The claimant, a diabetic, was experiencing blurred vision. He called out sick without any sick time available in violation of the employer's attendance policy. Because he was unable to report to work due to a medical condition that prevented him from driving and was unable to find a ride to work, he established mitigating circumstances for his absence. Held the employer failed to show that the claimant's acted in wilful disregard of the employer's interest, and he is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0082 8423 04

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 was discharged from his position with the employer on May 17, 2024. He filed a claim for unemployment benefits with the DUA, effective May 12, 2024, which was denied in a determination issued on June 28, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on July 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 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 afford the employer the opportunity to testify and present other evidence. Only the employer 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 did not engage in deliberate misconduct in wilful disregard to the employer's interest when he failed to attend work due to blurred vision, 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 material handler for the employer, a medical manufacturer. The claimant began work [sic] for the employer on August 1, 2022. He worked [sic] 11 p.m. to 7:30 a.m., Monday through Friday, and earned $22.34 per hour. He was assigned to work in a clean room where he was one of eight team members and the only material handler.

2. The employer maintains an attendance policy that gives employees 40 hours of sick time each calendar year. The policy also states that progressive discipline will be issued for unexcused absences. Progressive discipline starts after the third unexcused absence and includes verbal counseling, a written warning, a written final warning, and discharge. The policy states that unexcused absences include absences due to illness after the employee has exhausted their sick time.

3. The claimant was not aware of the employer's policies.

4. The claimant has had diabetes for over 20 years. The illness affects his health, including having high blood pressure and poor visibility.

5. The employer offers employees medical insurance during an open enrollment period in November and December. The claimant did not participate in the employer's healthcare insurance because it was too expensive. His income was too high to qualify for health care through the government. Because of the lack of insurance, he has not seen a physician since 2023.

6. Early during his employment, the claimant's eye doctor recommended that he work a different shift. The claimant asked his supervisor, the team lead, about an earlier shift. The team leader said he could transfer to an earlier shift but did not reassign him.

7. The claimant did not ask the employer's human resources department for an accommodation.

8. The claimant called out of work when he did not feel well or if his vision was too blurry to allow him to drive safely. He also called out of work when he felt unsafe working with blurred vision because some of the materials he worked with were hot. He would ask a supervisor or coworker for a ride if he had blurred vision but felt well enough to work.

9. By March 8, 2024, the claimant had exhausted his 40 hours of sick time for 2024.

10. The claimant was absent from work on March 8, 2024, March 13, 2024, March 18, 2024, March 20, 2024, and March 21, 2024.

11. On March 26, 2024, the team lead and the employer's Sr. HR Generalist met with the claimant and gave him a warning for poor attendance. The claimant

told them he had medical issues and did not have medical insurance or a doctor that he saw regularly.

12. On April 1, 2024, the claimant had an unexcused absence from work.

13. On April 3, 2024, the employer gave the claimant a final written warning for poor attendance.

14. The claimant continued to miss work because of blurry vision. He always notified the employer by email if he could not work.

15. On a day in May, the claimant fainted at work because of symptoms related to his illnesses. His supervisor took him to the emergency room. Medical staff told him that his blood sugar and blood pressure were low.

16. On May 15, 2024, the claimant had blurry vision and could not get a ride to work. He emailed that he would not be there.

17. On May 17, 2024, the employer discharged the claimant.

Credibility Assessment:

The claimant participated in the initial hearing. The employer did not participate in the initial hearing. The claimant's testimony at the initial hearing was candid and was accepted as credible. The employer's Senior HR Generalist attended the remand hearing. The claimant did not attend the remand hearing. The Senior HR Generalist stated she would provide the employer's policies, the claimant's acknowledgment of the policies, the claimant's hours and earnings, and correspondence by the end of the week. However, she did not provide these documents. Her testimony about the existence of the employer's policies was credible. However, absent any written proof that the claimant received the policies, it cannot be concluded that he did. Still, aside from the issue of whether the claimant received the policies, the statements of the claimant and the Senior HR Generalist did not conflict and create a record for this case.

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 findings of fact except as follows. We reject Finding # 3, because this is unsupported by the record as further discussed below. In adopting the remaining findings, we deem 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.

Because the claimant was discharged, 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 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).

To prove deliberate misconduct in wilful disregard of the employer's interest, the employer must first show that the claimant engaged in the conduct for which he was discharged. After the claimant had exceeded his yearly allotted 40 hours of sick time and continued to accumulate unexcused absences from work, the employer discharged him for poor attendance. *See* Consolidated Findings ## 2, 9, 11–13, 16, and 17. Inasmuch as the employer expected employees not to call out of work unless they have sick time available for their use, and the claimant called out of work on May 15, 2024, without any sick time available, he engaged in the misconduct for which he was discharged. *See* Consolidated Findings ## 8 and 16. Absent any evidence to suggest that the claimant mistakenly sent the email to the employer calling out that day, and we see none, we can reasonably infer that his actions were deliberate. *See* Consolidated Finding # 16.

However, the Supreme Judicial Court (SJC) has stated, "[d]eliberate 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). 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). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Id. at 95.

The employer's attendance policy prohibits employees from being absent without sick time available for their use. *See* Consolidated Finding # 2. We reject Consolidated Finding # 3, insofar as it states that the claimant was not aware of the employer's attendance policy. In his testimony, the claimant confirmed that he was aware of the employer's expectation based upon the two written warnings he had received. Further, he understood that he had exceeded his 40 hours of sick time,

and that any further absences beyond his yearly allotment violated that expectation.[1] *See* Consolidated Finding ## 9–13. We believe that the employer's expectation was reasonable, as the claimant worked in a medical manufacturing plant where he was the only material handler on his shift, and it is evident the employer depended on his attendance for production. *See* Consolidated Finding # 1.

We next consider whether the record establishes the presence of mitigating circumstances. 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 Consolidated Findings reflect that the claimant is diabetic, and that his illness has caused complications such as high blood pressure and blurred vision. *See* Consolidated Finding # 4. The employer was aware that the claimant was suffering from medical issues that caused him to be absent from work. *See* Consolidated Findings ## 4, 11, and 15. The findings also show that the claimant was unable to seek treatment for his medical condition because he could not afford health insurance. *See* Consolidated Finding # 5. Furthermore, the facts indicate that, on May 15, 2024, the claimant, who was experiencing blurred vision and unable to drive himself, attempted to comply with the employer's expectation but was unable to find a ride to work. *See* Consolidated Findings ## 8 and 16. Based upon these findings, the claimant has established circumstances that were beyond his control, which prevented him from complying with the employer's attendance policy. Thus, the claimant may not be disqualified due to deliberate misconduct in wilful disregard of the employer's interest.

For the same reason, the claimant may not be disqualified for a knowing violation of a reasonable and uniformly enforced policy. He was not capable of complying with the policy.

We, therefore, conclude as a matter of law that the employer did not meet its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest or for knowingly violating a reasonable and uniformly enforced rule or policy of the employer, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending May 18, 2024, and for subsequent weeks if otherwise eligible.

[1] The claimant's testimony regarding his awareness of the employer's policy and its expectation, 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 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 - February 26, 2025

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.

DY/rh