

**Review examiner’s legal conclusion that the claimant’s absences from work were deliberate misconduct in wilful disregard of the employer’s interests is unsupported by substantial and credible evidence, where there are no findings regarding the claimant’s state of mind, and the employer’s inconsistent application of its own attendance policy and tolerance of several instances of absenteeism and tardiness clouded the claimant’s awareness that the attendance policy would be enforced.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
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 2135 12**

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 September 8, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 21, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties<sup>1</sup>, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on January 26, 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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal.

The issue before the Board is whether the review examiner’s conclusion that the claimant engaged in deliberate misconduct by being absent or late to work 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. The claimant worked full time as a dock worker for the employer, a freight company, from June 25, 2021, through September 8, 2022.

---

<sup>1</sup> The employer participated as a witness only.

2. The claimant's immediate supervisor was the dock supervisor (DS).
3. The employer maintained an attendance policy which required employees, including the claimant, to report to work as scheduled. The employer maintained this policy to ensure adequate staffing. The claimant was informed of this policy at the time of hire. Violations of this policy were disciplined at the employer's discretion based upon the circumstances of the violation.
4. The employer maintained an expectation that employees report to work as scheduled, and employees who would not arrive to work as scheduled were required to contact their supervisor at least an hour before their scheduled start time. The employer maintained this expectation to ensure adequate staffing, and to allow the employer to adjust staffing at given locations if an employee would not arrive as scheduled. The claimant was reminded of this expectation when he received multiple warnings about his attendance.
5. On unknown dates, the claimant called off from work as expected, when he was going to be absent or late to work. On multiple occasions, the claimant did not call off from work when he was going to be late or absent from work.
6. On unspecified dates, the DS verbally warned the claimant about his attendance.
7. The claimant was issued a written warning regarding his attendance in December of 2021, and February of 2022.
8. The claimant was placed on a final written warning for attendance issues in March of 2022, and was warned that any additional attendance infractions could cause his discharge from the company.
9. On unknown dates, the claimant was late or absent from work because his car was unreliable. The claimant had a motorcycle that he could take to work, and he did not want to use the motorcycle to travel to work in inclement weather. The claimant had family and friends that would give him a ride to work on occasion.
10. On unknown dates, the claimant was absent from work because he was caring for his young daughter.
11. In July of 2022, the claimant was absent from work on three occasions, and was at least twenty minutes late to work on four occasions.
12. In August of 2022, the claimant was absent from work on five occasions, and was at least thirty minutes late to work on six occasions.
13. The claimant was absent from work on September 1, 2022, and September 6, 2022.

14. The claimant was discharged September 8, 2022, because he continued to be late or absent from work as scheduled, and failed to consistently notify the employer when he was going to be late or absent from work.

### 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 original 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 do not believe these findings support the review examiner's legal conclusion that the claimant is ineligible for benefits.

Since the record establishes that the employer discharged the claimant from his employment, this case 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 . . .

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's actions were deliberate and 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. *See* 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, 377 Mass. at 97.

The review examiner's findings of fact do not support a conclusion that the claimant had the requisite state of mind to warrant disqualification. The review examiner made no findings that the claimant was intentionally or deliberately absent from work on September 1, 2022, or September 6, 2022. The review examiner only found that the claimant was aware of the employer's expectations prior to September, 2022. *See* Findings of Fact ## 3 and 4.

Furthermore, it is well-established that an employer's inconsistent application of discipline can cloud its expectations. *See* Gold Medal Bakery, Inc. v. Comm'r of Division of Unemployment Assistance, No. 08-P-767, 2009 WL 995867 (Mass. App. Ct. Apr. 15, 2009), *summary decision pursuant to rule 1:28* (awarded unemployment benefits to a claimant who had been discharged for an absence, because the employer's attendance policy had been "inconsistently applied."). The

Court found that the fact that the employer had effectively excused the claimant's past absences led the claimant to "reasonably [believe] that his absence . . . would be excused as it had been before, and that [he] did not possess the requisite state of mind" to be disqualified for deliberate misconduct. *Id.* See also New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 533–535 (2004) (where the employer had overlooked the claimant's prior absences and then discharged the claimant for excessive absences, the employer led the claimant “to believe that he would not lose his job for failing to adhere to the attendance policy's . . . requirements.”).

Here, the review examiner found that the employer issued a series of verbal and written warnings for attendance violations between December, 2021, and February, 2022. Findings of Fact ## 6–7. The review examiner also found that the employer then issued the claimant a “final” written warning in March, 2022, that informed the claimant that his job was in jeopardy due to his ongoing attendance issues. Finding of Fact # 8. The review examiner further found that, after the issuance of this “final” warning, the claimant had 18 additional incidents of absenteeism and tardiness in July, 2022, and August, 2022. Findings of Fact ## 11–12. Nothing in the record, including the employer’s testimony, shows that the claimant was disciplined for any of these incidents. The employer finally discharged the claimant on September 8, 2022, after he was absent from work on September 1, 2022, and September 6, 2022. Under these circumstances, the claimant cannot have reasonably known that the final two absences from work on September 1, 2022, and September 6, 2022, would have violated the employer’s expectations, as it appears from the record that the employer tolerated the same behavior (absenteeism) on at least eight prior occasions after the issuance of the “final” warning.<sup>2</sup>

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 under G.L. c. 151A, § 25(e)(2).

---

<sup>2</sup> In fact, the claimant testified that he did not expect to be discharged by the employer when he reported to work on September 8, 2022. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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 review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning September 4, 2022, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - April 13, 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.

JMO/rh