Employer that discharged the claimant for reporting to work more than three hours late, allegedly without notifying the employer of her tardiness, failed to establish a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest. The claimant had notified her manager that she had a family medical emergency, the manager approved her reporting to work late, and the nature of the family medical emergency that caused the claimant to be late constituted mitigating circumstances. Held claimant is entitled to benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0081 4511 45

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 reverse.

The claimant was discharged from her position with the employer on November 6, 2023. She filed a claim for unemployment benefits with the DUA, effective November 5, 2023, which was approved in a determination issued on November 24, 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 January 6, 2024. 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 allow the claimant to provide testimony and other evidence, and so that the parties could provide copies of relevant policies, disciplinary warnings, and contemporaneous medical documentation. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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's unrefuted testimony established that the claimant's discharge for attendance infractions constituted 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. On September 18, 2023, the claimant began working full-time for the employer, a non-profit community health center, as a behavioral health specialist. She was supervised by the behavioral health specialist manager (manager) and the director of nursing education (director). Her most recent rate of pay was $23.00 per hour.

2. For the first 90 days of her employment, the claimant was in a probationary/orientation period. During this period, an employee is under supervision regarding their basic duties. If a supervisor determines that the employee is not fulfilling the requirements of their position, they can recommend that the employee be terminated.

3. The employer maintains an attendance policy requiring employees to be at their workstation and ready to work at the beginning of their shift. If an employee is going to be absent or late, they must let the employer know at least 60 minutes before the start of the workday and give the employer an expected time when they can return to work.

4. Employees who are repeatedly absent, late, or leave work early are in violation of the policy.

5. Employees who fail to appear for work or call out for three days are determined to have abandoned their jobs.

6. The employer has this policy because they work with clients based on appointment and they need to be punctual in order to ensure a smooth workflow.

7. The employer is required by the state to maintain a certain staff-to-client ratio, otherwise they will have to close and will not be able to offer services to clients.

8. The policy is contained in the employee handbook. The claimant received a copy of the handbook and acknowledged it on September 26, 2023.

9. Employees who violate the attendance policy are subject to discipline up to and including termination.

10. The employer expects employees to appear on time to their schedule[d] shifts. If an employee is going to be late, needs to leave early, or cannot come in, they are expected to let the employer know at least 60 minutes ahead of their start time.

11. Employees can let their supervisors know that they are going to be absent or late via text message.

12. The employer has this expectation in order to maintain a smooth workflow and stay within the state-required staffing ratio.

13. On the claimant's first day of work, September 18, 2023, she took an overly long lunch during orientation. That day the director had a discussion with her about the attendance policy.

14. The director considered the conversation on September 18, 2023, to constitute a verbal warning. The claimant was not required to sign anything acknowledging the warning.

15. On October 5, 2023, the claimant left work early. She asked her manager if she could leave work early that day and her request was approved.

16. On October 11, 2023, the claimant texted her manager and informed him that she had COVID-19. He instructed her to remain out for 5 days. On October 16, 2023, the claimant texted him and asked when she should come back in. He told her to come back on October 18, 2023. On October 18, 2023, the claimant was sick again. When she informed the manager via text message, she was allowed to stay out for the next two days. The claimant returned to work on October 20, 2023.

17. On October 26, 2023, the claimant texted her manager and asked to stay home that day due to a medical issue. He approved her request.

18. The claimant was scheduled to work from 7:00 a.m. to 3:30 p.m. on November 1, 2023.

19. The claimant lives with and cares for her elderly grandfather. Her aunt and uncle help her grandfather during the day. The claimant handles his care at night.

20. Early in the morning of November 1, 2023, the claimant's grandfather's gallbladder bag was ripped out from his body. At approximately 5:20 a.m., the claimant called an ambulance and brought her grandfather to the emergency room.

21. On November 1, 2023, the claimant's grandfather was admitted to the hospital for a gallbladder infection and sepsis and required surgery. The claimant had to serve as her grandfather's medical proxy.

22. On November 1, 2023, at 6:13 a.m., the claimant texted her manager and informed him that she was at the hospital due to a family emergency. The claimant asked if she could come in when she was able to leave the hospital. She informed him that she did not know when this would be.

23. The manager approved the claimant's request. The claimant thanked him and told him that she would let him know when she was on her way.

24. Shortly before 9:00 a.m., the claimant's aunt and uncle appeared and took over for the claimant. The claimant was free to go to work.

25. At 9:02 a.m., the claimant texted her manager and told him that she was leaving the hospital and that she would come in after she changed clothes. She asked if that was okay. He told her it was.

26. Around 9:00 a.m., the claimant left the hospital, went home, changed, and came to work.

27. The claimant lives very close to both the hospital and her work.

28. On November 1, 2023, the claimant clocked into work at 9:32 a.m. She was approximately 2.5 hours late for her shift.

29. When the claimant appeared for work on November 1, 2023, she and her manager spoke about her grandfather's illness. They discussed whether it would be a problem moving forward and whether or not the claimant should possibly switch to a 3:00 p.m. – 11:00 p.m. shift. There was no discussion about her attendance. The manager did not ask her for doctor's note.

