The employer discharged the claimant because he failed to report to a mandatory Employee Assistance Program by the assigned deadline. As the claimant understood the employer's directive to report to the program and did not provide any mitigating circumstances precluding him from complying with the employer's directive, his actions were deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2), and he is ineligible for benefits.

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 8295 05

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 his position with the employer on March 20, 2024. He filed a claim for unemployment benefits with the DUA effective March 17, 2024, which was approved in a determination issued on June 13, 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 affirmed the agency's initial determination and awarded benefits in a decision rendered on July 19, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). 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 had not violated the employer's attendance policy because he was not scheduled to work on the days the employer said he was absent, 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 for the employer, a non-profit social services agency, as an Overnight Program Specialist, a non-clinical fee-based employee, beginning November 16, 2015. The claimant was paid $18.00 per hour.

2. The employer's Human Resources Policy & Procedure Manual contains a Termination/Resignation Policy 106, which states, in part:

   No Call/No Show

   Any employee, other than clinical fee-based employees, who fails to call or show up for work for three (3) consecutive scheduled work days will be considered a voluntary termination. The effective date of termination shall be on the 3rd absence/day without notification. Clinical fee-based employees who do not call or - show up for work on more than one (1) occasion, not necessarily consecutive, will be considered a voluntary termination.

3. The policy is a measure to ensure the employer has sufficient staff to meet its business needs.

4. On November 16, 2015, the claimant acknowledged receipt of the Human Resources Policy & Procedure Manual.

5. The claimant, who suffered from substance abuse, lived in a sober house, which was not the claimant's work location with the employer, as a House Manager.

6. The employer received complaints from 3 coworkers about the claimant after hours consuming alcohol at the sober house which was prohibited and about putting his hands around the hips of a female resident.

7. The employer initiated an investigation.

8. On February 22, 2024, the employer met with the claimant who[ ] admitted he had consumed alcohol after hours at the sober house.

9. On February 23, 2024, the claimant was placed on paid administrative leave pending the outcome of the investigation, at which time, if the allegations were supported, additional disciplinary action may be taken, up to and including termination of employment.

10. On March 7, 2024, the employer sent the claimant a mandatory Referral Letter instructing the claimant to contact the Employee Assistance Program (EAP) for an assessment.

11. The claimant was given a deadline of 5:00 p.m. on Thursday, March 14, 2024, to schedule the assessment.

12. On March 12, 2024, the employer contacted the EAP and was told the claimant had not scheduled an assessment.

13. On March 12, 2024, the claimant [sic] called the claimant to remind him he must schedule an assessment no later than 5:00 p.m. on Thursday, March 14, 2024.

14. On March 15, 2024, the employer contacted the EAP and was told the claimant had not scheduled an assessment.

15. On March 15, 2024, March 18, 2024, and March 19, 2024, the claimant did not call or show up for work.

16. The claimant was not scheduled to work on March 15, 2024, March 18, 2024, and March 19, 2024.

17. On March 20, 2024, the employer sent the claimant a letter stating he had voluntarily terminated his employment having failed to call or show up for work for three (3) consecutive scheduled workdays in violation of No Call/No Show policy.

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 of fact 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 findings of fact and deems 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 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. . . .

"[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).

Based on the language in the claimant's termination letter, the review examiner found that the employer discharged him for failing to report to work or call out of work for three consecutive shifts. *See* Finding of Fact # 17. This misconstrues the reason for the claimant's separation.

The employer never contended that it terminated the claimant because he failed to report to work on March 15th, 18th, or 19th, 2024. When asked about the substance of the termination letter, the employer's witness explained that the employer concluded the claimant's failure to participate the mandatory EAP constituted a voluntarily termination most consistent with a violation of its "No Call/No Show" policy.[1] Given the particular facts of this case, the employer's decision to categorize the claimant's separation as a voluntary act leading to his termination was understandable. *See* Findings of Fact ## 2, and 10–14. Therefore, a proper analysis of the claimant's eligibility for benefits requires we consider whether his failure to participate in the EAP constituted a knowing violation of a uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

While the employer maintains a policy addressing job abandonment, it did not provide evidence showing it applied this policy to all employees who similarly failed to attend a mandatory EAP. *See* Finding of Fact # 2. 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 met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden under the law, the employer must first show that the claimant engaged in the misconduct for which he was discharged. As discussed above, the employer discharged the claimant for failing to schedule a mandatory EAP assessment by the assigned deadline. Evidence provided by both parties confirmed that the claimant did not contact the EAP by the March 14, 2024, deadline. Finding of Fact # 11 and 15. Therefore, the employer has shown that the claimant committed the misconduct for which he was discharged. Moreover, as nothing in the record indicates that the claimant simply forgot about the deadline, did not know how to schedule an assessment, or otherwise made a mistake, we can reasonably infer that his refusal to enroll in the program was a deliberate act.

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).

In the fact-finding questionnaire admitted into evidence as Exhibit 3, the claimant confirmed he received and reviewed the employer's instructions to schedule an assessment with the EAP by March 14, 2024.[2] As the claimant also acknowledged that the employer followed-up with him in order to remind him of the deadline, the claimant's statements confirm he understood the employer

[1] The employer'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).

[2] Exhibit 3 is also part of the unchallenged evidence introduced at the hearing and placed in the record.

expected him to schedule an assessment with the EAP by March 14, 2024. *See* Finding of Fact # 12.

We believe that the employer's expectation that the claimant schedule an assessment with the EAP was reasonable. The claimant was living at one of the employer's sober houses in exchange for his services as a House Manager. Finding of Fact # 5. Inasmuch as the employer serves individuals with substance abuse disorders, it reasonably acted in response to the claimant's admission that he was drinking at the employer's sober house. *See* Findings of Fact ## 1, 5, 8, and 10. The record also indicates that the employer's directive regarding the EAP assessment was in furtherance of the claimant's interest in maintaining his employment.

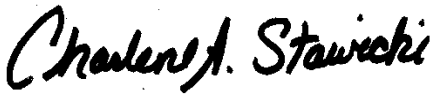
Nothing in the record suggests that circumstances beyond the claimant's control precluded him from meeting the employer's deadline. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control). The absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28.* Accordingly, the record supports a conclusion that the claimant's failure to schedule an EAP assessment by the deadline was done in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week of March 17, 2024, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 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