The claimant was discharged because he did not work his scheduled shifts. Although he had requested time off to complete online classes, the employer scheduled him anyway. The claimant's decision to prioritize school over work does not constitute mitigating circumstances. Held he engaged in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0079 7992 64

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 on different grounds.

The claimant separated from his position with the employer on January 22, 2023. He filed a claim for unemployment benefits with the DUA, effective January 22, 2023, which was denied in a determination issued on April 28, 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 May 24, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, and, thus, he was disqualified under G.L. c. 151A, § 25(e)(1). 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's separation was voluntary without either good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where the record shows that he was terminated for not complying with the employer's work schedule.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant worked as a Bar Back/Busser for the employer, a restaurant, from 10/19/22 until he separated from the employer on 1/22/23.

2. The claimant was hired to work part time, 30 hours a week, earning $7.00 an hour plus tips.

3. The claimant had left work to complete a class he was enrolled in. The claimant was taking delayed classes in order to complete his bachelor's degree program in History in August of 2023.

4. The claimant started this program in September of 2018 at [University].

5. The claimant was enrolled in an accelerated class called Religious Traditions of the World. The claimant started the class on 1/2/23 and completed it on 1/23/23.

6. The claimant sent his manager a text message on 1/2/23 informing him that he would need to work weekends only due to him starting school.

7. The claimant needed to be on a computer for 2 hours 3 to 4 times a week for the class. He was not able to work his regular schedule and attend school at the same time.

8. The employer continued to schedule the claimant as he had been scheduled during the week.

9. The claimant had to call out during the week because he was attending his class.

10. The employer separated employment from the claimant as of 1/22/23 [sic]. The Supervising Manager informed the claimant on this day that they had to let him go.

11. Prior to his separation, the claimant had not received any disciplinary action.

12. The claimant did not request a leave of absence before he quit.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. In finding of Fact # 12, we disagree with the review examiner's statement that the claimant "quit." This is a mixed question of fact and law, and, as discussed below, we believe that this finding is incorrect as a matter of law. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, while we believe that the review examiner's findings of fact support the conclusion that the claimant is subject to disqualification, we do so on different grounds.

The first question is whether the claimant's separation is treated as a resignation or a discharge for purposes of unemployment benefit eligibility. In Finding of Fact # 12, the review examiner states that the claimant quit his employment. We disagree.

In this case, the employer failed to answer any DUA fact-finding questionnaires in connection with the claimant's separation, and it did not participate in the hearing. The only evidence in the record has been presented by the claimant. He testified that, in January, he requested to only work weekends while he attended his online class. *See* Finding of Fact # 6. When the employer continued to schedule the claimant to work weekdays, the claimant had to call out for the scheduled weekday shifts. *See* Findings of Fact ## 8 and 9. After calling out for his shifts, the manager told the claimant on January 22, 2023, that they had to let him go. *See* Finding of Fact # 10. The claimant asked if there was anything that he could do to retain his employment, but the manager informed him that there was not.[1] In our view, this evidence shows that the employer made the decision to end the claimant's employment when the claimant failed to comply with the employer's schedule. In other words, he was discharged.

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 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 presented no evidence that the claimant violated a particular policy or rule about working scheduled shifts. Nor is there any evidence that it treated all employees who failed to work their shifts uniformly. Thus, it has not met its burden to show a knowing violation of a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2). Alternatively, we consider whether 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 misconduct. As the claimant did not work his scheduled shifts during the week of January 16, 2023, there is no

[1] While not explicitly incorporated into the review examiner's findings, the claimant's testimony in this regard, as well as the portions of his testimony referenced below, are part of the unchallenged evidence introduced at the hearing and placed in the record. As such, they are 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).

question that he engaged in misconduct. *See* Finding of Facts ## 6, 8, and 9. Further, as the claimant informed the business in advance that he would not be reporting to work as scheduled, there is no question that his absences on those three days were deliberate.

However, the Supreme Judicial Court (SJC) 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).

The claimant did not dispute that he understood the employer expected him to work on the weekdays. Instead, he testified that he did not return to work as scheduled because he had given notice that he needed the time off for school. Although the claimant states that this request was approved, the employer scheduled him to work, indicating that the employer still expected him to work on certain days. *See* Finding of Facts ## 8–9. This record demonstrates that the claimant understood that his decision not to report to work on the weekdays was contrary to the employer's expectations.

We can reasonably infer that the employer needs its employees to report for their scheduled shifts in order to continue operating its business. As such, the employer's expectation that employees will report to work as scheduled is facially reasonable.

We next consider whether the record showed that mitigating circumstances prevented the claimant from adhering to the employer's expectation. 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 absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

The claimant's decision to call out for his shifts stemmed from his decision to attend online classes for school. *See* Finding of Fact # 6. His decision to prioritize school over work does not amount to a circumstance beyond his control that prevented him from working weekdays.

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to 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 affirmed. The claimant is denied benefits for the week beginning January 22, 2023, and for subsequent weeks, until such time as he has had eight 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 - May 31, 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.

MM/rh