Claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest and for a knowing violation of the employer's reasonable and uniformly enforced attendance policy, due to tardiness. The employer met its burden under G.L. c. 151A, § 25(e)(2).

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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 reverse.

The claimant was discharged from his position with the employer on February 20, 2023. He filed a claim for unemployment benefits with the DUA, effective February 26, 2023, which was denied in a determination issued on March 18, 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 awarded benefits in a decision rendered on April 21, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was entitled to benefits 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 allow the employer to present testimony and evidence. Both parties 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 absence from the initial hearing precluded it from establishing that the claimant's discharge for alleged attendance infractions constituted deliberate misconduct in wilful disregard of its interest or a knowing violation of a reasonable and unfirmly enforced rule or policy, 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 material handler/warehouse worker for the employer, a food manufacturer, from July 11, 2016, to February 20, 2023. The claimant earned $23.34 per hour working for the employer.

2. The claimant's [fiancée] used to drive the claimant to work because he lost his license to drive.

3. The employer had an attendance policy which worked on a point system. An employee received 1 point for an unexcused absence, .5 point for being tardy and 2 points for a no call/no show. In accordance with the attendance policy, an employee received a verbal warning after accruing 4 points, a written warning at 5 points and termination from employment at 6 points. A point would be removed if no points were accrued during a 90 day period.

4. Pursuant to the employer's attendance policy, employees must call a specific number provided by the employer and leave a message for their supervisor if they are going to be late or absent.

5. The employer requires regular attendance so that the work of the employer can be accomplished.

6. The claimant knew the employer's attendance policy and point system.

7. As of August 1, 2022, the claimant had 4 points and received a verbal warning.

8. The claimant was out of work on a leave of absence from approximately August [of] 2022 to November 11, 2022, because his [fiancée] became ill and passed away.

9. The claimant's [fiancée] passed away on October 11, 2022.

10. The claimant became homeless after his [fiancée] passed away.

11. The claimant started staying at his cousin's house in November [of] 2022.

12. The claimant started driving to work as of November [of] 2022 even though he did not have a license.

13. The claimant was late to work on November 17, 2022, and received .5 point from the employer bringing his total to 4.5 points.

14. From December 23, 2022, to January 20, 2023, the employer excused the claimant for being late six times. The employer excused the points due to the claimant's personal problems.

15. The claimant received a written warning on January 23, 2023, because he was late to work on December 20, 2022, which brought him to 5 points.

16. On February 7, 2023, the supervisor spoke to the claimant and told the claimant that the employer had been lenient with him but that he could not be late anymore.

17. The claimant was late to work on February 9, 2023, and this brought him to 5.5 points.

18. On February 13, 2023, the claimant called his supervisor directly and stated that he would be late.

19. The claimant was late to work on February 13, 2023, and this brought him to 6 points.

20. All employees for the employer who accumulate 6 points are terminated from their employment.

21. The claimant was discharged from his job with the employer on February 20, 2023, because he had accumulated 6 points in violation of the attendance policy.

Credibility Assessment:

The claimant testified in the hearing that he did not know he had four points as of August 1, 2022, however, the claimant did sign the verbal warning given to him by the employer. The claimant testified in the hearing that he did not know the number of points he had because he had been told that points were excused. However, the claimant also testified in the hearing that he called a supervisor directly on February 13, 2023, because he was going to be late and did not want to lose his job.

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. However, 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.

Because the claimant was discharged from his employment, his 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). Thus, the employer must prove that the claimant intentionally violated the employer's policy. *See* Still, 423 Mass. at 813.

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." Id. 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, the employer provided its written attendance policy that assigns points for various attendance infractions. Employees who accrue four points receive a verbal warning, five points prompt a written warning, and six points result in discharge. *See* Consolidated Finding # 1 and the employer's attendance policy, Exhibit # 3. All employees who reach six points are discharged. *See* Consolidated Finding # 20. Arising from the policy is an expectation that employees will maintain regular attendance so that the employer's work can be accomplished. *See* Consolidated Finding # 5. As such, we believe the policy to be reasonable. Further, the claimant knew the employer's attendance policy and point system. *See* Consolidated Finding # 6.

