The claimant was discharged for not reporting to work on September 26 and 27, 2023. The review examiner reasonably rejected this testimony that he believed he had the time off as not credible. Nor did he show mitigating circumstances for his absences, as he knew in advance that he would need childcare for those days but did not take steps to secure such childcare. Held he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), due to engaging in deliberate misconduct in wilful disregard of the employer's interest.

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 3192 65

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 reverse.

The claimant separated from his position with the employer on September 27, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 20, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 29, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, 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 additional information about the circumstances surrounding 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest when he failed to report for his scheduled shifts, 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 employer is a fire protection sprinkler company. The claimant worked as a full-time warehouse driver from January 3, 2022, until September 27, 2022.

2. The claimant was on a paid leave of absence beginning July 4, 2022, following the birth of his child. The leave was scheduled to end on September 26, 2022.

3. The employer maintains an attendance policy as part of the employee handbook. The policy requires prompt and regular attendance. If an employee is to be absent, they are required to notify the supervisor and the receptionist prior to the start of their scheduled shift. The employer considers an employee to have voluntarily abandoned their position after two days absence without notice. The claimant was aware of the policy, having received the employee handbook upon hire and orientation and having gone through new employee training.

4. The employer expected its employees to report to work when scheduled. The claimant was aware of that expectation.

5. On September 19, 2022, at 10:58 a.m., the claimant sent an e-mail to the employer's human resources (HR) manager. The claimant said he was taking an additional six weeks of leave and had put the claim in directly with the third-party administrator (TPA).

6. On September 19, 2022, at 11:53 a.m., the HR manager replied via e-mail, stating she had spoken with the TPA and there was no further time available on the claimant's claim; he had used twelve weeks of family leave, and did not have any remaining. The e-mail said the claimant was expected to return on Monday September 26, 2022, and would need to set up a return-to-work drug test prior to being able to return to work.

7. On September 19, 2022, shortly after the e-mail exchange, the claimant spoke with the employer's HR manager via telephone. The claimant requested an extended leave of absence of six weeks. The HR manager informed the claimant that no additional leave was available. The HR manager informed the claimant he had exhausted all available paid leave and the employer's policy was to not offer unpaid leave. The HR manager told the claimant he was expected to return to work on Monday September 26, 2022.

8. During the September 19, 2022, conversation, the HR manager informed the claimant that he had a total of 5.44 hours of paid time off available.

9. On September 19, 2022, at 1:05 p.m., the claimant e-mailed the HR manager asking to discuss his options. The HR manager replied at 1:20 p.m. stating that the claimant's options had been discussed when he called earlier, and again stating that he had used his available family leave.

10. On September 19, 2022, in e-mail exchanges between the employer and the claimant, the HR manager informed the claimant he had exhausted available leave and was expected to return to work on Monday, September 26, 2022.

11. On September 19, 2022, the claimant sent an e-mail to the employer stating that he needed to use a heart monitor for thirty days. The claimant had been diagnosed with an irregular heartbeat but had not been advised by a medical provider not to return to work due to this condition. If the claimant had worn a heart monitor it would have not impacted his ability to work.

12. The claimant did not make a specific request for paid time off for Monday September 26, 2022, or for Tuesday September 27, 2022. The request for extended leave covered those dates but no specific request was made. The claimant sent a text to the employer's warehouse manager on September 23, 2022, informing her he would not be in on those dates because he was extending his leave and was waiting to hear his options from HR and the TPA, but did not specifically request paid time off.

13. The claimant did not request a later scheduled start time to his shift. The claimant's normal shift was 5:30 a.m. to 2:30 p.m. The start time was occasionally flexed due to operational needs, such as an earlier delivery to a worksite or a more distant worksite requiring additional travel time.

14. The coming week's schedule was posted at the warehouse on the proceeding Friday. No other method of communication was used. The warehouse manager would seek to verbally tell employees if there were any changes or variation from the normal schedule. If there were changes to the schedule between posting and the start of the work week, the warehouse manager would text employees.

15. On September 23, 2022, at 11:50 a.m., the HR manager e-mailed the claimant. The e-mail again informed the claimant he was out of available leave, and was expected to return to work on Monday, September 26, 2022. The e-mail further told the claimant that failing to show for his scheduled shift on Monday morning may result in disciplinary action, up to and including termination. The claimant was aware that he could be subject to disciplinary action if he did not show up for work as scheduled on that Monday.

16. The claimant had not secured any childcare arrangements as of September 26, 2022. Given that the baby's mother had a higher paying position, she and the claimant decided that she would return to work. The claimant had not applied for places at any childcare centers or family daycare providers. The claimant's mother was planning on taking a leave from her work in November to assist with childcare but until that time, the claimant did not have firm childcare plans. The claimant had no other family nearby that could take care of the baby.

