

Although unexpectedly summoned to court, the claimant could have notified his employer that he was unable to report to work prior to the start of his shift, as the employer expected. Held that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and he was ineligible for benefits under § 25(e)(2).

**Board of Review
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Issue ID: 0084 2100 56

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 October 10, 2024. He filed a claim for unemployment benefits with the DUA, effective November 3, 2024, which was denied in a determination issued on December 11, 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 February 11, 2025. 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 was not subject to disqualification because it was clearly his intent to inform his employer that he would be absent from work, 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 contract security services [sic], as a security officer, beginning June 17, 2024. The claimant was paid \$17.00 per hour.
2. The **Employee Communications Procedures** policy states, in part:

Calling Out of Work

The call out procedure is as follows: Please call your Field Supervisor. If you do not reach your Supervisor, then call the Director of Operations at XXX-XXX-XXXX. **DO NOT TEXT OUT! You must speak to someone in person.** Never assume your text has been received. You must be given permission to be off from work otherwise it will be considered an abandoned post and is a terminable offense. Any excessive absenteeism hurts your team members and will affect your employment with [Employer]. Your team relies on you to be on post as do our clients who are looking for their regularly scheduled guard to be on post. **Excessive absenteeism is a valid reason to be considered for termination.** We understand that life happens, but please remember that a sudden call out affects everyone in the company, especially your co-workers. Unless it is a life-or-death emergency, you must call out at least 5 hours prior to your shift.

It is your responsibility to arrive at your designated post in enough time to start your duties at your start time. Arriving exactly at your start time, and getting settled before you start your shift is unacceptable. You should arrive to your assigned post 15 minutes early to allow for traffic, construction, travel time, etc.

The following violations will result in **immediate discharge**: (portions taken directly out of the disciplinary matrix)

- Leaving assigned post without being properly relieved.
 - Sleeping, or giving the appearance of sleeping or dozing during working hours.
 - Falsifying reports.
 - Insubordination or an unwillingness to comply with orders/ instructions from a Supervisor.
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3. The policy is a measure to ensure the employer has sufficient staff to meet its business needs.
4. All employees are subject to the policy.
5. It is left to the discretion of the employer what discipline to impose after investigation.
6. On June 17, 2024, the claimant received and signed for the **Employee Communications Procedures** policy.
7. It was the employer's expectation employees call their Field Supervisor if unable to report for work.

8. The claimant did not need to be told it was the employer's expectation that he notifies [sic] the Field Supervisor if unable to report for work and it was "common sense."
9. On Monday, October 7, 2024, the claimant was scheduled to work 8:30 a.m. to 8:30 p.m. for the employer's client, a library (Library A), located in [City A], Massachusetts.
10. At about 8:00 a.m., the [City B], Massachusetts Police ([City B Police]) arrived at the claimant's home.
11. [City B Police] informed the claimant, who had reported the mother of his son had taken his son out of state, that they were serving a summons in relation to violation of a restraining order previously issued by the court.
12. The claimant had informed his employer of [sic] issue with the mother of his son.
13. The claimant was instructed to contact Supervisor A if unable to report for work due to a court appearance.
14. The claimant was summoned to appear in court on October 7, 2025.
15. The claimant had recently been assigned to Library A and was instructed to report to a new field supervisor (Field Supervisor A) if unable to report for work.
16. Field Supervisor A had been issued the cell phone used by his prior field supervisor (Field Supervisor B).
17. At about 8:15 a.m., the claimant called Field Supervisor A.
18. Field Supervisor A did not answer.
19. The claimant did not leave a voice message for Field Supervisor A.
20. The claimant had always texted the Field Supervisor if his call went unanswered.
21. On Monday, October 7, 2024, at 11:52 a.m., the claimant texted Field Supervisor A that he would be out of work.
22. The Director of Human Resources and Supervisor A called the claimant during the day.

23. The claimant was unable to respond because he was in court and unable to use his phone.
24. On October 7, 2024, at about 5:30 p.m. the claimant called the employer.
25. The employer requested documentation of the claimant's [sic] had notified Field Supervisor A of his absence.
26. On October 8, 2024, at 10:46 a.m. the claimant, as requested, texted a screen shot of his Monday, October 7, 2024, 11:52 a.m., text message to Field Supervisor A that he would be out of work.
27. On October 10, 2024, the claimant was terminated for not speaking directly to Field Supervisor A on October 7, 2024, to report that he would be out of work.
28. On Monday, October 7, 2024, the claimant would have reported for [sic] had he not been summoned to court.
29. The claimant did his job to the best of his ability.
30. The claimant did not expect to be terminated.

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 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 Finding of Fact # 14, which states that the claimant was summoned to appear in court on October 7, 2025. Consistent with the record and Findings of Fact ## 9, 21, 24, and 26–28, we believe that the review examiner intended to find that the claimant was summoned to appear in court on October 7, 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 eligible for benefits based on the circumstances of his separation.

Because the employer discharged the claimant, his qualification 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 maintains specific policies and procedures for calling out of work. *See Findings of Fact #2*. However, the employer maintains discretion over whether the employee is discharged for violating this policy. *See Findings of Fact # 5*. Since the employer maintains this discretion, it has not met its burden to prove the claimant was discharged for 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 expected employees to call and speak to someone in person if they were unable to report to work. Barring “a life-or-death emergency,” the employer expected employees to call out at least five hours prior to their shift. *See Finding of Fact # 2*. It is reasonable to infer that, even in an emergency, such as the court summons in this case, the employer expected employees to call out prior to the start of their shift if they were able to do so.

The claimant did not comply with this expectation when he was summoned to court on October 7, 2024. Although he tried to call his field supervisor, he did not reach him, and he made no further efforts prior to the start of his shift to reach his employer. By failing to comply with the employer’s expectation, the claimant engaged in misconduct.

The fact that the claimant placed a call to his field supervisor before the scheduled start of his shift shows that he had not forgotten about his obligation to call out. We can thus reasonably infer that the claimant’s failure to either text the Field Supervisor then or attempt to reach the Director of Operations was deliberate.

However, establishing 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). 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 claimant was aware of the employer’s expectation since he received and signed for the policy containing the call-out procedure when he started working for the employer. *See Findings of Fact ## 1, 2 and 6*. Furthermore, when the claimant had informed the employer of his issues with his son’s mother, he had been specifically instructed to contact his field supervisor if he was unable to report to work due to a court appearance. *See Findings of Fact ## 12 and 13*.

As a contract security services provider, it is evident that the employer was concerned about disappointing clients and losing contracts, if an employee does not report for duty or a shift is not covered. *See* Finding of Fact # 2. The employer's call-out procedure is a reasonable way of ensuring that clients' needs are met and that the employer can maintain its business.

We next consider whether the claimant has demonstrated 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).

Being unexpectedly summoned to court is a circumstance over which the claimant had little or no control. It may have caused him to be unable to report to work on October 7, 2024. However, nothing in the record suggests that these circumstances prevented the claimant from making additional calls to Field Supervisor, leaving a message, or directly calling the Director or Operations before his shift started at about 8:15 a.m., when he first tried his Field Supervisor. *See* Findings of Fact ## 9 and 17–19.

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

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning October 6, 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 - April 25, 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.

REB/rh