

The event which triggered the claimant's discharge was her failure to report to work or notify the employer of the absence ahead of her shift on December 29, 2023. Held the claimant was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), because her actions on that date were due to the mitigating circumstances of her cell phone not working and her daughter's unexpected illness.

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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 separated from her position with the employer on January 2, 2024. She filed a claim for unemployment benefits with the DUA, effective February 4, 2024, which was denied in a determination issued on May 31, 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 June 27, 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 remanded the case to the review examiner to obtain additional evidence about the circumstances leading up to 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 is eligible for benefits because she had mitigating circumstances for her absence and her failure to contact the employer prior to the start of her shift, 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 claimant worked as a full-time medical assistant with the employer, a primary care medical practice, from June 27, 2022, through January 2, 2024, when she separated from her employment.
2. The claimant's direct supervisor was the assistant manager.
3. No written rules or policies were presented.
4. The employer maintained an expectation that employees would work when scheduled.
5. The purpose of this expectation is to ensure adequate staffing.
6. The employer communicated the expectation to the claimant through the employee handbook, and verbal discipline.
7. The employer maintained an expectation that employees would call the employer prior to the start time of their scheduled shift if they could not make it to work or would be tardy.
8. The purpose of this expectation is to ensure adequate staffing.
9. The employer communicated the expectation to the claimant through the employee handbook, and verbal discipline.
10. In June, 2023, the director of nursing and assistant manager provided the claimant with verbal coaching in an effort to improve the claimant's attendance.
11. On August 7, 2023, the claimant received a verbal warning due to on-going violations of the attendance policy.
12. During the August 7, 2023, verbal warning, the claimant was asked if she would like to change her schedule in an effort to improve her attendance, but the claimant declined the offer.
13. During the last week of December, 2023, the claimant was absent or tardy for work four (4) out of the five (5) scheduled workdays.
14. On December 29, 2023, the claimant was scheduled to work at 8:30 a.m.
15. Upon waking up on December 29, 2023, the claimant's cell phone was dead.
16. The claimant did not own a house phone.
17. The morning of December 29, 2023, the claimant's friend picked her up at her residence to first drop her child off at her aunt's home for childcare and then go to work.

18. The claimant did not arrive to work on-time for her scheduled 8:30 a.m. scheduled shift.
19. The claimant did not contact the employer prior to the 8:30 a.m. scheduled shift.
20. The claimant dropped her daughter off at her aunt's residence after her 8:30 a.m. shift began.
21. Upon arriving at her aunt's home, the claimant spent time getting her child acclimated for her day.
22. The claimant did not utilize her aunt's cell phone as she did not recall the number of the employer.
23. The claimant did not utilize her aunt's cell phone to perform a google search of the employer phone number.
24. The claimant's aunt provided the claimant with a phone charger.
25. Upon getting in her friend's car, the claimant began charging her cell phone.
26. It would take the claimant approximately twenty-five (25) minutes to get from her aunt's residence to work.
27. At 8:53 a.m., the assistant manager sent the claimant a text message asking, "Are you here?"
28. At approximately 9:01 a.m., upon her cell phone turning on, the claimant responded to the assistant manager's text message stating, "Almost! My phone's been dead or else I could've texted sooner."
29. At approximately 9:03 a.m., the assistant manager sent a text message response, "Ok."
30. While on the way to work, the claimant and claimant's friend stopped at a gas station for gas.
31. While on her way to work, the claimant received a call from her aunt requesting the claimant's daughter be picked up as the claimant's daughter was feeling ill.
32. At 10:16 a.m., the assistant manager sent a text message to the claimant asking, "ETA?"
33. At approximately 10:31 a.m., the claimant sent a text response to the assistant manager stating, "I'll call you in a few minutes, but (aunt) is having me go back kuz (sic) (daughter) has a fever and she's coughing."

34. The claimant did not call the assistant manager following the text message exchange.
35. At approximately 11:39 a.m., the claimant sent the assistant manager a text message stating, "On my way to the ER with my daughter to get tested."
36. At approximately 11:40 a.m., the assistant manager sent a text message response, "Ok, see you Tuesday. Next time call."
37. The claimant did not arrive for her December 29, 2023, scheduled shift, because her daughter was ill and needed to care for her.
38. At approximately 3:00 p.m., the claimant sent the assistant manager a text message stating, "[Name A] was negative, but the two others were positive, and I am testing."
39. At approximately 4:00 p.m., the assistant manager sent a text message response, "So far everyone who has tested positive at work tested negative the first few times, so be careful."
40. On January 2, 2024, the claimant was called into a meeting with the director of human resources and director of nursing, whereby the claimant was informed she was being discharged due to on-going issues with her attendance.
41. The employer would have discharged the claimant even if the claimant contacted the employer prior to her scheduled December 29, 2023, shift because of the claimant's on-going attendance violations.
42. The claimant was discharged due to her lack of attendance for her December 29, 2023, scheduled shift, and for not calling the employer prior to her scheduled start time.

