The claimant was discharged for a final attendance infraction, which exceeded the allowable number of partial absences. However, nothing in the record shows that the claimant deliberately overslept causing her to be late that day, where she had stayed up late to help her children, who returned from a vacation with her parents. Held the employer did not show that the claimant acted deliberately in wilful disregard of the employer's interest and she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0081 0128 92

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 her position with the employer on August 23, 2023. She filed a claim for unemployment benefits with the DUA, effective August 20, 2023, which was denied in a determination issued on September 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 overturned the agency's initial determination and awarded benefits in a decision rendered on December 16, 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 and present 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 had not met its burden of proof to show that the claimant's discharge for attendance was attributable to either a knowing violation of a reasonable and uniformly enforced rule or 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 employer is a manufacturer. The claimant worked full-time as a machine operator for the employer from March 28, 2022, to August 23, 2023. The claimant earned $15.00 per hour working for the employer.

2. The claimant was originally hired as a machine operator through a staffing agency on December 27, 2021. The claimant was then hired full-time by the employer on March 28, 2022.

3. The claimant worked Monday through Friday, from 7:00 a.m. to 3:00 p.m. The claimant also worked approximately one Saturday per month for the employer.

4. The employer had an Attendance Control Policy that set forth, in part, "[a]bsences include all time lost from the work schedule whether avoidable or unavoidable, voluntary or involuntary."

5. Under the employer's Attendance Control Policy, "[a]bsences (both full days and partial days) will be computed by looking back over the preceding twelve months."

6. Under the employer's Attendance Control Policy, an employee will get a verbal warning after the 6th tardiness/and or early departure (partial absence), a written warning after the 9th partial absence, and will be terminated from their employment on the 12th partial absence.

7. When an employee misses work, it places an extra burden on the other employees.

8. The claimant knew the employer's attendance policy.

9. From May 22, 2022, through December 8, 2022, the claimant had six partial occurrences. The claimant received a verbal warning on December 14, 2022, because she had six partial occurrences.

10. The claimant has an eleven-year-old son who has disabilities.

11. The claimant's son was prescribed therapy once a week.

12. The therapy sessions for the claimant's son were scheduled for every Tuesday. The claimant had to leave work at 1:30 p.m. each Tuesday to take her son to therapy.

13. The claimant informed the employer about her son's need for therapy and the scheduled appointments.

14. The employer's human resources sent the claimant information for both Family Medical Leave (FML) and Paid Family Medical Leave (PFML) so that the claimant could leave work and take her son to therapy each week.

15. The employer used a private insurance carrier that was approved by the state of Massachusetts for its PFML applications.

16. The claimant did not receive assistance from the employer's human resources regarding the applications for FML and PFML.

17. The claimant's application for intermittent FML was approved and started January 3, 2023. The claimant could not get FML prior to January 3, 2023, because she was not employed by the employer for the requisite time period.

18. The claimant was applying for PFML because it would start retroactively from November 2022.

19. The claimant's applications for FML and PFML through the employer's private carrier required a medical portion to be filled out by the claimant's son's physician.

20. The son's physician sent his portion of the PFML application directly to the employer's private carrier.

21. When the son's physician wrote the medical note/application, he wrote that the need for therapy was "for his lifetime."

22. On March 6, 2023, the employer's human resources sent the claimant a memo that stated, "Attached is the Designation Notice showing that your request has been approved under FMLA. …The PFML claim form has been submitted to (private carrier) on 2/10/2023. They will reach out to you should they have any additional questions."

23. On April 17, 2023, the employer's human resources sent the claimant a memo that stated, "Just a friendly reminder that (private carrier) is still awaiting information from your / your (sic) physician on your son's leave. This is currently being counted as FMLA time, with PFML pending."

24. As of April 17, 2023, the claimant's PFML application had been complete and was awaiting approval from the employer's private carrier. There was no additional information required for the application as of April 17, 2023.

25. On May 24, 2023, the claimant's PFML [application] through the employer's private carrier was denied.

26. On May 25, 2023, the claimant met with her manager and the Director of Human Resources regarding the denial of her application for PFML. The

claimant was given a written warning at that meeting. The written warning stated, in part, "[t]his warning is being given in May 2023 on a December 2022 partial occurrence, due to the fact that (the claimant) had a PFML claim pending, and she had four partial occurrences that were part of this pending claim, so they were excused pending a PFML approval. We were notified today that these four absences are no longer excused."

27. Four partial occurrences were added to the claimant's total because they were for leaving work early to take her son to his weekly appointment, prior to the FML approval on January 3, 2023.

28. The Director of Human Resources did not know why the PFML application was denied.

29. The claimant spoke to a representative of the employer's private carrier on or about the end of May 2023, regarding why the application was denied. The claimant was told by the representative that the application was denied because the doctor's note said that the son's need for therapy was "for his lifetime" and it needed to state the need for treatment in yearly increments. The representative told the claimant to reapply for PFML with the doctor filling out the paperwork without stating the son needed treatment for his lifetime.

30. In the beginning of June 2023, the claimant spoke to her son's physician regarding the language he used on the application. The claimant told the doctor she needed the doctor to fix the language. The claimant told the doctor that the note cannot state that the son needed the treatment for his lifetime.

