The claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when she called out of work without showing mitigating circumstances. However, in light of the DUA's constructive deduction regulations, this disqualifying separation from her subsidiary part time employer does not render her ineligible for benefits.

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

Issue ID: 0078 8412 83

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 her position with the employer on October 6, 2022. She filed a claim for unemployment benefits with the DUA, effective December 11, 2022, which was denied in a determination issued on March 7, 2023. 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 June 7, 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 afford the employer an opportunity to testify and present other evidence. Only the employer 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 or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, is supported by substantial and credible evidence and is free from error of law and, if not, whether a disqualifying separation from this part-time employer renders the claimant ineligible for benefits.

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 part-time as a salesperson and key carrier for the employer, a retailer, from approximately January, 2019 until October 6, 2022.

2. The claimant's immediate supervisor was the store manager (the Manager).

3. The employer maintained an attendance policy stating that late arrivals greater than 5 minutes are considered an "Attendance Occurrence." Attendance Occurrences are tracked during a 12-month rolling period. The policy was contained in an employee handbook and was communicated to the claimant during onboarding and training. Violations of the attendance policy are subject to progressive discipline of a first written warning at 6 Attendance Occurrences, a second written warning at 7 Attendance Occurrences, a "Final Corrective Action" at 8 Attendance Occurrences, and termination at 9 Attendance Occurrences.

4. The employer maintained a policy that unreported absences (No Call/No Show) were prohibited. The policy was contained in an employee handbook and was communicated to the claimant during onboarding and training. Violations of the No Call/No Show policy were subject to a final written warning on the first occurrence and termination for job abandonment on the second occurrence within a 12-month rolling period.

5. The employer maintained an expectation that employees would arrive to work as scheduled. The expectation was communicated to the claimant by the policy, training, and her schedule. The purpose of the expectation was to ensure the operation of the business.

6. The employer posted its schedule at least three weeks in advance within the store and through a phone application.

7. The claimant's job duties as a key carrier included opening and closing the store.

8. On June 26, 2022, the claimant arrived to work 8 minutes late.

9. On August 3, 2022, the claimant was scheduled to open the store at 7:00 a.m. The claimant arrived to work at 8:36 a.m. The store was not opened until the claimant arrived with the key.

10. On September 10, 2022, the claimant was issued a Final Corrective Action for opening the store late on August 3, 2022. The Final Corrective Action noted that the claimant had one prior Attendance Occurrence in the previous 12-month rolling period. The Final Corrective Action was the claimant's first written warning for attendance violations. The employer elevated the warning to a Final Corrective Action because the claimant's late arrival prevented the store from being opened on time.

11. On September 19, 2022, the claimant was 9 minutes late to work for unknown reasons.

12. On September 21, 2022, the claimant was 15 minutes late to work for unknown reasons.

13. On September 22, 2022, the claimant was 41 minutes late to work for unknown reasons.

14. On September 23, 2022, the claimant was 32 minutes late to work for unknown reasons.

15. On September 24, 2022, the claimant was a No Call/No Show to work for unknown reasons.

16. On September 26, 2022, the claimant called out of work at an unknown time due to a conflict with another job.

17. It is unknown what dates, if any, the claimant was responsible for opening the store following August 3, 2022.

18. On October 6, 2022, the claimant was discharged by the GM by text message for violating the attendance policy.

19. The claimant was not discharged on the first Attendance Occurrence following the Final Corrective Action because the employer was giving her another chance.

Credibility Assessment:

The claimant attended the initial hearing. The employer did not attend the initial hearing. The case was remanded for additional testimony. The district manager and an agent attended the remand hearing on behalf of the employer. The claimant did not attend the remand hearing.

In the initial hearing, the claimant testified that she was not told a reason for her discharge but testified that human resources had "messed up" her schedule. Because the employer did not attend the initial hearing, the claimant was not subjected to cross examination and did not further explain the statement. In the remand hearing, the employer testified that the schedule was posted at least three weeks in advance. The district manager also provided specific dates and times that the claimant was late or absent from work, which he got from the termination document (Exhibit #3). The employer's evidence is credible, as it was specific and detailed and was, therefore, used to revise the findings as indicated. Further, the employer's testimony about the posting of the schedule is credible because it demonstrates a common business practice. It is also unlikely that the claimant's schedule was changed in a way that would lead to her being late by the increments

presented by the employer. Based on the testimony presented, it is not credible that the claimant's schedule was "messed up" by human resources. The claimant's testimony on this point is rejected as not credible. The claimant did not testify to any other reason why she was late or absent. As such, the record does not contain substantial and credible evidence showing why the claimant was late on the various dates testified to by the employer. The district manager testified that he did not know why the claimant was late or absent, except that she reported a conflict with another job on September 26, 2022. Therefore, findings of fact were made regarding the claimant's tardiness and absence and the unknown reasons for them.

