not provide the employer with the required medical provider verification. Instead, he gave the employer a photograph showing the rash. *See* Consolidated Findings ## 6 and 23. In submitting this photograph, we can reasonably infer that the claimant knew that he had to provide proof of his medical reason for being out.

Despite an employer policy, which provides for termination after an employee accrues seven points due to absenteeism, the claimant was still working with 11.5 points. *See* Consolidated Findings ## 16 and 17. Thus, we can infer that failure to submit a medical note for this last absence triggered his discharge.

The Supreme Judicial Court has stated that behavior is not done in wilful disregard of the employer’s interest, where the claimant acts to further the employer’s goals. *See* Garfield, 377 Mass. at 98 (claimant took alternative steps to prepare store for his absence, where he believed he could not reach the district manager); *see also* Fallon Community Health Plan v. Acting Dir. of

Department of Unemployment Assistance, No. SJC-13440, 2024 WL 899770 at 4 (Mass. Mar. 4, 2024), Slip Opinion (rather than disregarding employer's interest, claimant offered to take several measures in lieu of vaccination to safeguard employer's vulnerable patient population). In this case, although the claimant did not provide a written medical note, the photograph that he provided to the employer on August 17, 2022, clearly shows a rash on his face. Consolidated Finding # 23; *see also* Remand Exhibit 6.¹ Because this photographic evidence corroborates the medical reason for his absence, we cannot conclude that the claimant acted in wilful disregard the employer's interest.

We also agree that the employer did not show a knowing violation of a reasonable and uniformly enforced rule or policy. It did not enforce the attendance policy's progressive discipline with the claimant according to the point system stated in the policy. *See* Consolidated Findings ## 5 and 17. This indicates that its policy was not *uniformly enforced*.

We, therefore, conclude as a matter of law that the employer failed to sustain its burden to show that the claimant either knowingly violated a uniformly enforced rule or policy, or engaged in 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 entitled to receive benefits for the week beginning August 28, 2022, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 2024



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

¹ The photograph contained in Remand Exhibit 6 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).

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