

The claimant failed to report to work because his car was repossessed. His lack of resources to find reasonable alternative transportation constituted mitigating circumstances. Thus, his actions were not in willful disregard of the employer's interest, and he is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**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 9658 58

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 December 22, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 24, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on April 19, 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 decision, which concluded that the claimant was disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2), because he deliberately failed to show up for his scheduled shift, 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 as a printing press operator for the employer, a printing company.
2. The claimant owned a 2019 SUV.
3. The claimant had a monthly car payment of \$821 per month.

4. The claimant fell behind in his car payments.
5. On about December 16, 2022, the financial lender repossessed the claimant's car.
6. The claimant relied upon his car for his twenty-five-minute drive each way to work.
7. The claimant asked for time off from work on Monday, Tuesday, and Wednesday, December 19, 20, and 21, 2022, to allow him [to] recover his SUV.
8. The claimant needed to gather \$3,500 to regain possession of the SUV, and he undertook to gather the money from friends.
9. On Thursday, December 22, 2022, the claimant still had not recovered the car.
10. The claimant's supervisor told him by text on Thursday, December 22, 2022, to come to work that day or otherwise not to return to work.
11. The claimant's work was more than three hours away by public transportation.
12. The claimant's only viable option was a ride sharing company since public transportation was more than three hours each way.
13. The cost of a round-trip ride was \$70.00.
14. The claimant deemed the ride to be too expensive, and he, therefore, did not report to work on Thursday.
15. When the claimant expressed a willingness to return to work the following Tuesday, the employer made clear that the claimant was no longer employed and had already been discharged.
16. By Notice of Disqualification, dated January 24, 2023, the claimant was denied benefits as of December 22, 2022.
17. The claimant appealed the disqualification.

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 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 reject the review examiner's legal conclusion that the claimant is not eligible for benefits.

Because the claimant was terminated from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

The employer discharged the claimant because he failed to report for work on Thursday, December 22, 2022. *See* Finding of Fact # 10. There is no dispute that the claimant did not show up for his scheduled shift in violation of the employer's expectation that the claimant report to work. *See* Finding of Fact # 14. Thus, he engaged in misconduct on December 22, 2022, when he failed to report for his shift.

However, our analysis does not end there. We must now address whether the claimant's actions were deliberate and in wilful disregard of the employing unit's interest. Finding of Fact # 14 shows that the claimant made a deliberate choice not to go to work on December 22, 2022, because of the cost to pay for a ride.

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).

Here, the findings show that the claimant was aware of the employer's expectation that he report for his scheduled shift. Finding of Fact # 7, shows the claimant reaching out to his employer on three successive days requesting time off to excuse his attendance at work. He had been informed on December 22, 2022, that if he did not show up for work, not to return. *See* Finding of Fact # 10. Thus, the claimant was aware of the employer's attendance expectation. The expectation is reasonable in light of the employer's need to complete its printing orders and run its operations smoothly.

Next, we consider whether the claimant's failure to report to work was due 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).

The review examiner found that the claimant's SUV was repossessed by the financial lender on or about December 16, 2022. *See* Finding of Fact # 5. The claimant did not have the \$3,500 to

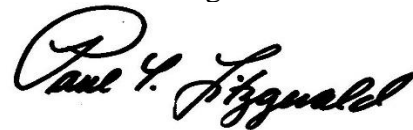
retrieve his vehicle, so he had to borrow the money from friends. *See* Finding of Fact # 8. Because the claimant needed time to collect the money and retrieve his vehicle, he requested time off from his employer (Monday through Wednesday). *See* Finding of Fact # 7. However, by Thursday, December 22, 2022, the claimant still did not have possession of his vehicle, and he was not able to report to work due to lack of transportation. *See* Findings of Fact ## 9 and 10.

The findings further reflect that public transportation was not a feasible option, because it would take the claimant approximately three hours one way just to reach his workplace. *See* Finding of Fact #12. The only option available to the claimant was to take a ride share, which would have cost \$70.00 for a round trip fare. *See* Findings of Fact ## 12 and 13. Given that the claimant was borrowing money to get his SUV back, we think that he reasonably deemed this cost to be too expensive. *See* Findings of Fact ## 8 and 14. These facts demonstrate that claimant's failure to report to work on December 22, 2022, was not done out of wilful disregard of the employer's need for the claimant's attendance, but due to circumstances beyond his control.

We, therefore, conclude as a matter of law that the claimant was not discharged for 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 ending December 31, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 15, 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.

DY/rh