The employer's owner told the claimant that she could be absent from work twice before she would be noncompliant with the employer's attendance policy, but it fired her after the second absence. Held, the claimant was eligible for benefits pursuant to G.L. c. 151A § 25(e)(2), because she was not consciously aware that she was violating the policy, and because she called out that second time in order to take care of her ill daughter. Thus, her decision to call out was a result of mitigating circumstances.

Board of Review
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Issue ID: 0083 3139 76

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 her position with the employer on July 10, 2024. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 21, 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 September 26, 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 pertaining to the reason for the claimant's separation. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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's inability to improve her unplanned absenteeism rate to less than 11% constituted deliberate misconduct in wilful disregard of the employer's expectation, 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 full time as a massage therapist for the employer, a wellness center, from August 23, 2023, until July 10, 2024.

2. The employer has a written policy regarding attendance (the policy) contained within an employee handbook that prohibits "Excessive absenteeism or any absence without notice."

3. The claimant became aware of the policy when she was hired.

4. The policy was changed and updated in February 2024.

5. The claimant signed an acknowledgement she received the employee handbook on February 28, 2024.

6. A final draft of the employee handbook was provided to all employees on March 16, 2024.

7. The claimant and the owner had a conversation at the time the claimant was provided with the updated policy.

8. The updated policy prohibited unplanned absences without a doctor's note.

9. The purpose of the policy is to advise employees of the procedure for calling out of work.

10. The policy lists excessive absenteeism is an "… example[s] of infractions of rules of conduct that may results in disciplinary action, up to and including termination of employment …"

11. The employer's progressive method of discipline for policy violations is a verbal warning for a first offense, then the employee is issued a performance improvement plan ("PIP") and termination occurs after a third offense.

12. The employer has not had to terminate other employees for policy violations.

13. The employer has an expectation that employees will not have an unplanned absenteeism rate that exceeds 11%. The employer uses an online calculator to determine an employee's absenteeism rate.

14. The national absenteeism rate is 3.2%.

15. The average unplanned absenteeism rate for other employees of the employer is .05%.

16. The reason for the expectation is to ensure the employer's customers are adequately served and appointments are not cancelled.

17. The employer communicated its expectation to the claimant through warnings.

18. The employer is harmed when employees are absent because scheduled clients are not served and need to be rescheduled, others have to cover the absent employee's shifts, there is a loss of productivity, a loss of workplace morale, and sometimes financial loss through refunds given to customers.

19. The claimant was aware that leaving the employer short staffed caused the employer to suffer harm by rescheduling clients because she had received warnings in the past where the harm to the employer was explained.

20. The claimant was unaware of whether the employer had refunded customers as a result of her absences.

21. The claimant received a verbal warning for an excessive absenteeism rate of 19% on May 23, 2024, and was placed on a PIP.

22. The PIP stated, "… The goal of this plan is to enhance comprehension, communication, collaboration within 30 days and improve your current absenteeism rate of 19% to at least 11% by the end of August 2024. … Shall you be unable to meet the goals outlined in the action plan over the next 30/90 days, you will have the option to accept the reduced shift schedule outlined or shall resign from your duties at [Employer]."

23. At the time the claimant was placed on the PIP, the claimant had missed 16 out of 92 shifts, had left early on 2 shifts, and had been late for 1 shift.

24. At the time the claimant was placed on the PIP, her absenteeism rate was calculated by the employer to be 19%.

25. At the time the claimant was placed on the PIP, she asked the owner how many shifts she could miss between May 23, 2024, and August 31, 2024, and still meet the 11% absenteeism rate. The owner told the claimant she could only miss 2 shifts.

26. The claimant questioned the accuracy of the calculations made by the employer with the owner. The claimant and the owner never met to go over how the owner arrived at an absenteeism percentage for the claimant of 19%.

27. The claimant's absences from February 1, 2024, through February 3, 2024, were due to the claimant having a sore throat. The claimant's absences from February 8, 2024, through February 12, 2024, were due to the claimant having COVID-19.

28. The claimant's absences beginning on March 8, 2024, were due to the claimant being rushed to the hospital and the employer requiring a doctor's note clearing

her to return to work. As a result, the claimant was out of work from March 8, 2024, through March 12, 2024.

