As the claimant was aware he needed permission to leave early, but still chose to leave without being granted permission, his actions constituted deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2). Because he denied engaging in the misconduct at issue, the defense of mitigation is not available to him.

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Issue ID: 0079 6254 76

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 affirm.

The claimant was discharged from his position with the employer on March 27, 2023. He filed a claim for unemployment benefits with the DUA, effective March 19, 2023, which was approved in a determination issued on May 11, 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 July 22, 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 afford the claimant an opportunity to testify and present additional evidence. 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 employer met its burden to show the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest when he left his shift early without permission, 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 part-time as a mobile expert for the employer, a cellular phone company, from March 21, 2022, until March 27, 2023.

2. The employer has a written policy regarding attendance (the policy) contained within its employee handbook.

3. The purpose of the policy is to ensure employees are on time and present for scheduled shifts, so the employer's stores operate properly and employees are not left to work alone during shifts.

4. The employer notified the claimant of its policy when he was hired and provided [him] with a copy of the employee handbook. The policy is also available to employees at all times online.

5. The claimant signed an acknowledgement that he reviewed the policy. The claimant did not review the policy online.

6. The employee handbook states that violations of the policy can result in disciplinary action or termination.

7. The employer has terminated other employees for violations of the attendance policy.

8. The usual disciplinary course of action for employees is a verbal conversation for a first offense, a step-up conversation for a second offense, a formal conversation for a third offense, a not-in-good-standing conversation for a fourth offense, and termination for a fifth offense.

9. The employer has an expectation that employees will work their scheduled shifts and not have excessive absences.

10. The employer communicated its expectation to the claimant through its policy, and through numerous disciplinary conversations.

11. The claimant has an undiagnosed medical condition that causes his eyes and joints to swell at various, unexpected times. The employer was aware of the claimant's condition.

12. The employer did not request the claimant provide medical documentation of his condition.

13. The employer has a timekeeping system that employees use to punch in and out of work, which records the time of each punch for every employee.

14. If an employee mistakenly fails to punch in or out timely, the failure should be reported to a manager. A punch correction can only be performed by a manager.

15. Between April 16, 2022, and March 27, 2023, the claimant had 35 instances of being late or absent. The employer does not count absences for sickness against the claimant.

16. The reasons provided to the employer for the claimant's tardiness or absence were lack of transportation, a court date, and an unapproved shift swap with another employee. There were also various times where the claimant did not provide the employer a reason.

17. The claimant received a performance review in August 2022. During the performance review, the claimant was reminded about the employer's attendance policy.

18. On February 18, 2023, the claimant's supervisor had a conversation with the claimant regarding his medical condition. During the conversation, the claimant was advised how to apply for an intermittent medical leave of absence and was provided information regarding the employer's third-party insurer that oversees leave of absences.

19. The claimant did not apply for an intermittent medical leave of absence.

20. The claimant was placed on probation twice for attendance policy violations. The first time on October 13, 2022, for a period of 60 days, then the probation was extended on October 20, 2022, for a period of three months, to end on or about January 20, 2023.

21. Each time the claimant was placed on probation, the employer provided the claimant with a Not in Good Standing letter which advised the claimant that additional discipline "up to and including discharge" was the next disciplinary step. The claimant signed each Not in Good Standing letter, acknowledging its receipt.

22. The claimant did not dispute any of the attendance policy violations listed on the Not in Good Standing letters.

23. The claimant's supervisor and/or the senior manager conducted disciplinary conversations with the claimant in August 2022, on September 27, 2022, October 20, 2022, October 31, 2022, on January 28, 2023, February 8, 2023, February 18, 2023, and February 27, 2023.

24. In each of the conversations held, the claimant was advised how his absences affected the employer's business.

25. In each of the conversations held, the claimant was asked if he required any accommodations from the employer or to be assigned a different shift.

26. On February 27, 2023, the claimant and another employee were the only employees working the closing shift for the employer.

27. The claimant and the other employee had an argument about trash removal. The claimant attempted to contact the assistant manager by text message and by telephone call. The assistant manager did not respond to either communication and did not grant the claimant permission to leave early.

28. On February 27, 2023, the claimant left work early without permission. The claimant had been scheduled to close the store with another employee.

29. On February 27, 2023, the claimant was scheduled to work until 8:00 p.m. The claimant left work at some point before 7:00 p.m. without telling the other employee he was leaving.

30. The claimant leaving work early left the other employee alone in the store until closing.

31. The employer's senior regional manager submitted a request to close the store early to a higher authority. The higher authority granted the senior regional manager permission to close the store.

32. On February 27, 2023, the employer closed the store at 7:00 p.m. because the claimant left another employee to close the store alone which was against the employer's policy.

33. The claimant's supervisor conducted a conversation with the claimant about his attendance.

34. After February 27, 2023, the claimant's manager was out of work for a period of time, which caused a delay in the manager sending termination paperwork to the department heads for a decision to be made to terminate the claimant.

35. The claimant called out of work two more times after February 27, 2023.

36. On March 6, 2023, and March 7, 2023, the claimant had an allergic reaction which caused his eye to swell and required him to call out of work. The allergic reaction absences were not counted against the claimant.

37. If the claimant had had perfect attendance between February 27, 2023, and March 27, 2023, aside from the allergic reaction, he likely would not have been terminated.

