

The claimant was tardy to her shift on multiple occasions because her tachycardia caused her to oversleep on occasion and an injury to her hand impacted her ability to complete activities of daily living in the morning. As the claimant had set multiple alarms, her actions show that she did not intend to be late to work and therefore did not have the requisite state of mind to engage in deliberate misconduct. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0079 1259 44

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 separated from her position with the employer on January 4, 2023. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 15, 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 May 26, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated 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 evidence relevant to the claimant's separation. 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 did not engage in deliberate misconduct because her tardiness was a direct result of her medical condition, 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 a second shift warehouse associate for the employer, a manufacturer, from 8/16/2021 until 01/4/2023.
2. The claimant worked from 2:00 p.m. until 10:00 p.m. and reported directly to the second shift supervisor (supervisor).
3. In 2018, the claimant was diagnosed with severe tachycardia, a condition where your heart rate is rapid or irregular which may cause fatigue and sleep disturbances. Due to the claimant's medical condition, she occasionally oversleeps.
4. The employer has a "Time and Attendance" policy which states that excessive incidents of tardiness and/or leaving early are considered unacceptable and will be addressed with corrective action. The policy further states that two or more incidents of absences or tardiness in a "rolling 5-week period or a total of 5 events in 12 months" are considered unacceptable.
5. The employer's policy is included in their handbook. On 8/16/2021, the claimant signed an acknowledgment that she received the employer's handbook.
6. The employer, in its discretion, may skip steps of the usual sequence of corrective actions and impose whatever discipline it deems appropriate based upon the circumstances.
7. The employer expected employees to arrive on time and work their scheduled shifts.
8. The purpose of this expectation is to ensure adequate staffing.
9. This expectation was communicated to the claimant upon hire.
10. The claimant was aware of and understood the employer's expectation.
11. During the claimant's employment, the claimant was occasionally late to work due to oversleeping caused by her tachycardia.
12. On 7/15/2022, the employer issued the claimant a verbal warning for being late on 6/16/2022, 7/1/2022, 7/11/2022, and 7/15/2022.
13. On 7/28/2022, the employer issued the claimant a written warning for time and attendance issues. The warning stated the claimant called out on 7/21/2022, left early on 7/22/2022, and was late on 7/27/2022 and 7/28/2022. The warning further stated that continued absenteeism will result in disciplinary action up to and including termination.

14. Sometime in October 2022, the claimant met with the supervisor and human resources manager (HR manager) to discuss her excessive absenteeism. The claimant told the supervisor and HR manager that due to her tachycardia she occasionally oversleeps.
15. At the meeting, the claimant offered the employer a printout for her medical condition. The employer had additional questions regarding the claimant's medical condition and asked the claimant to submit medical documentation from her doctor.
16. The HR manager provided the claimant with Family and Medical Leave Act (FMLA) documents for the claimant's doctor to fill out.
17. The claimant did not provide the employer with documents from her doctor or return the completed FMLA forms to the employer.
18. The claimant did not request any accommodations from the employer due to her tachycardia.
19. On 11/14/2022, the claimant was suspended for one day due to excessive absenteeism. The claimant was advised that further occurrences will result in her termination.
20. Sometime in late November 2022, the claimant injured her right hand. The claimant did not immediately seek medical attention for her hand because she assumed it would improve on its own.
21. The claimant's right hand is her dominant hand.
22. Due to the injury, the claimant had limited mobility in her right hand which caused delays in the claimant's morning routine. It took the claimant longer to shower, get dressed, administer her cat's morning medicine, and grab the doorknob due to the limited mobility in her right hand.
23. The claimant began to set earlier alarms to address the delay in her morning routine, but she occasionally still overslept due to her tachycardia.
24. On 12/12/2022, the claimant went to a local hospital to seek treatment for her injured hand. The doctor determined the claimant had a "fracture of the metacarpal on [her] fifth finger."
25. The doctor advised the claimant that since the finger has been broken for "a couple of weeks," they would place the claimant's finger in a splint and require a follow-up with an orthopedic surgeon due to a "rotational deformity."