In the remand hearing, the district manager testified that he was not the person who made the decision to give the claimant another chance when she had Attendance Occurrences following the Final Corrective Action, and that he did not know why the decision was made. As such, the employer did not provide testimony as to why the policy was not enforced as written in this case. Nevertheless, the employer had expectations regarding tardiness and absences, which the claimant did not follow.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We set aside the portion of Consolidated Finding # 1, which states that the claimant began her employment in January, 2019, as her most recent start date with the employer is unknown on this record.[1]

We also set aside the portion of Consolidated Finding # 15 that states that the claimant was a no call, no show on September 24, 2022, for unknown reasons. Exhibit # 3, the "Termination Recap" submitted by the employer, states that the claimant informed the employer that she could not work, as her availability had changed after the employer made the schedule. Finally, we note that Consolidated Finding # 16, which states that the claimant called out due to a conflict with another job on September 26, 2022, fails to acknowledge that the employer reported that on this date, the claimant's availability had once again changed. *See* Exhibit # 3. In adopting the remaining findings, we deem 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.

Because 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:

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner, including the testimony and Exhibit # 3 referenced below. *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).
Both parties testified that the claimant worked for the employer on two separate occasions, and the claimant specifically testified that after working for the employer in 2019, she left for approximately one year before returning.

> [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] 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 presented an attendance policy and stated that the claimant was discharged for violating multiple provisions in the policy. However, the employer did not strictly abide by the progressive discipline procedures contained in the policy when disciplining the claimant for various attendance infractions and, therefore, has not met its burden to show that the claimant engaged in a knowing violation of a reasonable and *uniformly* enforced policy. Consolidated Finding # 19. 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. Following remand, the review examiner accepted as credible the employer's testimony that the claimant continually failed to comply with the employer's attendance policy, with the final incident occurring on September 26, 2022, when the claimant failed to report to work as scheduled. Consolidated Findings ## 10–16. Consistent with the review examiner's reasonable credibility assessment, the consolidated findings confirm that the claimant engaged in the misconduct for which she was discharged. Absent any evidence that the claimant made a mistake about the schedule, and we see none, we can reasonably infer that her misconduct was deliberate.

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 here was aware of the employer's expectation that she report to work as scheduled through the employer's policy and training she had previously received. Consolidated Finding # 5. We further believe that the employer's expectation was reasonable, as it was in place to ensure the proper operation of the employer's business. Id. Finally, we consider whether the claimant established mitigating circumstances to excuse her failure to comply with the employer's expectation that she report to work as scheduled.

The claimant's final absence prior to separation was on September 26, 2022, when she called out of work due to a conflict with another job. Consolidated Finding # 16. While it's possible that the claimant's reason for calling out on September 26th could be mitigating under certain circumstances, the claimant has not established that such was the case here. It was the employer's practice to make and post the employee schedule at least three weeks in advance. Consolidated Finding # 6. Thus, the claimant would have been aware weeks before September 26th that she was scheduled to work on that day. The claimant notified the employer that she could not work that day due to a scheduling conflict with her other job, but she has not provided an explanation as to why she waited until the last moment to call out of work when she was aware of her schedule weeks in advance. In light of the above, the claimant has not established the existence of mitigating circumstances for her misconduct.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2). However, the claimant's disqualifying separation from the instant part-time employer does not render her ineligible for benefits.

When a claimant separates from subsidiary part-time employment under a disqualifying circumstance under G.L. c. 151A, § 25(e), we must consider whether a constructive deduction, rather than a complete disqualification from receiving unemployment benefits should be imposed. 430 CMR 4.76 provides, in relevant part, as follows:

> (1) A constructive deduction as calculated under, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than a complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under G.L. c. 151A, § 25(e), in any of the following circumstances:
>
> > (a) if the separation is:
> > 1. from subsidiary, part-time work during the base period, and at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work; . . .