31. The claimant believed that her son's doctor would send the letter/application with the proper language directly to the employer's private carrier in the same manner the first application was sent.

32. The claimant did not follow up with the employer's private carrier to find out if they received the new application/doctor's note.

33. On August 19, 2023, the claimant overslept and came to work late.

34. The claimant overslept on August 19, 2023, because her children were with her parents for vacation, and they did not get home until midnight. The claimant waited and stayed awake to assist her children when they came home.

35. The claimant worked a full eight-hour shift after she arrived to work late on August 19, 2023.

36. On August 23, 2023, the claimant met with her supervisor and the Director of Human Resources. The claimant was discharged from her job with the employer because she was late to work on August 19, 2023, and this was the twelfth partial occurrence.

37. The claimant would not have been discharged on August 23, 2023, if the four early departures to bring her son to counseling prior to January 3, 2023, had not been counted against her. The claimant would only have a written warning.

Credibility Assessment:

The Director of Human Resources testified in the hearing that, when she met with the claimant on August 23, 2023, the claimant stated that she thought that the discharge was coming and did not feel it was worth it to put in another note. The claimant testified in the hearing that she never said that she did not feel it was worth it to put in another note.

Reviewing the totality of the testimony and evidence presented, the claimant's testimony in its entirety is accepted as more credible. The claimant credibly testified that she asked her son's physician for a new note in the beginning of June that did not say he needed the treatment "for his lifetime." The claimant further believed that the doctor would send the note directly to the private carrier because that was the way everything was sent in when she first applied. The Director of Human Resources was not involved with the application for PFML through the private carrier. The Director of Human Resources forwarded the claimant information regarding what she needed to do to apply for both FML and PFML and the actual forms needed.

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.[1] 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 the review examiner's decision to award benefits is supported by substantial and credible evidence and free from error of law.

Because the claimant was discharged from her employment, her 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

[1] We note that, while Consolidated Finding # 6 refers to tardiness and early departures as partial absences, Consolidated Finding # 9 characterizes these types of infractions as occurrences. However, in multiple documentary submissions, including its policy and warnings issued to the claimant, the employer utilizes these terms interchangeably, along with the terms "instance" or "instances." Therefore, we take no exception with the review examiner doing the same.

> 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 maintains an attendance control policy, which states, in part: employee "absences include all time lost from the work schedule whether avoidable or unavoidable, voluntary or involuntary;" absences will be computed by looking back over the preceding twelve-month period; and accrual of six partial absences or more within that twelve-month period will result in progressive discipline. *See* Consolidated Findings ## 4–6. Such a policy is reasonable, as employees who miss work place an unfair burden on other employees. *See* Consolidated Finding # 7. The review examiner also found that the claimant was aware of the employer's policy.[2] Consolidated Finding # 8. In addition, the claimant had received from the employer a verbal warning on December 14, 2022, and a written warning on May 25, 2023, regarding her attendance. Consolidated Findings ## 19 and 26; Exhibits 3–4.[3] However, based on language contained in the employer's attendance control policy, the employer appears to retain some level of discretion in its progressive discipline, and there is insufficient evidence in the record for us to determine whether the policy is uniformly enforced.[4] Therefore, the Board cannot conclude that the claimant knowingly violated a reasonable and *uniformly enforced* policy under G.L. c. 151A, § 25(e)(2).

We next consider whether the employer has shown the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectation. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged. In this case, the claimant was discharged because she was late for her scheduled shift on August 19, 2023, which was after she had reached her eleventh partial absence. *See* Consolidated Finding # 36. Inasmuch as her tardiness on August 19th triggered her discharge, we consider whether this event was deliberate misconduct in wilful disregard of the employer's interest. We do not question the employer's decision to discharge the claimant. The only issue before us is whether she is eligible for unemployment benefits.

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[2] The record also establishes that the claimant had acknowledged and received a copy of the employer's handbook upon hire. Exhibit 1 is the claimant's acknowledgement of receipt, dated April 1, 2022. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

[3] Exhibit 3 is the documented verbal warning issued to the claimant by the employer on December 14, 2022, and Exhibit 4 is the written warning issued to the claimant by the employer on May 25, 2023.

[4] Exhibit 2 comprises of the employer's attendance control policy. Before describing its progressive discipline scheme, the employer indicates that employees are "subject" to the "following act for absences," and subsequently notes that "additional days may be permitted, but shall require submission of evidence acceptable to [ER] and justifying the reason." Nothing in this policy, or the employer's testimony, demonstrates that the employer discharges all employees who engage in the same conduct that resulted in the claimant's separation. The employer's written attendance policy is also part of the unchallenged evidence in the record.

Since the review examiner found that the claimant came to work late on August 19, 2023, the employer has proven that she engaged in misconduct. Consolidated Finding # 33. Consolidated Finding # 34 provides that she was late because the night before, her children had returned at midnight from a vacation with her parents, she had stayed awake to help them when they got home, and then she overslept in the morning. Nothing about these facts indicates she overslept deliberately.

Accordingly, the employer has not shown that the claimant engaged in deliberate action that caused her to arrive late to her shift on August 19, 2023.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning August 20, 2023, and for subsequent weeks if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 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.

JMO/rh