The review examiner's consolidated findings outlined personal circumstances in the claimant's life beginning in August of 2022 that contributed to some of the attendance issues that prompted his eventual discharge. Specifically, the claimant had accrued four attendance points and received a verbal warning on August 1, 2022. *See* Consolidated Finding # 7. Thereafter, the claimant's fiancée became ill in August of 2022; he began a leave of absence that month to care for her; she died on October 11, 2022; he became homeless and began staying at his cousin's home in November of 2022; and he returned to work from his leave of absence on November 11, 2022. *See* Consolidated Findings ## 8–12.

After returning to work from his leave of absence, the claimant was late six more times between December 23, 2022, and January 20, 2023. However, the review examiner found that the employer excused some of these points because of the claimant's personal problems. *See* Consolidated Finding # 14. Nevertheless, on January 23, 2023, the employer issued a written warning to the

claimant because he had been late on December 20, 2022, which had brought him to five points. *See* Consolidated Finding # 15.[1]

On February 7, 2023, the claimant's supervisor told him that he could not be late anymore. On February 9, 2023, the claimant was late to work and was assessed one half-point for tardiness, bringing him to 5.5 attendance points. *See* Consolidated Findings ## 16–17.

On February 13, 2023, the claimant called his supervisor directly to report that he would be late. The claimant was late on February 13, 2023, for which he received another half-point for tardiness that brought him to six attendance points. *See* Consolidated Finding ## 18–19. The employer discharged the claimant on February 20, 2023, because he had accumulated six points in violation of its attendance policy. *See* Consolidated Finding # 21.

The review examiner provided a credibility assessment noting that, while the claimant testified that he did not know how many attendance points he had accrued in August of 2022, and claimed that he did not know how many points he had accrued thereafter because some of his points had been excused by the employer, the claimant admitted that he called a supervisor on February 13, 2023, because he was going to be late and he did not want to lose his job. More simply put, the last time that the claimant was late on February 13, he knew that his employment was in jeopardy. 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). We believe it is reasonable in relation to the evidence presented.

Where the review examiner's consolidated findings show that the employer always discharges employees who reach six attendance points, arguably its policy was uniformly enforced. The claimant reached six points when he was tardy for the last time on February 13, 2023, and has failed to offer any evidence that he was incapable of reporting to work on time that day. Thus, the employer has met its burden to show a knowing violation of a reasonable and uniformly enforced policy.

Even assuming, *arguendo*, that the employer's leniency in disregarding many of the claimant's instances of tardiness shows that the policy was not uniformly enforced, the employer established that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The employer fired the claimant after he was tardy on February 13, 2023. *See* Consolidated Findings ## 19 and 21. Notwithstanding his history of tardiness, our inquiry is focused on the event which triggered his discharge. In this case, that was his failure to report to work on time on February 13, 2023. There is no dispute that he was late that day. We can also reasonably infer that his failure to timely report to work was deliberate, inasmuch as calling to say he would be late shows that he knew when his shift started and whatever he was doing would make him late.

[1] Notwithstanding Consolidated Finding # 14, the written warning in evidence issued on January 23, 2023, states on its face that the employer "disregarded 3 [points] due to warning timing". *See* Exhibit # 5, p. 1. The employer's actual reason for disregarding these attendance points does not affect our decision, however, because the document clearly confirms that, as of January 23, 2023, the employer told the claimant that he had reached five attendance points as of that date. Id.

However, a showing of deliberate misconduct alone is not enough. Such misconduct must also be "in 'wilful disregard' of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to 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). 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).

As stated, the claimant knew he was expected to report to work on time, and the employer's expectation for him to do so was reasonable. Because nothing in the record establishes that he was late on February 13, 2023, for reasons beyond his control, the claimant has failed to present any mitigating circumstances.

We, therefore, conclude as a matter of law that the employer has established that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending February 25, 2023, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 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.

JPCA/rh