38. On March 27, 2023, the claimant was terminated in person by his manager and the senior manager for excessive attendance issues.

39. The senior regional manager explained to the claimant that his leaving work early without permission on February 27, 2023, was the reason for his termination.

Credibility Assessment:

During the hearing, the claimant disputed that he left work early without permission on February 27, 2023. The claimant asserted he was discharged because he could not work the shifts that the employer wanted him to work. The claimant's testimony is not credible when weighed against the testimony of the employer. The employer explained, in sufficient detail, that when the claimant left work early on February 27, 2023, the employer was caused to close the store one hour early because it was against the employer's policy to leave only one employee present to operate the store alone. The closing of the store early required a submission of a request to close early from the senior regional manager, and an approval from a higher authority. It is not plausible that the employer would have a record of such a request on February 27, 2023, if the claimant had worked his entire shift.

In addition, the claimant stated he had never been absent for reasons other than recurring intermittent medical incidents and the death of his father. However, the claimant also confirmed he was absent or tardy for other reasons which included not having transportation, unapproved shift swapping, a court date, and other times where the claimant did not provide the employer a reason. Regarding the dates the claimant was late for work, the employer provided dates and times the claimant clocked in late. To this, the claimant rebutted that he must have forgotten to clock in or out, which is not persuasive since the employer's timekeeping system tracks employees' time and if the claimant had failed to correctly clock in or out, a correction of his time could only have been performed by a manager. The employer testified that the timekeeping system does not show that the claimant's time was fixed by a manager on any of the dates he reported to work late. The employer's testimony compels a conclusion that the claimant never asked a manager to correct his time which would have been reasonable had claimant had merely forgotten to clock in or out. The claimant's assertation that he was not on probation at the time he was discharged is also not compelling, since the claimant knew, or should have known, that an end to his probation did not mean that his slate had been wiped clean of prior absences and tardies.

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.

Because the claimant was discharged from his employment, his 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. . . .

"[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 employer discharged the claimant for excessive attendance issues, triggered by leaving work without permission on February 27, 2023. *See* Consolidated Findings ## 38 and 39. While the employer maintains an attendance policy that communicated its expectation that employees work their scheduled shifts, it retains discretion over how to discipline employees who violate that policy. Consolidated Findings ## 2, 6, 9, and 10. As the employer did not provide any evidence showing that it discharged all other employees who abandoned their shifts without permission, the evidence presented is insufficient to show a knowing violation of a reasonable and *uniformly enforced* policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged. Following remand, the review examiner accepted as credible the employer's testimony that the claimant left his shift early and without permission on February 27, 2023, and left another employee to close the store by himself. Consolidated Findings ## 28–30. 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).

Although the claimant disputed leaving work early without permission on February 27, 2023, the review examiner rejected his contention, in part, because the employer had provided specific and detailed testimony regarding its records of the early store closure on that date. The review examiner had also noted that the claimant provided inconsistent testimony at times, where he failed to take any steps to correct his time records for February 27, 2023, despite testifying that he merely forgot to clock in or out that day. The record, taken as a whole, leads us to conclude that the review examiner's assessment crediting the employer's testimony is reasonable in relation to the evidence presented.

Consistent with the review examiner's assessment, the consolidated findings confirm that the claimant engaged in the misconduct for which he was discharged. Despite the claimant's contention that he did not leave work early and without permission on February 27, 2023, the claimant did not refute the employer's testimony that he left work early because he had argued with another employee about trash removal. *See* Consolidated Finding # 27. Under the circumstances, we believe that it is self-evident that his decision to leave early and without permission was deliberate.

However, the Supreme Judicial Court 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).

It is reasonable for an employer to expect its employees to work until the end of their scheduled shifts, unless granted permission not to. Consolidated Finding # 27 indicates that, at some point on February 27, 2023, the claimant attempted to contact the assistant manager by text message and telephone call, but did not receive a response, and was not granted permission to leave early. The claimant did not provide any testimony explaining the reasons for these communications. However, the claimant testified that he understood that "we show up to work on time, leave work when you are scheduled to be out of work," and that, although he had left work early on other occasions prior to February 27, 2023, he had been given permission to do so by one of his supervisors.[1] Given the claimant's testimony and that he had not been granted permission to leave before the end of his shift on February 27, 2023, we conclude that he understood that his decision to leave early was contrary to the employer's expectations.

Finally, we need not consider whether the claimant presented mitigating circumstances for his misconduct, as he denied leaving his shift early on February 27, 2023. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See* Lagosh v. Comm'r of Division of Unemployment Assistance, No. 06- P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found).

We further note that the claimant alleged that the employer discharged him for being absent from work on March 6, 2023, and March 7, 2023, due to his medical condition. The record, however, demonstrates that the employer had already made the decision to discharge the claimant for leaving work early and without permission on February 27, 2023, and had not counted the subsequent two absences against the claimant. Consolidated Findings ## 34 and 36.

We, therefore, conclude as a matter of law that 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 expectation within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning March 19, 2023, and for subsequent weeks, until such time as he has had at least eight

[1] The claimant's testimony regarding his awareness of the employer's expectations around attendance is part of the unchallenged evidence introduced at the hearing and placed into the record, and it is thus properly referred to in our decision today. *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).

weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 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.

JMO/rh