29. The claimant continued to have unplanned absences after receiving the PIP.

30. On June 24, 2024, the claimant called out of work because she was sick.

31. On July 9, 2024, the claimant's 13-year-old child came to visit her from Texas.

32. The claimant's child had had braces placed on her teeth on July 9, 2024, prior to leaving Texas.

33. On July 10, 2024, the claimant called out of work by sending an e-mail to the employer to reschedule her client appointments for the day because her daughter was running a fever and her face was swollen.

34. The claimant called her child's doctor in Texas for advice. The claimant was told to keep an eye on her child and watch for swelling.

35. The claimant did not take her child to a doctor.

36. The claimant did not have anyone to watch her child so she could work. The claimant could have found a way for her child to go to work with either herself or her husband.

37. On July 10, 2024, the employer sent the claimant an e-mail stating, in relevant part, "… I just reviewed & updated your performance improvement plan and though your unplanned absence rate has dropped to 16%, even with offering reduced shifts, there is no way you will be able to achieve the 11% we have agreed upon between now and August 31st. You agreed to resign should you not be able to meet the goals outlined, therefore, effective immediately, I am concluding our working relationship to avoid any further damage to the clientele, employees and reputation of [Employer]. …"

Credibility Assessment:

During the hearing, there was a dispute as to the accuracy of the claimant's absenteeism percentage rate as calculated by the employer. The employer asserted the claimant had a 19% absenteeism rate at the time she was placed on the PIP. The claimant disputed the employer's calculations stating that as of May 20, 2024, she calculated her absenteeism rate to be 11.2%, which was lower due to the claimant adding additional shifts she worked and subtracting absences for sickness where the employer did not allow her to return to work (having COVID-19 in February, and the employer requiring a cleared to work doctor's note in March). The employer testified it terminated the claimant at a 16% absenteeism percentage rate, while the claimant asserted that at the time of her termination, her absenteeism percentage rate should have been lower. Both parties were determined to be

credible in their testimony despite differing on how the absenteeism percentage rate should have been calculated.

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. 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 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 fired the claimant after she called out on July 10, 2024, because it concluded that the claimant was unable to meet its expectation that she have an unplanned absence rate of 11% or less by August 31, 2024. Consolidated Finding # 37. While the employer decided to discharge the claimant because she had a higher-than-average unplanned absenteeism rate, "[t]he issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). Similarly, to be a knowing violation at the time of the act, the employee must have been ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still, 423 Mass. at 813.

When the employer issued the PIP on May 23, 2024, its owner told the claimant that she could still meet the expected 11% attendance rate if she was absent from work twice between May 23, 2024,

and August 31, 2024. Consolidated Finding # 25. Because the employer's owner was responsible for calculating the claimant's attendance rate and where the claimant's decision to call out on July 10th was only the second time she had called out since May 23, 2024, we agree that the claimant could reasonably believe that she was not doing anything wrong when she called out on that day. *See* Consolidated Finding # 21, 26, 30, 33, and 37. Because the claimant was not consciously aware that she was acting contrary to the employer's interest or in violation of an employer policy, she may not be disqualified for a knowing violation of a reasonable and uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

Even assuming *arguendo* that the claimant knew that her decision to be absent on July 10th might be contrary to the provisions of the PIP, the record shows claimant's absence on that day was a result of mitigating circumstances. 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's daughter's doctor advised the claimant to monitor her daughter throughout the day because her daughter had begun to run a fever and developed swelling in her face. Consolidated Finding # 34. As the claimant did not have anyone else who could monitor her child while she worked, the claimant's need to provide care for her daughter constituted mitigating circumstances for the claimant's decision to call out of work on July 10, 2024. *See* Consolidated Finding # 36. As such, she may not be disqualified under the alternative provision under G.L. c. 151A, § 25(e)(2), because she did not act in wilful disregard of the employer's interest, but due to mitigating circumstances.

We, therefore, conclude as a matter of law that the claimant's discharge was not 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 within the meaning of G.L. c. 151A, § 25(e)(2).

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

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 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