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, given the employer's inconsistent application of its own attendance policy. Because the review examiner credited claimant's testimony that she was absent from work because she did not have childcare, held there were mitigating circumstances for her misconduct. The claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0078 2611 92

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 her position with the employer. She filed a claim for unemployment benefits with the DUA, effective September 18, 2022, which was denied in a determination issued on November 9, 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 March 3, 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. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest because the claimant failed to return to work or notify the employer of her absence after being cleared to return to work, 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 as a delivery associate for the employer, a contractor for an online retailer. The claimant began work for the employer on October 25, 2021. She worked Sunday through Wednesday, from 9:15 a.m. until completion, and earned $18.50 per hour.

2. The claimant sometimes picked up additional shifts if they were available.

3. The employer maintains an attendance and punctuality policy that states, excessive "occurrences" of tardiness or absenteeism in a rolling six-month period may subject an employee to discipline.

4. The employer uses its discretion to enforce their attendance and punctuality policy.

5. The claimant was not aware of the employer's written policies.

6. The employer maintains an expectation that employees who will be absent from work call the dispatcher to inform them before their shift. The claimant was aware of the expectation.

7. Before her separation, the claimant had been ill. Her symptoms included fatigue, nausea, and dizziness. On April 4, 2022, she consulted with her medical provider about cystitis. The claimant also received vaccinations and was concerned they were causing her to feel ill.

8. The claimant called out of work on April 11, 2022, May 3, 2022, and May 29, 2022, because she did not feel well.

9. The claimant's supervisor, the director of operations, told her that her attendance was getting bad. The employer did not issue her any formal or written discipline.

10. The claimant last performed work for the employer on Tuesday, June 14, 2022.

11. On Wednesday, June 15, 2022, the claimant was absent from work, but did not call out.

12. On Thursday, June 16, 2022, the claimant called out sick.

13. The claimant remained out of work but did not call out.

14. The employer held her job because they believed she was ill and needed drivers for upcoming promotions by the online retailer.

15. On June 22, 2022, the HR manager sent the claimant a text message, informing her that when she returned to work, she would need a note from a medical provider clearing her to work.

16. There was no communication between the claimant and the employer between June 22, 2022, and July 11, 2022.

17. On July 11, 2022, the claimant texted the HR manager a photo of her provider's medical note. The note cleared the claimant to return to work on July 12, 2022.

18. The claimant spoke with the dispatcher, who told her she was scheduled to work the next day, July 12, 2022.

19. The claimant has a 10-year-old son. The claimant's son lived with the claimant's grandmother in [City], MA, during the school year. In July 2022, the claimant's son returned to live with her.

20. The claimant's family usually assisted her with childcare.

21. The claimant's mother and grandmother could not help care for her son on July 12, 2022. The father of the claimant's son was working and was also unavailable.

22. The claimant called the dispatcher and told him she did not have a babysitter and could not come to work. The dispatcher was upset. The claimant said to him that at least she was calling.

23. The HR manager and the director of operations discussed the claimant's attendance and decided to discharge her.

24. The HR manager sent the claimant a text message informing her they would no longer employ her because of her poor attendance.

Credibility Assessment:

The only discrepancy between the claimant and the employer witness at the hearing concerned the claimant's communication after June 14, 2022. The claimant testified that she always let the employer know if she was not going to work. However, the claimant provided no evidence to support her allegation. The human resources manager, the employer witness at the hearing, testified they only heard from the claimant on June 16, 2022, and when they received the note from her medical provider on July 11, 2022. Because the claimant did not provide evidence of additional communication, the human resources manager's testimony is found to be credible.

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. 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 her 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. . . .

"[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 are 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 Finding # 4. 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 excessive absenteeism, which is in violation of its attendance policy. *See* Consolidated Findings ## 23–24. After her supervisor informed her that her attendance was "getting bad," the claimant was absent from work for several consecutive shifts beginning June 15, 2022, through July 12, 2022. *See* Consolidated Findings ## 9, 11–13, and 22. Specifically, the claimant was absent for fifteen shifts within that timeframe. Thus, we agree that she engaged in misconduct, as so many absences in a single month can reasonably be regarded as excessive.

However, we must next consider whether the claimant acted deliberately and in wilful disregard of the employer's interest. 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. 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 review examiner's findings of fact do not support a conclusion that the claimant had the requisite state of mind to warrant disqualification. Although the review examiner made no findings that the claimant was intentionally or deliberately absent from work on July 12, 2022, the fact that she called the dispatcher to say that she could not report for work indicates that she deliberately chose not to report for work. *See* Consolidated Finding # 22.

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 Appeals 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 claimant's supervisor informed her that her attendance was getting bad, but the employer did not issue any formal or written discipline for those occurrences. *See* Consolidated Findings ## 8–9. There are no findings, and nothing in the record

indicates, that the employer disciplined the claimant for subsequently missing fifteen consecutive shifts in June and July 2022. Moreover, the employer acknowledged inconsistencies between its written policy and its application, testifying that, although the written attendance policy refers to a progressive disciplinary scheme that includes coaching and written warnings before termination, "our policy with attendance has always been verbal."[1] *See* Exhibit 1.[2] The employer finally discharged the claimant after she was absent from work on July 12, 2022. *See* Consolidated Finding # 24. Under these circumstances, the claimant cannot have reasonably known that the final absence from work on July 12, 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 fifteen prior occasions after the claimant's supervisor had spoken with her about her attendance.

In addition, the claimant will not be disqualified if her 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).

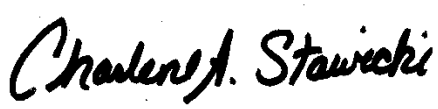
Here, the claimant has maintained that she was unable to report for work on July 12, 2022, due to circumstances beyond her control. *See* Consolidated Finding # 21. The record supports that assertion. The findings reflect that the claimant has one minor child, and that the child had returned to live with her at the end of the school year. *See* Consolidated Finding # 19. The review examiner credited the claimant's testimony that she could not report for work because she did not have a babysitter for her child that day. *See* Consolidated Findings ## 21–22. Further, the record reflects that the claimant was experiencing childcare issues during this period, and there is nothing in the record to suggest that it was due to lack of effort in securing childcare arrangements. The claimant has met her burden to show that her 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's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest 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 beginning July 10, 2022, and for subsequent weeks if otherwise eligible.

[1] The employer's testimony, while not explicitly incorporated into the review examiner's consolidated findings, is part of the unchallenged evidence introduced at the remand 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).

[2] Exhibit 1 is the employer's written attendance and punctuality policy.



BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2024

Charlene A. Stawicki, Esq.
Member

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

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