Credibility Assessment:

The claimant gave consistent testimony about the events of December 29, 2023, during both the initial and remand hearings but provided conflicting accounts of the timeline. Initially, she claimed her shift was to start at 8:30 or 9:00 a.m., dropped her daughter off at 9:00 a.m., received a call from her aunt at 9:42 a.m., and first contacted her employer at 10:16 a.m. to say she might not make it to work. However, during the remand hearing, she stated her shift was set for 8:30 a.m., was picked up by a friend at 8:22 a.m., received a call from her aunt at 8:45 a.m., and responded to an 8:53 a.m. text from her assistant manager at 9:01 a.m. Due to these inconsistencies, her timeline cannot be deemed credible.

It is undisputed that the claimant was going to be late for her 8:30 a.m. shift and did not contact her employer until 9:01 a.m. after receiving a text from the assistant

manager at 8:53 a.m. The claimant consistently testified that her phone was dead when she woke up and she could not contact her employer until it was charged. Additionally, it's undisputed that the claimant only informed the employer she could not come to work due to her daughter's illness in texts sent at 10:31 a.m. and 11:39 a.m.

The employer testified candidly that even if the claimant had contacted them before her 8:30 a.m. shift, she would have been discharged due to ongoing attendance issues.

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 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 did not present a specific attendance policy or provide evidence it discharged all other employees who failed to notify the employer of their absences prior to the start of their shift under similar circumstances. *See Consolidated Finding # 3*. 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 that 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 she was discharged.

Notwithstanding the claimant's history of attendance issues, we focus on the event which triggered her discharge, her absence and failure to call in ahead of her shift on December 29, 2023. Consolidated Finding # 42. There was no dispute that the claimant did not report to work as scheduled on December 29, 2023, nor any dispute that she failed to notify the employer of her absence prior to the start of her shift. Consolidated Findings ## 18, 19, and 42. Therefore, she engaged in the misconduct for which she was discharged. The claimant's decision not to report to work was deliberate, as she chose instead to return to her aunt's house to pick up her daughter to be tested. Consolidated Findings ## 31, 33, and 35. Absent evidence suggesting that the claimant forgot to contact the employer prior to the start of her shift, we can reasonably infer that her failure to do so was also a deliberate act. *See* Consolidated Findings ## 15 and 19.

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).

From previous warnings, the claimant understood the employer expected her to report to work as scheduled or otherwise contact her supervisor prior to the start of her shift if she was going to be tardy or absent. *See* Consolidated Findings ## 10–12. Therefore, she understood her actions on December 29, 2023, were inconsistent with the employer's expectation. Further, the employer's expectation to timely notify the employer of an inability to report to work as scheduled is facially reasonable, as it serves to ensure the employer had adequate staffing to care for patients. *See* Consolidated Findings ## 1, 5, and 8.

Finally, we consider whether the claimant presented mitigating circumstances for her failure to comply with the employer's expectation surrounding attendance. Mitigating circumstances include factors that cause the misconduct at issue 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 testified that her phone was out of battery on the morning of December 29, 2023, because her cat had chewed through the cord the night before and she had no other means of charging her phone. She further testified that she did not arrive at her aunt's house until after her 8:30 a.m. start time because her friend was more than twenty minutes late.¹ Because the claimant did not have a landline and could not start charging her phone until she obtained a cord from her aunt, she had no alternative means of contacting the employer prior to the start of her shift. Consolidated Findings ## 15, 16, 20, 22, 24, and 25. Thus, the record shows that the claimant was unable to contact the employer prior to 8:30 a.m. on the 29th as a result of circumstances beyond her control.

¹ The claimant's uncontested testimony in this regard, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in 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).

Similarly, the record shows claimant's absence on December 29, 2023, was also a result of circumstances beyond her control. The claimant had planned to have her aunt provide childcare for her daughter while she was at work. Consolidated Finding # 17. However, the aunt asked the claimant to return to pick up her daughter because her daughter began coughing and started running a fever. Consolidated Finding # 31. The claimant's daughter's illness and the resulting unexpected loss of childcare constituted mitigating circumstances for the claimant's failure to report to work as scheduled.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interests pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week of February 4, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 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.

LSW/rh