Although the claimant had a history of attendance issues, the final instance of tardiness was due to the mitigating circumstance of traffic caused by a vehicle accident. He is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0080 4595 01

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 was discharged from his position with the employer on June 1, 2023. He filed a claim for unemployment benefits with the DUA, effective May 28, 2023, which was denied in a determination issued on October 13, 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 November 15, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate 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 afford the employer an opportunity to testify. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 to award benefits is supported by substantial and credible evidence and is free from error of law, where the record establishes that the claimant was late on his last day of work because he was stuck in traffic caused by a vehicle accident.

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 as a driver for the employer, a construction equipment rental company. The claimant began work for the employer on April 29, 2019.

He worked Monday through Friday from 6:00 a.m. to 2:30 p.m. and earned $28.00 per hour.

2. The employer maintains an attendance policy that requires employees to work when scheduled. The policy also states: "Employees who do not have time available and are required to have time entered into the Time & Attendance system as 'No Pay' will be considered excessively absent, unless the Employee is on approved leave."

3. The claimant's managers did not always discipline employees who were absent or tardy.

4. In early 2023, the claimant took a leave of absence because of a blood infection. The claimant used all of [sic] his accrued paid time off because of his leave of absence.

5. Because the claimant had no available paid time off, he was considered excessively absent whenever he called out of work or was tardy.

6. The claimant worked at the employer's location in [City A], MA. The claimant lives in [City B], MA. It usually took the claimant 30 minutes to commute to work.

7. The claimant was sometimes late to work for personal reasons, including his mother's illness, and difficulties with traffic.

8. On February 6, 2023, the employer issued the claimant a verbal warning for failing to call his manager to notify him he would not be at work.

9. On April 3, 2023, the employer issued the claimant a written warning for tardiness.

10. On April 27, 2023, the employer suspended the claimant for two days because of tardiness.

11. On May 31, 2023, the claimant left his home at approximately 5:10 a.m.

12. On his way to work, the claimant was stuck in traffic because of a vehicle accident.

13. At approximately 5:55 a.m., the claimant called the dispatcher to inform him he would be late. The claimant arrived at work at approximately 6:05 a.m.

14. On June 1, 2023, the employer discharged the claimant.

Credibility Assessment:

> The employer witness at the hearing, the HR Generalist, had no direct knowledge of the events leading up to the claimant's separation. She also had no direct knowledge of the uniform enforcement of the employer's policies at the claimant's worksite. Therefore, the claimant's direct testimony regarding these facts is accepted as credible.

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 consolidated findings show that the employer maintained discretionary authority in the form of discipline for any violation of its attendance policy. *See* Consolidated Finding # 3. Since the employer failed to provide any evidence showing that it discharged all employees who violated its attendance policies under similar circumstances, it has failed to meet its burden to show that the claimant knowingly violated 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 initial burden, the employer is required to show that the claimant engaged in misconduct. The employer discharged the claimant for excessive tardiness, which is in violation of its attendance policy. *See* Consolidated Findings ## 2, 8–10, and 13–14; *see also* Remand Exhibit 7.[1]

[1] Remand Exhibit 7 is the employer's attendance policy, which was submitted during the remand hearing without objection from the claimant.

The consolidated findings show that the claimant was "sometimes late to work for personal reasons," and that, in April, 2023, the employer had issued him a written warning, followed by a two-day suspension, due to tardiness. Consolidated Findings ## 7, 9–10. The claimant was then discharged when he was late to work on May 31, 2023. Consolidated Findings ## 11–14. There is no dispute that the claimant was late to work on May 31, 2023. The claimant's tardiness was in direct violation of the employer's expectations that the claimant arrive to work on time, and that he work his scheduled shifts. As noted earlier, the claimant had been warned about his attendance on April 3, 2023, and April 27, 2023. Consolidated Findings # 9–10. On those dates, the claimant had been informed that his attendance was not satisfactory, and that further instances of tardiness or lateness could lead to his termination. *See* Exhibits 3 and 4.[2] As the consolidated findings show that the employer expected the claimant to arrive to work on time, and the claimant did not do so on May 31, 2023, the employer established that the claimant engaged in the misconduct for which he was discharged.

However, nothing in the record suggests that the claimant deliberately reported late to work on May 31, 2023. It usually took the claimant thirty minutes to commute to work. Consolidated Finding # 6. However, on May 31, 2023, the claimant left his home at approximately 5:10 a.m., which is fifty minutes before the beginning of his scheduled shift, and twenty minutes more than his usual commuting time. Consolidated Findings ## 1 and 11. This suggests that, on that date, the claimant made a conscious effort to arrive to work on time and avoid reporting to work late.

In addition, to establishing the alleged misconduct, the employer must also show such misconduct was 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). 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).

There is no dispute that the claimant was aware of the employer's policy and expectation to arrive to work on time and work his scheduled shifts. *See* Consolidated Findings ## 9–10. We believe the reasonableness of the policy is self-evident, to ensure that the employer's business and operational needs are met.

The remaining issue here is whether the claimant's tardiness on May 31, 2023, was mitigated in any manner. We believe that it was. The claimant left his home at 5:10 a.m., with the intention of arriving to work on time, at or before 6:00 a.m. Consolidated Finding # 11. This gave him nearly one hour to travel from his home in [City B] to the employer's work location in [City A]. *See* Consolidated Finding # 6. For the vast majority of his employment, this had usually been ample time for his work commute. He was late to work on May 31, 2023, due to traffic stemming from a vehicle accident, and he notified his supervisor that he was going to be late that day.

[2] Exhibit 3 is the written warning issued to the claimant, dated April 3, 2023, and Exhibit 4 is the suspension notice issued to the claimant, dated April 27, 2023.

Consolidated Findings ## 12–13. The claimant's conduct in giving himself additional time to get to work and notifying the employer that he was going to be late does not suggest that he was willfully disregarding the employer's interest in his punctuality.

We recognize that the claimant had a history of attendance issues and that he was warned about his attendance. However, we do not think that the record supports a conclusion that the claimant "intentionally adopted a routine that inevitably would result in tardiness." Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 628 (1984). Although the claimant had been late to work before due to traffic, his other instances of tardiness were due to various personal issues. Consolidated Finding # 7. Notwithstanding, there is nothing in the record showing that the claimant knew fifty minutes was an insufficient amount of time to allot for his commute. His tardiness on May 31, 2023, the final incident just prior to his discharge, was due to a circumstance beyond his control, which he could not have reasonably foreseen.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the employer has not shown that his discharge was due to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced policy.

The review examiner's decision is affirmed. The claimant entitled to receive benefits for the week beginning May 28, 2023,[3] and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 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

[3] In his original decision, the review examiner awarded benefits beginning on June 1, 2023. We have modified the start of the claimant's eligibility period to reflect the appropriate week beginning date.

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