Employer that discharged the claimant for absenteeism failed to establish a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest. The claimant had attempted to return to work by repeatedly contacting her supervisor and the human resources manager to no avail. Held claimant is entitled to benefits under G.L. c. 151A, § 25(e)(2).

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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 her position with the employer on December 15, 2022. She subsequently filed a claim for unemployment benefits with the DUA, effective February 5, 2023, which was approved in a determination issued on May 18, 2023. 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 June 30, 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 allow the claimant to provide testimony and other evidence and so that the parties could provide copies of relevant policies, disciplinary warnings, and contemporaneous medical documentation. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 employer's unrefuted testimony established that the claimant's discharge for attendance infractions constituted deliberate misconduct in wilful disregard of the employer's interest, 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 general laborer for the employer from 5/16/2022 until 12/1/2022.

2. The claimant reported directly to the supervisor.

3. The employer has an attendance policy which states employees must work their shifts as scheduled and arrive on time. The policy further states that employees in violation would be subject to disciplinary action including termination.

4. The policy is included in the employer's handbook and was communicated to the claimant upon hire.

5. On 5/16/2022, the claimant signed a document acknowledging receipt of the employer's handbook.

6. The employer uses discretion when enforcing the policy.

7. The employer maintains an expectation that employees work their scheduled shifts and arrive on time.

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. On 10/7/2022, the claimant was absent. The claimant received a verbal warning for her absence.

12. On 11/25/2022, the claimant went to work and was experiencing flu-like symptoms. The claimant took an at-home COVID-19 test which was negative.

13. The supervisor told the claimant to go home for the day and schedule a COVID-19 test with her doctor.

14. The claimant scheduled a doctor's appointment for 11/28/2022 to get tested for the COVID-19 virus.

15. On 11/28/2022, the claimant received a medical note from her doctor excusing her from work until 11/30/2022 due to her symptoms.

16. On 11/28/2022, the claimant provided the employer with the doctor's note via email.

17. The claimant was expected to return to work on 12/1/2022.

18. At 6:00 a.m. on 12/1/2022, the claimant arrived at work for her scheduled shift.

19. Sometime after 6:00 a.m., the supervisor told the claimant that she could not work her scheduled shift that day because she had not been authorized to return to work by the human resources manager (HR manager). The supervisor told the claimant to go home and wait for the HR manager to call her.

20. The claimant went back home and did not work her scheduled shift on 12/1/2022.

21. On 12/2/2022, the claimant called the HR manager but there was no answer.

22. On 12/2/2022, the claimant called the supervisor and told him that she had not received a call from the HR manager yet. The supervisor advised the claimant to use sick time to cover the days of work she was missing while she waits for the HR manager to call her.

23. On 12/2/2022, the claimant called out sick as she was advised to do so by the supervisor.

24. On 12/5/2022, the claimant called the HR manager again but there was no response.

25. On 12/5/2022, the claimant called the supervisor and asked if she could return to work yet. The supervisor told the claimant, "You need to wait."

26. The claimant did not show up to her scheduled shifts the week beginning 12/5/2022 and ending 12/9/2022 because she was advised by the supervisor to stay home until the HR manager called her.

27. The week beginning 12/5/2022 and ending 12/9/2022, the HR manager did not call the claimant.

28. The employer marked the claimant as 'no call no shows' for the dates 12/5/2022, 12/6/2022, 12/7/2022, 12/8/2022, and 12/9/2022.

29. On 12/15/2022, the claimant called the HR manager again. The HR manager's secretary told the claimant that the HR manager was not in the office.

30. On 12/15/2022, the claimant spoke with the supervisor and the supervisor told the claimant, "The HR manager does not want you to come back to work." The supervisor told the claimant that the employer had to replace her due to her absences.

31. On 12/15/2022, the employer terminated the claimant's employment for violating the employer's attendance policy.

32. The claimant did not receive any separation documents from the employer.

33. The claimant did not believe her absences in early December 2022 would lead to her termination, because she was in constant communication with the supervisor and was only missing work at the direction of the supervisor.

34. On 2/6/2023, the claimant filed a claim for unemployment benefits effective 2/5/202[3].

35. On 5/18/2023, the Department of Unemployment Assistance (DUA) issued a Notice of Approval. The employer appealed that determination.

