The claimant did not notify the employer, a temporary staffing agency, of her absence because she was only told to notify the client company of her absences. Since the claimant was not aware of the employer's expectation to be called about an absence, her failure to comply with the expectation was not done in wilful disregard of the employer's interest, as meant under G.L. c. 151A, § 25(e)(2). She is eligible for benefits.

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Issue ID: 0081 1836 39

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 September 26, 2023. She filed a claim for unemployment benefits with the DUA, effective September 24, 2023, which was denied in a determination issued on October 24, 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 22, 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 give the employer an opportunity to testify and present other 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 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, is supported by substantial and credible evidence and is free from error of law where, after remand, the review examiner found that the claimant complied with the expectations that had been communicated to her.

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 for the employer, a temporary staffing company, between 4/24/2023 and 9/26/2023, when she separated.

2. The claimant was assigned to work full time as a parts clerk for a client company. The assignment was ongoing with no end date.

3. The claimant's point of contact at the employer was the administration department employee and the owner. Upon hire, the administration employee [sic] department employee was administrator A. Administrator A's employment ended, and the new administration department employee became administrator B.

4. The claimant's immediate supervisors at the client company were supervisor A and supervisor A's son (supervisor B). The client company's senior human resources administration specialist was not the claimant's immediate supervisor.

5. The claimant's only contact with the senior human resources administration specialist was at the beginning of the assignment to complete her intake and get her photo identification. The claimant did not have further contact with the senior human resources administration specialist thereafter.

6. The employer does not have any attendance policies.

7. The client company has an attendance policy to control manufacturing costs. Six (6) points results in a verbal warning; eight (8) points results in a written warning; and twelve (12) points results in a 3-day suspension or termination. Per the client company's attendance policy, a violation can result in discipline "up to and including termination."

8. On 11/23/2022, the claimant signed the client company's attendance policy acknowledgement and returned it to administrator A.

9. On 11/23/2022, the claimant signed a job order for her assignment at the client company. The job order lists the claimant's contact person at the worksite as supervisor A as well as the client company's human resources phone number.

10. The employer expected employees to call the employer two (2) to four (4) hours prior to the start of their shift if they were going to be absent. The purpose of this was to allow time for the employer to find coverage for the shift. Administrator A did not inform the claimant of this expectation.

11. At no time during the claimant's employment when she needed to be absent did she notify the employer.

12. The claimant spoke to the employer about call out procedures. Administrator A told the claimant that as long as the client is aware of absences, "it is perfectly fine." The claimant was not aware of any requirement to contact the employer to report absences.

13. Administrator A told the claimant of the requirement to call the client company at least one (1) hour before the start of her shift and leave a message if the claimant was going to be absent. The phone number the claimant was given to call was the human resources phone number.

14. In the first few weeks of her assignment at the client company, supervisor A and supervisor B told the claimant to contact them to report absences.

15. During the claimant's employment, she reported absences to the client company by calling the human resources phone number and leaving messages for supervisors A and B as required. On three (3) occasions during the claimant's employment, supervisor A and supervisor B did not receive the claimant's messages. At times when supervisor A and supervisor B did not receive the claimant's messages, the employer would contact the claimant to ask if she was absent.

16. The claimant did not sign and was not issued a second warning for tardiness and absenteeism dated 5/25/2023. Neither administrator A nor administrator B issued any warnings to the claimant.

17. On 9/26/2023, the claimant was scheduled to work from 8:00 a.m. to 5:00 p.m.

18. On 9/26/2023, between 6:45 a.m. and 7:00 a.m., the claimant called the human resources phone number and left a message for supervisor B that she would be absent. The claimant was absent from work on 9/26/2023 because one of her children was sick and the claimant's other child had an IEP meeting at the school that afternoon. Neither supervisor A nor supervisor B contacted the claimant back.

19. The claimant did not think she violated any employer expectations when she called out of work on 9/26/2023 because the claimant called the client company at least one (1) hour before the start of her shift and left a message for supervisor B reporting her absence.

20. The client company did not get the claimant's message. On 9/26/2023 at 10:39 a.m., the client company's senior human resources administration specialist emailed the employer asking if anyone heard from the claimant.

21. At some point on 9/26/2023, administrator B called the claimant several times, and she did not answer.

22. Administrator B emailed [the] senior human resources administration specialist at 11:12 a.m. on 9/26/2023. The senior human resources administration specialist replied at 11:14 a.m. to end the claimant's assignment.

23. After the IEP meeting, the claimant returned administrator B's phone call and explained she had been in an appointment. This was the claimant's only communication with administrator B during her employment.