17. The claimant would have been able to work had his shift started later in the day.

18. The claimant did not attend his scheduled work shifts on September 26, 2022, and September 27, 2022.

19. On September 26, 2022, the HR manager e-mailed the TPA stating they were looking to terminate the claimant and needed information. The TPA replied, stating that they had informed the claimant on September 19, 2022, that his claim was exhausted after using twelve weeks of family leave. The claimant was not included in this exchange.

20. On September 27, 2022, the employer discharged the claimant for not reporting to work on September 26, 2022, and September 27, 2022.

21. The claimant did not use a heart monitor after his separation from employment.

Credibility Assessment:

During the hearings, the claimant presented as having made a good faith effort to secure childcare arrangements and a reasonable belief that he was entitled to additional leave or arrangements could be made with the employer. However, based on the testimony of the claimant, it is apparent that he had not made serious attempts to arrange for childcare. The claimant had not applied for slots at any childcare center or with a family daycare provider and his suggestions that a neighbor may occasionally help out was vague and insubstantial. The claimant argued that he believed he was eligible for additional leave time despite there being no indication that the TPA had informed of that, and the employer's HR manager repeatedly told him he was out of leave on September 19, 2023, via e-mail and telephone, and again on September 23, 2023. It is therefore concluded that the claimant was aware he had no additional leave time available to him.

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 entitled to benefits.

Because the claimant was discharged from his employment, his 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] . . . (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).

While the employer maintained an attendance policy requiring its employees to report to their shifts as scheduled, it did not provide any evidence showing that it discharged all other employees who violated the employer's attendance policies under similar circumstances. *See* Consolidated Finding # 3. Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. We, therefore, consider only whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged. As the claimant confirmed he was absent from work on September 26, 2022, and September 27, 2022, and the record shows that he did not have permission to do so, there is no question that he engaged in the misconduct for which he was discharged. Consolidated Findings ## 15, 18, and 20. Further, as the claimant informed the warehouse manager in advance that he would not be reporting to work as scheduled, there is no question that his absences those two days were deliberate acts.[1]

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). 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).

The claimant did not dispute that he understood the employer expected him to return to work on September 26, 2022. Consolidated Findings ## 6, 7, 10, and 15. Instead, he testified that he did not return to work as scheduled because he was entitled to, and had applied for, an additional six weeks of leave. As neither the employer nor the employer's third-party leave administrator had granted the claimant's request for additional time off, the claimant did not have any reason to believe the employer's expectation about his return to work had changed. *See* Consolidated Findings ## 5–7, 9, 10, and 12. This record demonstrates that the claimant understood his decision

[1] Inasmuch as the claimant told his manager that he would not report for work, we disagree with the employer's characterization that this was a *no-call*, no-show. Had it been, we would have analyzed his eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(1). *See* Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950).

not to report to work on September 26, 2022, or September 27, 2022, was contrary to the employer's expectations.

The employer needs its employees to report for their scheduled shifts in order to continue operating its business. As such, we believe the employer's expectation that employees will report to work as scheduled is facially reasonable.

We next consider whether the record showed that mitigating circumstances prevented the claimant from adhering to the employer's expectation. 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).

In his testimony at both hearings, the claimant contended that he was unable to report to work because he did not have adequate childcare coverage. *See* Consolidated Findings # 16 and 18. The Board has recognized that serious personal family problems, such as an unexpected lack of childcare, may constitute mitigating circumstances where a claimant shows he lost the childcare as a result of circumstances beyond his control, and was unable to secure a viable alternative. *See, e.g.*, Board of Review Decision 0023 8366 01 (Sept. 27, 2018). In this case, the claimant has not shown evidence of such mitigating circumstances.

On remand, the claimant conceded that he had not taken steps to secure alternative childcare arrangements, even though he knew he would not have childcare until sometime in November, 2022. He did not contact any childcare centers or daycares regarding potential availability and did not request a later scheduled start time, even though such an adjustment may have addressed his childcare needs. Consolidated Findings ## 13 and 16. Additionally, the claimant's uncontested testimony at the remand hearing was that he would have been able to drop his child off at his mother's house prior to work, if he had advance knowledge of his schedule for the week.[2] As the employer would post the schedule in advance and would notify employees of any changes to that schedule, the claimant had access to the information he needed to make the necessary childcare arrangements with his mother. Consolidated Finding # 14. Accordingly, the claimant has not shown that circumstances beyond his control prevented him from complying with the employer's expectation that he report to work as scheduled on September 26th or 27th, 2022.

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 reversed. The claimant is denied benefits for the week of September 25, 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.

[2] The claimant's uncontested testimony in this regard 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 20, 2023

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

LSW/rh