Credibility Assessment:

In the original hearing, the employer witness, the HR manager, testified that the claimant was discharged for violating the employer's attendance policy. Although the employer witness referenced the relevant policy in the original hearing and alleged that the claimant had received disciplinary action due to her attendance, they failed to provide supporting and corroborating documentation, despite the Board of Review's request for such documentation.

In the remand hearing, the claimant provided specific details about conversations she had with the supervisor which led to her absences between 12/1/2022 and 12/12/2022. The claimant directly testified that she attempted to return to work on 12/1/2022 but was told by the supervisor that she was not authorized to return and had to wait for the HR manager to call her. The claimant further testified that beginning 12/1/2022, she remained in communication with the supervisor and attempted to reach the HR manager numerous times but there was no response. Although the HR manager testified in the initial hearing that he attempted to call the claimant between 12/5/2022 and 12/9/2022, the claimant denied receiving any calls from the HR manager on those dates. Since the HR manager did not participate in the remand hearing, they did not provide testimony on which number they called when they attempted to reach the claimant. Additionally, since the supervisor did not participate in either hearing, the claimant's testimony about her conversations with the supervisor is accepted as more credible than the evidence given by the employer regarding the communications between the claimant and the employer in early December 2022.

In the original hearing, the HR manager also testified that the claimant called in sick on 12/2/2022 but failed to provide medical documentation excusing her absence. In the remand hearing, the claimant explained that she only called out sick on 12/2/2022 because the supervisor advised her to use sick time while she waited for the HR manager to call her back to work. The claimant's testimony in the remand hearing regarding the reason for not returning to work after 12/1/2022 are consistent with her fact-finding responses. The claimant has consistently indicated that she attempted to return to work on 12/1/2022 and was told to return home and wait for the HR manager to call her. Given the consistency and overall credibility

of the claimant's testimony as to the 12/2/2022 absence, the claimant's testimony is accepted as more credible than the employer's.

Although the HR manager alleged in the initial hearing, that the claimant first attempted to return to work on 12/12/2022 and that is when she was told to go home and wait for a call from the employer, this is not credible, since the alleged final incident which led to the claimant's discharge was on 12/1/2022. In the fact-finding questionnaires, the employer also indicated that the claimant's employment was terminated on 12/1/2023. This confusion and inconsistency with the dates detracted from the overall credibility of the employer's testimony and evidence.

Given that the employer did not participate in the remand hearing, findings of fact could not be made about the alleged calls to the claimant and the number they dialed.

Overall, the claimant's testimony is deemed more credible in that it was consistent with the claimant's responses in her fact-finding questionnaires, it was reasonable in relation to the evidence presented, and the employer was not at the remand hearing to answer specific questions posed for it by the Board of Review.

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 entitled to benefits.

Because the claimant was discharged from her employment, her qualification 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. . . .

"[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 issue before us is not whether the employer was justified in terminating the claimant's employment, but whether he is eligible for unemployment benefits. The purpose of the unemployment statute is to provide temporary relief to "persons who are out of work . . . through no fault of their own." Cusack v. Dir. of Division of Employment Security, 376 Mass. 96, 98 (1978) (citations omitted).

The Supreme Judicial Court has held that, to establish a knowing violation, the employer must show that "at the time of the act, [the employee] was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996). An employer does not meet its burden if the conduct was "'unintentional by virtue of being involuntary, accidental, or inadvertent.'" Cusack, 376 Mass. at 98, *quoting* Still v. Comm'r of Department of Employment and Training, 39 Mass. App. Ct. 502, 510 (1995).

Here, despite being asked to do so on remand, the employer failed to provide any written attendance policies. Where the review examiner found that the employer uses discretion when enforcing its attendance policies, we conclude that the employer has failed to meet its burden to show the claimant was discharged for a knowing violation of a reasonable and *uniformly enforced* policy. *See* Consolidated Finding # 6. Alternatively, the employer may prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's consolidated findings show that the employer expected employees to work their scheduled shifts and to arrive on time. *See* Consolidated Finding # 7. The claimant was aware of this expectation, which is inherently reasonable, because it was communicated to her at hire. *See* Consolidated Findings ## 9–10.

