Although the claimant had previously been warned about attendance issues, the final instance of tardiness was due to mitigating circumstances. The claimant was late because of a flat tire, not as a result of any wilful disregard of the employer's expectation that he arrive to work on time. Held he is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0082 1031 22

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 separated from his position with the employer on January 25, 2024. He filed a claim for unemployment benefits with the DUA, effective January 28, 2024, which was approved in a determination issued on February 22, 2024. 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 March 16, 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 obtain additional evidence about the reason for the claimant's separation. 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, which concluded that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest because he arrived late on January 25, 2024, and failed to timely notify the employer of his tardiness, 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 are set forth below in their entirety:

1. The employer is a food distribution company. The claimant worked as a full-time freezer selector for the employer. The claimant worked for the employer from 5/3/2023 to 1/28/2024.

2. The claimant worked second shift for the employer. The employer assigned the claimant to start work at 5:00 p.m.

3. The employer expected the claimant to arrive on time for his scheduled shifts.

4. The employer expected the claimant to report his late arrivals. The employer expected the claimant to do this at least one hour prior to his shift start time. The employer expected the claimant to report his late arrivals via its call-out telephone line.

5. The employer gave a verbal warning to the claimant on 5/30/2023. This warning was for a performance issue.

6. The employer gave a warning to the claimant on 6/12/2023. The employer labeled this warning a "verbal written warning." This warning was for an attendance issue.

7. The employer gave a verbal warning to the claimant on 9/13/2023. This warning was for a performance issue.

8. The employer gave a final written warning to the claimant on 11/20/2023. This warning was for an attendance issue.

9. The employer did not issue any discipline to the claimant in the period from 11/21/2023 through 1/24/2024.

10. The employer assigned the claimant to work a shift scheduled for 5:00 p.m. on 2/25/2024.

11. The claimant lived in [City A], MA when he worked for the employer. The claimant worked at the employer's [City B], MA location. The claimant's commute to work took forty minutes.

12. The claimant drove to work on 2/25/2024. The claimant's vehicle sustained a flat tire on his commute to work. The claimant concluded that this would cause him to arrive late for work. The claimant sent a text message to his supervisor at 4:37 p.m. The text message read, "[Supervisor's name] running lil late like 515." The claimant then called the employer's call-out line and reported his anticipated late arrival. The claimant had a spare tire in the vehicle. The claimant changed the tire and then drove to work. The claimant arrived at work several minutes late.

13. The employer discharged the claimant on 1/28/2024. The employer discharged the claimant because he arrived late for work on 1/25/2024 and because it determined that he did not report this late arrival at least one hour before his shift start time.

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. After such review, the Board adopts the review examiner's consolidated findings except as follows. There appears to be a typographical error in Consolidated Findings ## 10 and 12, which state, in relevant part, that the final incident occurred on February 25, 2024. Consistent with the record and Consolidated Finding # 13, we believe the review examiner intended to find that the claimant was driving to work on January 25, 2024. 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 is not entitled to benefits.

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. . . .

"[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 an attendance policy, it did not provide any evidence showing that it discharged all other employees who were late for work under similar circumstances. Absent such evidence, the employer has not met its burden 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 the claimant engaged in the misconduct for which he was discharged. In this case, the employer discharged the claimant because he arrived late for work on January 25, 2024, and did not inform the employer that he would be tardy at least one hour prior to the start of his shift. Consolidated Finding # 12. As there was no dispute that the claimant arrived late to work on January 25, 2024, nor any dispute that he informed the employer that he was going to be late approximately 20 minutes before his shift was scheduled to start, there is no question that he engaged in the misconduct for which he was discharged. Consolidated Finding # 13. Further, his decision to stop and change the flat tire, which is what ultimately caused the claimant to be late for the start of his shift, was self-evidently a deliberate act. *See* Consolidated Finding # 12.

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).

At the remand hearing, the claimant confirmed that he understood the employer expected him not to be late for the start of his shift.[1] The employer's expectation in this regard was facially reasonable. It serves to ensure the employer's business operates properly and efficiently. As the claimant notified the employer that he would be late for his shift on January 25, 2024, via two different means, his testimony and actions confirm that he understood his tardiness on that day was contrary to this expectation. *See* Consolidated Finding # 12.

In this case, however, the dispositive issue is whether the claimant presented mitigating circumstances for his tardiness on January 25, 2024. 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).

The claimant arrived late to work on January 25, 2024, because he had gotten a flat tire on his way to work and had to stop to change the tire. Consolidated Finding # 12. We recognize that he had received two warnings for attendance issues in the past. 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). We can reasonably infer that the claimant could not have foreseen the flat tire that caused him to be late for work on the afternoon of January 25, 2024. Thus, it was a circumstance beyond his control.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the claimant established mitigating circumstances for the final instance of misconduct which caused his discharge.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of January 28, 2024, and for subsequent weeks if otherwise eligible.

[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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 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.

LSW/rh