30. After arriving late, the claimant worked her entire shift.

31. On November 2, 2023, the director of nursing education decided to move forward with terminating the claimant. He stated that this was due to attendance issues and a pattern of unreliability.

32. Shortly after November 2, 2023, the director of nursing and the director of nursing education decided to terminate the claimant.

33. The determinative factor was her allegedly appearing over 3 hours late to work on November 1, 2023, without calling out ahead of time.

34. On November 6, 2023, the employer discharged the claimant over a phone call for violations of the employer's attendance policy. During the phone call, the claimant told the employer that she had permission to come in late on November 1, 2023.

35. The claimant never requested any accommodations. It is questionable whether or not the claimant would have been eligible for benefits as she was still in her probationary/orientation period.

36. On November 24, 2023, the Department of Unemployment Assistance issued a Notice of Approval allowing the claimant benefits under Section 25(e)(2) of the

Law beginning November 5, 2023. The employer appealed the Notice of Approval.

Credibility Assessment:

The employer's witness (a human resources business partner) and the employer's representative attended a hearing on January 2, 2024. The claimant, the employer's witnesses (two human resources business partners), and the employer's representative attended a remand hearing on February 14, 2024, and March 8, 2024.

During the remand hearing, both the claimant and the employer agreed about the employer's attendance policy, the claimant's knowledge of the policy and the consequences for violating it, and that the claimant appeared late for her shift on November 1, 2023. However, during the remand hearing, the claimant's and the employer's testimonies [sic] differed on several major issues. The claimant credibly testified and provided documentary evidence (specifically, screenshots of text messages from the day in question), that on November 1, 2023, at 6:13 a.m., she had texted her manager and informed him that she was at the hospital due to a family emergency. The text messages show that the claimant asked her manager if she would be able to come to work late, that she told him that she did not know when it would be, and that the manager approved her to come in late. In addition, the text messages show that at 9:02 a.m., the claimant texted her manager again, told him she was leaving the hospital, and asked if she could still come in after she went home and changed. The manager again approved the claimant's request to come in late. Therefore, the employer's testimony that the claimant did not inform her manager that she was going to be late is outweighed by the evidence provided by the claimant. The employer's witnesses admitted during the hearing that they had not seen these text messages prior to the remand hearing and that they did not know if the individuals who had decided to discharge the claimant had seen the text messages either.

In addition, the employer's witnesses testified that the claimant had arrived to work on November 1, 2023, over 3 hours late for her shift. The claimant maintained that she had clocked into work at 9:32 a.m., which was approximately 2.5 hours late for work. The employer questioned the claimant as to how she could have left the hospital at 9:02 a.m., gone home, changed clothes, and arrived at work by 9:32 a.m. The claimant broke down the time it would have taken her to get home, change, and get to work, pointing out that she did not live far from either the hospital of [sic] the employer's establishment. The employer did not provide any evidence such as timecards or sign in sheets showing when the claimant appeared for work and neither of the employer's witnesses had any first-hand knowledge about when she arrived at work on November 1, 2023. Therefore, the claimant's testimony that she arrived at 9:32 a.m., 2.5 hours late, is granted more weight.

The claimant provided detailed testimony about why she was late to work on November 1, 2023. She explained that she lives with and cares for her elderly grandfather, that during the early morning of November 1, 2023, his gallbladder

bag was ripped from his body, that she called an ambulance and brought him to the emergency room around 5:20 a.m., that he was septic and needed to undergo surgery, and that the claimant had to stay with him to serve as his medical proxy until her aunt and uncle could come and relieve her. In support of her testimony, the claimant provided her grandfather's discharge papers which confirmed that he was admitted on November 1, 2023, and that he had a gallbladder infection and sepsis and required surgery.

The employer testified that the claimant displayed a pattern of attendance issues and unreliability which led to the decision to terminate her. They provided a list of days when the claimant was absent, tardy, or left early. The claimant provided text messages between her and her manager showing that on those days, she had informed him when she would not be able to work, that they had to do mostly with medical issues, and that in every case, her manager approved her absences. The employer also testified that the claimant had received a verbal warning on September 18, 2023 (her first day at work) for taking an overly long lunch during orientation. Both the claimant and the employer agreed that the director had had a conversation with the claimant about attendance but that the claimant was not required to sign anything. The employer described this interaction as a verbal warning. The claimant testified that she did not know that this was a warning.

When it comes to these discrepancies, the overall testimony of the claimant is assigned more weight than the overall testimony of the employer where the claimant's testimony was more logical, more specific, and easier to follow compared to the testimony of the employer, and where the claimant was able to provide substantial documentary evidence to support her testimony.

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. As discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is entitled to benefits.

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

"[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 purpose of unemployment compensation is to provide compensation for those who are thrown out of work through no fault of their own." Leone v. Dir. of Division of Employment Security, 397 Mass. 728, 733 (1986), *citing* Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002, 1003 (1985).

