The claimant was discharged because she left her shift early after getting into an argument with two coworkers. As the claimant's supervisor had instructed her to remain for the duration of her shift, she understood that her decision to leave early was contrary to the employer's expectation. Further, the claimant did not show that her panic attack rose to mitigating circumstances, as she was still able to work. Held her decision to leave was deliberate misconduct in wilful disregard of the employer's interest 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: 0082 0184 83

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 reverse.

The claimant separated from her position with the employer on January 19, 2024. She filed a claim for unemployment benefits with the DUA, effective January 14, 2024, which was denied in a determination issued on February 21, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 16, 2024. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's anxiety and fear of returning to a hostile environment constituted mitigating circumstances for her decision to leave work prior to the end of her shift without permission, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as medical assistant for the employer, a healthcare center, between September 3, 2019, and January 19, 2024, when she separated.

2. The claimant's immediate supervisor was the charge nurse (supervisor).

3. The employer maintains a "Standards of Conduct" policy (the policy) that prohibits employees from leaving work prior to the completion of their shift. When an employee whose job duties are to provide patient care leaves their work prior to the end of their shift, it is considered patient abandonment.

4. The purpose of the policy is to set guidelines as to what is expected of the employees.

5. The claimant was made aware of the policy.

6. A violation of the policy may lead to the employee being placed on a disciplinary action plan or termination depending on the infraction.

7. The employer expected the claimant to return from her lunch break and work until the end of her shift.

8. The claimant was aware of the expectation.

9. A violation of the expectation can result in termination.

10. The claimant has a history of experiencing panic attacks since the traumatic experience of losing her father when she was younger.

11. The claimant has not been diagnosed with panic attacks or anxiety by a doctor.

12. On January 16, 2024, the claimant was scheduled to work from 11:00 a.m. until 8:00 p.m.

13. The claimant was scheduled to work with two (2) other medical assistants with one (1) provider.

14. The claimant and her coworkers should have been taking turns assisting the patients.

15. The claimant did not see one (1) of the medical assistants (assistant A) for the majority of the shift and she did not assist any patients.

16. The claimant took turns with the second assistant (assistant B) assisting the patients as needed.

17. At approximately 3:30 p.m., the claimant overheard mumbles from the neighboring patient room.

18. The claimant opened the door and found assistant A and assistant B in the patient room not working. One assistant was playing on her cell phone and the other assistant was on her laptop.

19. The claimant responded, "I'm confused, this is what we are doing?"

20. Assistant A and assistant B responded in a hostile way that there were no patients in there and that they had already assisted their patient.

21. The claimant began to have a panic attack. The claimant began sweating, felt chest pain, was shaking, and her thoughts were blurry.

22. The claimant completed her tasks of assisting the patient in the room and setting up the room for the provider.

23. The claimant then attempted to contact the supervisor several times.

24. The claimant continued to call the supervisor attempting to reach her because the claimant was so distraught regarding the situation.

25. The claimant was able to contact the supervisor and inform her of the incident with assistant A and assistant B.

26. The claimant asked the supervisor if she could leave for the day. The supervisor instructed her to take her lunch break, but that she was required to come back and complete her shift. The supervisor also informed her that she would come to the facility.

27. The claimant sat in her car at the employer's facility.

28. The claimant spoke with the supervisor again from her car and begged her, asking her several times, to allow her to go home and take the rest of her shift off because she felt uncomfortable returning to her shift due to the hostile nature of assistant A and assistant B.

29. The claimant was unable to return to her shift due because she felt uncomfortable being alone with assistant A and assistant B for the remainder of her shift, she was afraid of being verbally attacked again by the assistants in a hostile manner and was afraid for her safety.

30. The claimant informed the supervisor she was not going to be returning to her shift and left the employer's facility.

31. On January 19, 2024, the claimant was discharged from employment for leaving her shift on January 16, 2024, which was considered abandoning patients.

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. We reject the portion of Finding of Fact # 29 that states that the claimant was unable to return to her shift as inconsistent with the evidence of record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was entitled to benefits.

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 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).

While the employer maintains a policy prohibiting employees from leaving work prior to the end of their shift, it retains discretion over how to discipline employees who violate that policy. Consolidated Findings ## 3 and 6. As the employer did not provide any evidence showing it discharged all other employees who abandoned their shifts without permission, the evidence presented is insufficient to show a knowing violation of 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 burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged. As the claimant conceded that she left her shift early on January 16, 2024, there is no question that she engaged in the misconduct for which she was discharged. Findings of Fact ## 26 and 30. Further, as the claimant informed her supervisor that she was not returning to her shift, it is self-evident that her decision to leave was deliberate. Finding of Fact # 30.

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 acknowledged that she made the decision to leave even though her supervisor had instructed her that she was required to complete her shift, and she understood that this meant she was not given permission to leave her shift early. Findings of Fact ## 26, 28, and 30. As the claimant sought permission to leave early and further conceded that she understood her supervisor's instruction to remain at work, her testimony and actions confirm that she understood that her decision to leave her shift early without permission was contrary to the employer's expectations. *See* Findings of Fact ## 7, 8, and 23–26.

A policy which requires employees to complete their shifts is reasonable, particularly here where staffing is necessary for patient care.

In this case, the claimant explained that she made the decision to leave early because she was afraid of being verbally attacked and was concerned for her safety. Findings of Fact ## 20, 28, and 29. We must, therefore, consider whether the claimant's explanation for her misconduct constituted mitigating circumstances that prevented the claimant from following the employer's instructions. 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).

While the review examiner omitted this information from her findings of fact, she inferred that the claimant was compelled to leave work early and without permission because she was continuing to experience a panic attack. The claimant did testify that she began experiencing a panic attack after confronting the two other medical assistants but never suggested that this panic attack precluded her from continuing to work. Finding of Fact # 21. To the contrary, the claimant explained that she was able to complete her duties before contacting her supervisor. Findings of Fact ## 22–25. Further, when asked why she did not return to work after taking a break, the claimant testified that she did not feel comfortable working with the other two medical assistants and had concerns about her personal safety. Findings of Fact ## 26 and 29. Therefore, we see no evidentiary foundation for the review examiner's conclusion that the claimant left because she was still experiencing a panic attack.

Further, we see no evidence in the record suggesting that the claimant was in imminent danger of harm such that might compel her to leave her shift early. When asked for details about what the two medical assistants had said to her, she explained that they became defensive and told her that they were in the empty room because they had already completed their work and no other

assignments were available.[1] The two medical assistants may have responded in hostile tones, however, there was no indication from the record that either had physically attacked the claimant, threatened the claimant, or taken any action that reasonably could be construed as threatening the claimant's safety. Findings of Fact ## 19 and 20.

We do not doubt that the claimant felt uncomfortable continuing to work with the other two medical assistants on that day, even with the knowledge that their supervisor's arrival was imminent. Findings of Fact ## 26 and 28. However understandable the claimant's discomfort may have been, it is insufficient to show that the claimant was compelled to leave before the end of her shift on January 16, 2024, due to circumstances beyond her control. Instead, as the claimant made the volitional choice to leave before the end of her shift despite acknowledging explicit instructions to the contrary, she is subject to disqualification under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectations under G.L. c. 151A, § 25(e)(2), because she left her shift early without requesting permission.

The review examiner's decision is reversed. The claimant is denied benefits for the week of January 14, 2024, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 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.

[1] The claimant's uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed into the record, and it is thus 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).

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.

LSW/rh