Initially, the review examiner accepted the employer's unrefuted testimony that the claimant was discharged for attendance infractions after failing to report to or call out from work on various days from November 23 through December 12, 2022.[1]

After remand, however, the review examiner provided a detailed credibility assessment rejecting the employer's initial testimony as not credible, instead adopting the claimant's detailed testimony on remand regarding conversations that she had with her supervisor that led to her absences from work — further noting that the claimant's detailed testimony was consistent with what she reported on DUA fact-finding questionnaires, and that the employer failed to appear for the remand hearing to respond to specific questions posed by the Board. 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. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). We believe that the review

[1] *See* Remand Exhibit # 1, the June 30, 2023, hearing decision, Findings of Fact ## 11–24.

examiner's credibility assessment is reasonable in relation to the evidence presented.

After remand, the consolidated findings show that the claimant's supervisor sent her home from work on November 25, 2022, and told her to schedule a COVID-19 test with her physician. *See* Consolidated Finding # 13. Consistent with her supervisor's directive, the claimant saw her doctor for a COVID-19 test on November 28, 2022, obtained a medical note excusing her from work from November 28 through November 30, 2022, and forwarded the doctor's note to the employer via email on November 28, 2022. *See* Consolidated Findings ## 14–16.

The claimant was expected to return to work on December 1, 2022, and she reported for her shift at 6:00 a.m. *See* Consolidated Findings ## 17– 18. But, shortly after she arrived at work, the claimant's supervisor told her that she could not work that day because she had not been authorized to return by the human resources manager. The supervisor told the claimant to go home and wait for the human resources manager to call, so the claimant returned home and did not work that day. *See* Consolidated Findings ## 19–20.

The consolidated findings reflect numerous, unsuccessful attempts by the claimant to contact the human resources manager between December 2 and December 15, 2022, as well as calls that the claimant made to her supervisor, asking to return to work and being told she had to wait. *See* Consolidated Findings ## 21–25.

The review examiner found that the claimant did not report to work between December 5 and December 9, 2022, because her supervisor told her to stay home until the human resources manager called her. *See* Consolidated Finding # 26. The human resources manager never called the claimant during the week of December 5 through 9, 2022. *See* Consolidated Finding # 27. Instead, the employer recorded the claimant as "no call/no shows" for the week of December 5 through 9, 2022. *See* Consolidated Finding # 28.

When the claimant tried calling the human resources manager again on December 15, 2022, the secretary told her the manager was not in the office. When the claimant called her supervisor next, he told her that the human resources manager did not want her to come back to work and had had to replace her because of her absences. *See* Consolidated Findings ## 29–30. The employer discharged the claimant on December 15, 2022, for allegedly violating its attendance policy. *See* Consolidated Finding # 31. The review examiner found that the claimant did not believe that her absences in early December of 2022 would lead to her discharge because she was in constant communication with her supervisor and was only absent from work at the direction of her supervisor. *See* Consolidated Finding # 33.

There is no dispute that the claimant did not report for work for the first two weeks of December. To the extent that this was not a mistake on her part, the conduct was deliberate. However, we must consider whether her conduct was done in wilful disregard of the employer's interest. Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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) (citation omitted).

Here, the claimant's conduct was not in wilful disregard of the employer's interest. Although she understood that she was supposed to report to work as scheduled and on time, she attempted to return to work but was instructed by her supervisor to go home and wait for the human resources manager to contact her. Thereafter, she made numerous attempts to contact the human resources manager and her supervisor but was not permitted to return to work.

Finally, we consider whether the claimant has shown mitigating circumstances for her decision not to report to work in early December of 2022. 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 the instant case, the review examiner found that the claimant remained out of work because she was instructed by her supervisor to stay home and wait for the human resources manager to call her. The employer's refusal to permit the claimant to return to work constitutes a circumstance beyond the claimant's control. Moreover, contrary to the employer's initial claims that the claimant failed to report her absences, the review examiner found that the claimant had remained in contact with her supervisor as she tried to return to work. The claimant has demonstrated mitigating circumstances for failing to report to work after December 1, 2022.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in a knowing violation of a reasonable and uniformly enforced rule or policy, or in 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 entitled to receive benefits for the week ending December 3, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 2024

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.

JPCA/rh