24. On 9/26/2023, administrator B discharged the claimant for a no call no show on 9/26/2023.

Credibility Assessment:

During the remand hearing, there was a dispute between the parties over who at the client company was the claimant's immediate supervisor. Administrator B alleged that the claimant's immediate supervisor was the senior human resources administration specialist. This is not credible. The claimant, who was offering direct testimony about her interactions with those at the client company, testified that her only contact with the senior human resources administration specialist was to complete her intake and get her photo identification and that they had no further contact with each other. It is not believable that an immediate supervisor would not have regular ongoing contact with their direct reports. Further, the job order itself lists the name of the contact person at the worksite as supervisor A and the claimant offered detailed direct testimony about her interactions with supervisors A and B, including their instructions in the first few weeks of her assignment at the client company to contact them to report absences. It is concluded that the claimant's immediate supervisors at the client company were supervisors A and B.

During the remand hearing, administrator B testified about the employer expectation for employees to call the employer two (2) to four (4) hours prior to the start of their shift if they were going to be absent. The claimant's testimony that she was not aware of this expectation is credible. While administrator B maintained that this should have been communicated to the claimant during her employment by administrator A, the claimant denied administrator A providing her with such instructions. The claimant was able to testify with specificity about what administrator A told her, namely that that as long as the client is aware of absences, "it is perfectly fine" and administrator A was not presented as a witness in this case. Furthermore, it was undisputed that at no time during the claimant's employment when she needed to be absent did she notify the employer, which corroborates the claimant's position that she was not aware this was required because the claimant did testify about occasions she needed to be absent and notified the client company. It stands to reason that if the claimant was aware that contacting the employer was a requirement, she would have done so.

During the remand hearing, the employer presented a second warning for tardiness and absenteeism dated 5/25/2023. Administrator B maintained that this should have been issued to the claimant by administrator A. It was undisputed that administrator

> B did not issue this warning to the claimant, and the claimant denied that administrator A issued it to her. The document is not signed and it is not clear who wrote the warning itself. As such, the claimant's testimony that this was not issued to her is believable.
>
> During the remand hearing, administrator B maintained that the claimant did not contact the client company on 9/26/2023 to report her absence that day. This too is not credible in light of the claimant's detailed direct testimony. The claimant was able to provide the time she called, the number she called, and that she left a message for supervisor B that she would be absent. There was no dispute between the parties about the client company phone number the claimant was supposed to use. The claimant offered direct testimony about three (3) prior occasions when she left messages for supervisors A and B as required that were not received. Given this history, it is believable that the claimant called the client company the morning of 9/26/2023 consistent with the expectation administrator A communicated to her and the client company did not receive the claimant's message.

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, 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 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 here is a staffing agency and did not provide a relevant policy that addresses the attendance-related behavior that led to the claimant's discharge. Consolidated Finding # 6. Consequently, the employer has not met its burden to show that the claimant engaged in a knowing

violation of a reasonable and uniformly enforced policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must show that the claimant engaged in the conduct for which she was discharged. Following remand, the review examiner found that the claimant was assigned to work for the client company on September 26, 2023, from 8:00 a.m. to 5:00 p.m. Consolidated Finding # 17. However, the claimant was absent from work that day because one of her children was sick and another child had a school IEP meeting. Consolidated Finding # 18. The claimant did not notify the employer of her absence, but she left a message for the client company consistent with the manner in which she was instructed to call out at the start of her employment. Consolidated Findings ## 13–15, and 18–19.

The employer discharged the claimant on September 26, 2023, because she did not notify the employer or, allegedly, the client company of her absence that day. Consolidated Findings ## 20 and 24. While the consolidated findings show that the claimant did not engage in any misconduct with respect to the client company, as she properly called out of work on September 26th, the consolidated findings do confirm that the claimant engaged in misconduct when she failed to notify the employer of her absence. Inasmuch as she had not reported prior absences to the employer when she was to be absent from work at the client company, we can reasonably infer that this was deliberate. *See* Consolidated Finding # 15.

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." <u>Grise v. Dir. of Division of Employment Security</u>, 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." <u>Garfield v. Dir. of Division of Employment Security</u>, 377 Mass. 94, 97 (1979).

The review examiner found that the employer expected the claimant to notify both the client company and the employer if she was going to be absent for a shift. Consolidated Findings ## 10 and 12. However, at no time during the claimant's employment was she notified that she was required to call the employer to report an absence. Consolidated Findings ## 10–12. Because the claimant was not aware of the expectation, we cannot conclude that her failure to notify the employer of her absence on September 26, 2023, was done in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or 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 entitled to receive benefits for the week beginning September 24, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 20, 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.

SVL/rh