The claimant understood that her employer expected her to notify her supervisor in advance of the start of her shift if she was going to be absent. However, the claimant failed to do so on November 25, 2022. The review examiner reasonably rejected as not credible the claimant's contentions that she was precluded from timely notifying the employer of her absence. Absent mitigating circumstances for her conduct, the record indicates the claimant's failure to properly notify the employer of her absence was deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0078 7046 32

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 affirm.

The claimant separated from her position with the employer on December 1, 2022. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 23, 2022. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 6, 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 testimony from the claimant, as she was unable to connect to the initial hearing due to technical issues beyond her control. Both parties 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 was discharged for deliberate misconduct in wilful disregard of the employer's interest because she failed to inform the employer that she would be late to work prior to the start of her shift on November 25, 2022, 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 as an administrative coordinator for the employer, a medical outpatient clinic, from January 10, 2022, until December 1, 2022.

2. The employer has a written policy regarding attendance (the policy) that is contained within its employee handbook. The employee handbook is given to employees during orientation and is available for viewing online through the company's intranet at any time.

3. The claimant was given a copy of the policy on or about January 10, 2022, and advised that it was also available for her to view online.

4. The policy covers attendance, tardiness, and the procedure for calling out or reporting a late arrival to work.

5. The purpose of the policy is stated in the policy and is intended, "to effectively and consistently control excessive unscheduled absenteeism in order to insure adequate staffing for quality patient care and continued uninterrupted operation of the [Employer]."

6. The employer follows a progressive disciplinary scheme for employees who violate the policy. The progression of discipline is stated within the policy and reads, in part, "No Call/ No Show: Employees who fail to notify their supervisor of their expected absence as required, in the absence of mitigating circumstances, shall receive a final written warning on a first offense. Employees who are absent from work for two (2) consecutive shifts, or a part-time employee who is absent an equivalent pro-ration of the regularly scheduled week, without properly notifying their supervisor will be considered as having voluntarily resigned their position. Absenteeism and Tardiness Guidelines: Having more than five (5) occurrences, or an absence rate that exceeds 2% of scheduled shifts, in a year is considered excessive. Absences and tardiness will normally be addressed as independent issues. Disciplinary action up to and including termination can be taken for under five (5) occurrences at management's discretion."

7. The employer has terminated other employees for failing to comply with the policy.

8. The employer has an expectation that employees will not have excessive absences and follow its required procedure for calling out of work if the employee is going to be absent or late.

9. When employees call out of work excessively or do not call out for work properly, the employer cannot ensure that its patients will receive quality care or that it can provide uninterrupted services to its patients.

10. On September 16, 2022, the claimant did not appear for work, nor did she call in and report her absence. The employer designated the claimant's absence as a "no call/no show."

11. On September 19, 2022, the claimant's supervisor issued a Corrective Action Form designated as a final written warning relative to the claimant's absence from work on September 16, 2022. The Corrective Action Form was approved by the employer's human resources department (HR).

12. The claimant signed her acknowledgment to the Corrective Action Form on September 19, 2022.

13. The Corrective Action Form stated, "Your recent unplanned absence negatively impacted the service we provide to our patients. A no call/no show for a shift is a violation of the [Employer's] Attendance Expectations Policy and has resulted in this final written warning. Immediate and sustained improvement of attendance is expected. You are expected to follow the [Employer's] standards. All absences must be communicated following the department policy, which is to notify your manager at least 2 hours before the beginning of hour scheduled shift."

14. The supervisor met with the claimant on September 19, 2022, and reviewed the Corrective Action Form and the attendance policy with the claimant. The claimant was given another copy of the attendance policy. The claimant acknowledged that she would be terminated for any subsequent offense.

15. On November 25, 2022, the claimant was scheduled to work at 7:00 a.m. The claimant sent a text message to her supervisor at 8:48 a.m. stating she was stuck out of state because the train to Massachusetts had been delayed and would not be coming to work.

16. The claimant knew she would be late for work because she did not arrive at the train station until approximately 8:10 a.m. or 8:15 a.m.

17. The train station was located 10 minutes away from where the claimant had stayed overnight.

18. The claimant knew the employer would be harmed by her calling out of work because "patients come first."

19. On November 30, 2022, the employer placed the claimant on a suspension while HR decided if the claimant should be terminated.

20. On December 1, 2022, the claimant's supervisor called the claimant into a meeting with the supervisor and a representative from HR and told the claimant she had been terminated for failure to comply with the employer's attendance policy when she did not call out of work prior to her shift on November 25, 2022, following a final written warning.