To determine whether this was the claimant's primary job, we turn to the information contained in the DUA's record-keeping system, UI Online. UI Online shows that the claimant was working the instant part-time job concurrently with three other jobs during the base period of her unemployment claim.[2] The agency determined that only two of the other three employers were interested parties on the claim, and no wages were reported for one of these two other employers. Therefore, we next analyze whether the instant employer or the other interested party employer for which wages were reported was the claimant's primary employer.

When determining whether employment can be considered full-time or primary employment, we look at several factors, including the number of hours worked, the wages earned, the duration of

[2] The base period of the claimant's 2022-01 unemployment claim was October 1, 2021, through September 30, 2022.

the employment, and the claimant's occupation. 430 CMR 4.74. Guidance on applying the criteria for determining full-time work is found in 430 CMR 4.75, which provides as follows:

> (1) The number of hours spent on the work and the wages earned for the week(s) will dictate whether the work was full-time or part-time.
>
> (2) The claimant's most recent work will be presumed to be full-time if he or she worked the normal full-time hours of the occupation in which the claimant was employed.
>
> (3) The claimant's most recent work will, in the case of multiple contemporaneous employers, be presumed full-time if he or she worked more hours or earned more money in the most recent work than in all other contemporaneous employment.
>
> (4) If a claimant is employed by multiple "most recent" employers under substantially the same terms of wages and hours, the claimant will be presumed to have worked full-time for the employer with which he or she has had the longest duration of employment.

Here, it is unknown how many hours the claimant worked with her other employer or the nature of her usual occupation. However, the information contained in the UI Online system shows that the claimant worked for the other employer during all four quarters of the base period, and she only worked for the instant part-time employer during the last three quarters of the base period. The UI Online system further shows that the claimant earned substantially more money with the other employer during each quarter of the base period. Based on the claimant's wages and length of employment with each of these employers, we believe that the other employer was the claimant's full-time or primary employer, and the instant employer was subsidiary part-time employment during the base period. 430 CMR 4.73.

The information contained in the UI Online system further shows that the claimant separated from her primary employer on November 25, 2022. Further, there is no indication in the record that, at the time the claimant separated from the instant part-time subsidiary employer on October 6, 2022, she had any knowledge that she would be separated from her primary employer approximately seven weeks later.[3] Therefore, a constructive deduction, pursuant to 430 CMR 4.76(1)(a)1, cannot be imposed.[4]

In Board of Review Decision 0011 4858 86 (Jun. 19, 2014), we declined to impose any disqualification at all in situations like this. We explained that 430 CMR 4.76(1)(a) is designed to penalize individuals who choose to leave gainful part-time employment knowing that they are about to lose their full-time job. We stated, "it would be an anomaly to interpret the regulation to

[3] The claimant's separation from the instant employer on October 6, 2022, was technically after the base period, during what the DUA refers to as the lag period, which is the period between the base period and filing a claim. However, this distinction does not affect our decision.

[4] A constructive deduction cannot be imposed pursuant to any of the other provisions of 430 CMR 4.76 either. The other circumstances in which it can be imposed are if the separation from the part-time work happens in the benefit year or if the separation from the part-time work occurs after the separation from the full-time job. Neither circumstance occurred in this case.

mean that an individual who quits a part-time job without knowledge of an impending separation from his full-time work receives the even harsher penalty of a full disqualification." Id.[5]

We, therefore, conclude as a matter of law that, although the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), the claimant is not disqualified from receiving benefits because she separated from a part-time, subsidiary job with the instant employer with no knowledge of her impending separation from her full-time job. She is entitled to her full weekly benefit amount.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending October 8, 2022, and for subsequent weeks if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 29, 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.

SVL/rh

[5] We further note that 430 CMR 4.78 (1)(a) imposes a constructive deduction under 430 CMR 4.76 (1)(a)1, only if the disqualifying separation occurred within the last four weeks prior to filing a claim for benefits. Thus, even if the claimant were subject to a constructive deduction under 430 CMR 4.76 (1)(a)1, because she separated from the instant subsidiary part-time employer on October 6, 2022, which was seven weeks before separating from her primary employer and two months prior to filing her unemployment claim effective December 11, 2022, no constructive deduction or loss of benefits would be imposed.