The Supreme Judicial Court has held that, to establish a knowing violation, the employer must show that "at the time of the act, [the employee] was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." *See* Still, 423 Mass. at 813. An employer does not meet its burden if the conduct was "unintentional by virtue of being involuntary, accidental, or inadvertent." Id.

Here, although the employer provided a copy of its policy handbook on remand, the review examiner found that discipline for violations of the employer's attendance policy may be "discipline up to and including termination." *See* Consolidated Finding # 9. Where the employer uses discretion when enforcing its attendance policies, we conclude that it has failed to meet its burden to show the claimant was discharged for a knowing violation of a reasonable and *uniformly enforced* policy. Alternatively, the employer may prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's consolidated findings show that the employer expected employees to appear on time for their scheduled shifts and to let the employer know 60 minutes before their scheduled start time if they are going to be late or cannot report to work. *See* Consolidated Finding # 10. The claimant was aware of this expectation, which is inherently reasonable, because it arises from the employer's attendance policy that she received at hire. *See* Consolidated Findings ## 3 and 8.

Initially, the review examiner accepted the employer's unrefuted testimony that the claimant was discharged for appearing at work more than three hours late without calling to report her tardiness on November 1, 2023.[1]

After remand, however, the review examiner provided a detailed credibility assessment rejecting the employer's testimony as less credible than the claimant's. She adopted the claimant's detailed testimony on remand about the communications she had with her manager regarding her absences from work prior to November 1, 2023, as well as communications they had exchanged on November 1, 2023, about her grandfather's medical emergency that morning. She noted that the claimant's direct testimony was corroborated by text message exchanges with her manager, as well as documentary evidence that her grandfather had a medical emergency on that morning requiring

[1] *See* Remand Exhibit # 1, the January 6, 2024, hearing decision, Findings of Fact ## 10–13.

the claimant to bring him to a hospital emergency room. 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. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). We believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

After remand, the consolidated findings show that the claimant's grandfather, for whom she provides overnight care and serves as a medical proxy, suffered a medical emergency early in the morning of November 1, 2023. The claimant brought him to a hospital emergency room, where he was admitted for a gallbladder infection with sepsis and required surgery. *See* Consolidated Findings ## 19–21.

At 6:13 a.m. on November 1, 2023, the claimant sent a text message to her manager informing him that she was at the hospital due to a family emergency, asking if she could report to work once she was able to leave the hospital and noting that she did not know when that would be. The manager approved the claimant's request. She replied that she would let him know when she was on her way to work. *See* Consolidated Findings ## 22–23.

The claimant's relatives appeared at the hospital shortly before 9:00 a.m., the claimant texted her manager that she was on her way to work at 9:02 a.m., he acknowledged that she could still report to work, she went home to change clothes, and she clocked into work at 9:32 a.m., where she worked through the end of her shift. The claimant was approximately 2.5 hours late for her shift on November 1, 2023. She spoke with her manager about her grandfather's illness, they did not discuss her attendance, and the manager did not ask for a doctor's note. *See* Consolidated Findings ## 24–30.

On November 2, 2023, the employer decided to discharge the claimant for "attendance issues and a pattern of unreliability." The determinative factor was her allegedly reporting to work more than three hours late on November 1, 2023, without calling ahead of time to report her circumstances. *See* Consolidated Findings ## 31–33. The employer discharged the claimant on November 6, 2023, for violating its attendance policy. *See* Consolidated Finding # 34.

There is no dispute that the claimant was late for work on November 1, 2023. To the extent that she was aware that she was going to be late for work, the conduct was deliberate. However, we must consider whether her conduct was done in wilful disregard of the employer's interest. Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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).

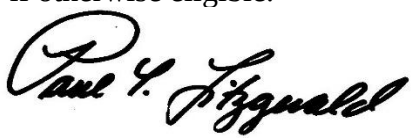
Here, the claimant's conduct was not in wilful disregard of the employer's interest. Although she understood that she was supposed to report to work as scheduled and on time, she contacted her manager from the hospital to inform him of her circumstances, she asked to be allowed to report

to work late, he approved her request, and she eventually reported to work approximately 2.5 hours after her scheduled start time. Although the employer discharged the claimant for allegedly not reporting her tardiness to her manager, the review examiner's consolidated findings establish that the claimant's manager knew of and approved the claimant's late arrival to work on November 1, 2023.

Finally, we consider whether the claimant has shown mitigating circumstances for reporting late to work on November 1, 2023. 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). In the instant case, the claimant was late to work because she had to take her grandfather, for whom she provided overnight care and served as a medical proxy, to the hospital for emergency surgery. This constitutes a circumstance beyond the claimant's control. Moreover, contrary to the employer's initial claims that the claimant failed to communicate her situation to the employer, the review examiner found that the claimant had remained in contact with her manager about her anticipated lateness and eventual return to work. The claimant has demonstrated mitigating circumstances for reporting late to work on November 1, 2023.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in a knowing violation of a reasonable and uniformly enforced rule or policy, or in 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 reversed. The claimant is entitled to receive benefits for the week ending November 11, 2023, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - December 20, 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.

JPCA/rh