21. On December 5, 2022, the DUA forwarded a fact-finding questionnaire to the claimant for additional information. A question on the questionnaire asked, "List any other information you want us to consider about this issue:" to which the claimant replied, "I never had a verbal warning or nothing."

22. On December 14, 2022, the claimant spoke with a DUA representative and reported the following, "I called in at 8:00am. I was suppose to call in 6:00am. I start work @7:00am I lose my phone on 11/24/2022 thanksgiving night.. I was suppose to report to work on 11/25/22. I was in CT. [City A] I was going to drive in I was over my friend's house. Everyone was asleep in the house. So I could not call in on time. I was over a friend's house. I was told on Monday Nov.28, 2022 I was terminated after she put me on admiration leave that Friday. I have never did this before. I live in [City B]."

Credibility Assessment:

During the hearing, the claimant confirmed that she was expected to be at work at 7:00 a.m. on November 25, 2022, and that she called out of work by texting her manager after 8:00 a.m. Most of the remainder of the claimant's testimony is not credible. The claimant stated in the hearing that she was staying at an aunt's house overnight on November 24th for a family gathering and the reason she did not call into work once she realized she would be late was because her phone screen was broken and not working properly. This contradicts information she provided to the DUA where she alleged that her phone had been lost and that she was staying at a friend's house on the night of November 24th. The claimant attempted to explain these discrepancies by saying that losing her phone and her phone not working were "the same thing" and that she also had friends at the family gathering. The claimant's explanation is not persuasive and does not support her credibility. The claimant also alleged in her fact-finding questionnaire that she had not received warnings for attendance from the employer in the past, however, during the hearing she confirmed her signature on the Corrective Action Form of September 19, 2022. The claimant asserted in the hearing that she did not know she could be fired for a subsequent absence because she either forgot or did not read the Corrective Action Form correctly and this is not credible given the discussion the claimant had with her supervisor on September 19th, and the claimant's acknowledgment to the supervisor that she would be fired for a subsequent offense. Further, the claimant's testimony during the hearing was vague, evasive, and conflicting. The claimant first stated she was stuck in traffic which made her late for work, then that either the bus or the train being late was the reason she could not make it to work on time before ultimately maintaining it was the train running late that caused her to be absent. During the hearing, the claimant could not recall the name of the town in which she

stayed overnight on November 24th, and generally stated no one was awake for her to use their phone on the morning of November 25th.

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 believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is not entitled to benefits.

As the claimant was discharged, her 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 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).

The employer did not provide evidence demonstrating that other employees who violated the employer's attendance policy under similar circumstances were discharged. Therefore, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must show that the claimant engaged in the misconduct for which she was discharged. The employer discharged the claimant because she had failed to timely notify her supervisor that she would be late to work on November 25, 2022, as required by the employer's attendance policy. Consolidated Finding # 21. As the claimant confirmed that she failed to notify her supervisor of her tardiness on November 25, 2022, until almost two hours after she was scheduled to start her shift, there is no question that she engaged in the misconduct for which she was fired. *See* Consolidated Findings ## 15–16.

Absent any evidence that the claimant forgot about her obligation to call-in before her shift, and we see none, we can reasonably infer that the claimant deliberately failed to timely inform her employer that she would be late. *See* Consolidated Finding # 15.

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). 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).

In addition to receiving the employer's attendance policy at the time of her hire, the employer had issued the claimant a final written warning on September 19, 2022, for failing to call out of work prior to the start of her shift. Consolidated Findings ## 10–12. The claimant confirmed she had received this warning and further testified that she understood her failure to notify the employer of her tardiness or absence from work was detrimental to the employer's operations. *See* Consolidated Finding # 18. Therefore, we believe the record establishes that the claimant understood the employer expected her to inform her supervisor that she was going to be tardy or absent in advance of the start of her shift. However, as the claimant maintained that she was unable to comply with this expectation because of issues beyond her control, we must consider whether the record contained sufficient evidence to conclude 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). An absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

The review examiner rejected the claimant's testimony that she could not contact the employer prior to the start of her shift on November 25th as not credible because the testimony she provided at the remand hearing contradicted the information she had previously provided to the DUA. Additionally, the review examiner noted that the claimant's testimony about where she was on November 24th and the morning of November 25th indicated that she had ample opportunity to timely contact the employer via other means. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

The absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest.

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 affirmed. The claimant is denied benefits for the week of November 20, 2022, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 31, 2023

Paul T. Fitzgerald, Esq.
Chairman

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

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