26. On 12/13/2022, the doctor provided the claimant with a “Return to Work Assessment” indicating that the claimant was cleared to return to work with ‘limited function’ due to a fracture in her right hand.
27. After the suspension [sic] November one-day suspension, the claimant was tardy or absent on 11/17/2022, 11/21/2022, 12/5/2022, 12/8/2022, 12/12/2022, 12/16/2022, 12/21/2022, 12/28/2022, 12/29/2022.
28. These absences were due to the claimant’s tachycardia and hand injury.
29. On 12/30/2022, the claimant was late to her scheduled shift.
30. On 12/30/2023, the claimant was late due to her hand injury.
31. On 1/4/2023, the employer discharged the claimant due to the excessive absenteeism.
32. On 1/28/2023, the claimant filed a claim for unemployment benefits effective 1/1/2023.
33. On 2/15/2023, the Department of Unemployment Assistance (DUA) issued a Notice of Disqualification. The claimant appealed that determination.

Credibility Assessment:

In the original hearing, the claimant testified that she had been diagnosed with tachycardia which caused her to occasionally oversleep. The claimant further testified that she informed the employer of her condition and requested accommodations. Although the claimant’s testimony that she has a medical condition is considered credible, the claimant’s testimony regarding when she informed the employer about her medical condition is inconsistent. At the original hearing, the claimant stated that she informed the employer of her medical condition at the start of her employment. At the remand hearing, the claimant testified that she first informed the employer of her condition sometime in May 2022 when the employer began to address the claimant’s attendance issues. The inconsistency with the dates, along with the fact that the claimant did not receive any warnings due to her attendance until July 2022, detracts from the overall credibility of the claimant’s testimony regarding when she informed the employer of her medical condition.

The employer’s testimony regarding the October meeting is deemed credible as the employer witnesses provided detailed and specific information regarding the meeting. Regarding the claimant’s tachycardia and whether she submitted medical documentation regarding her medical condition to the employer, the employer’s testimony seems more credible as it was undisputed that the employer provided the claimant with the FMLA forms, and it does not make sense that the claimant would

need assistance due to her medical condition yet fail to formally request any accommodations from the employer.

However, as to the final incident, the claimant had a hand injury that led to her arriving late to work on 12/30/2022. The claimant provided credible medical documentation which corroborates her testimony that she had limited function in her right hand due to the injury. The claimant also provided documentation showing that the employer was aware of her injury and the limited function in her right hand. In that the claimant's testimony regarding her hand is supported by medical documentation and has been consistent, the claimant's testimony regarding the final incident that led to her discharge is considered credible.

Overall, the claimant's testimony regarding the circumstances that affected her attendance at work leading up to her separation is deemed more credible in that it was consistent with her responses in the fact-finding questionnaires and corroborated with medical documents.

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 agree with the review examiner's legal conclusion that the claimant is entitled to benefits.

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

The employer maintains a policy requiring employees to arrive on time for their shift. Consolidated Finding # 4. However, as the employer retains discretion to skip steps in its

progressive disciplinary policy, there is insufficient evidence in the record for us to determine whether the policy is uniformly enforced. *See Consolidated Finding # 6.* Therefore, the Board cannot conclude that the claimant knowingly violated a uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

We next consider whether the employer has shown the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectation. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged. In this case, the claimant was discharged for excessive absenteeism. Consolidated Finding # 31. Specifically, the employer discharged the claimant because she was late for her scheduled shift on December 30, 2022, which was the tenth time she had been late or absent from work since receiving a one-day suspension for excessive absenteeism in mid-November, 2022. Consolidated Findings ## 19, 27, and 30.

The claimant did not dispute that she understood that her employer expected her to arrive on time for her shift, nor that she was late to her shift on multiple occasions, including on December 30, 2022. Consolidated Findings ## 4 and 10. However, she maintained at both hearings that she did not intend to be late to work.

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause [her] discharge." Id.

The claimant was diagnosed with severe tachycardia in 2018. Symptoms of this condition include fatigue and sleep disturbances, and, as a result, the claimant would occasionally oversleep. Consolidated Finding # 3. Additionally, the claimant sustained a hand injury in November, 2022, which limited her ability to perform activities of daily living and made it more difficult for her to complete her morning routine. Consolidated Findings ## 20 and 22. As the claimant made continuing efforts to ensure that she arrived at work on time for her shift despite the impact of her tachycardia and hand injury, we conclude that there is nothing in the record to suggest the claimant was intentionally oversleeping. *See Consolidated Findings ## 27 and 30.* Accordingly, we believe that the record demonstrates that the claimant did not take deliberate action that caused her to arrive late to her shift on December 30, 2022.

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 or a knowing violation of a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week of January 1, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 24, 2024



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