Although the claimant had previously been warned about attendance issues, the final instance of tardiness was due to mitigating circumstances. The claimant was late because of her childcare responsibilities, not as a result of any wilful disregard of the employer's expectation that she arrive at work on time. Held she is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

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: 0084 2789 95

*** CORRECTED DECISION ***

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 her position with the employer on October 23, 2024. She filed a claim for unemployment benefits with the DUA, effective November 10, 2024, which was denied in a determination issued on December 17, 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 February 8, 2025. 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 give the employer an opportunity to testify and present other evidence. 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 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, is supported by substantial and credible evidence and is free from error of law, where the claimant's final instance of tardiness was due to her childcare responsibilities.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The employer is a medical practice. The claimant worked for the employer from 1/15/2024 to 10/23/2024.

2. The employer's administrative supervisor (Administrative Supervisor 1) supervised the claimant.

3. The employer hired the claimant to work as a full-time front desk representative. The employer assigned an 8:30 a.m. start time to the claimant.

4. The employer expected the claimant to arrive on time for her scheduled shifts.

5. The employer created a policy titled "Office Hours." This policy reads, in part, "The routine office hours are Monday through Friday from 8:30 a.m. to 5:00 p.m." The employer created a policy titled "Time Clocks." The policy reads, in part, "It is important that you make every effort to be on time and ready to work." Under these policies, the employer will issue various forms of discipline at its discretion based on its assessment of the violations.

6. The claimant has two children ("Child 1" and "Child 2"). Child 1 is disabled. Child 1 rode a bus to school. In September and October, 2024, this bus picked up Child 1 at 7:45 a.m. The claimant situated Child 1 on the bus and then drove Child 2 to school. The claimant could arrive at work by 8:30 a.m. This schedule prevented an earlier arrival.

7. The employer promoted the claimant to a billing specialist position in July, 2024. The claimant spoke [to] Administrative Supervisor 1. The claimant told Administrative Supervisor 1 that she could not start work at 8:15 a.m. due to her childcare responsibilities. The claimant explained that she had to situate her disabled son on the school bus at 7:45 a.m. and then drive her daughter to school. Administrative Supervisor 1 directed the claimant to speak to a certain manager (Manager 1).

8. The employer changed the claimant's assigned work start time in August, 2024. The employer changed the start time from 8:30 a.m. to 8:15 a.m. The claimant spoke to Manager 1 about the 8:15 a.m. work start time. The claimant explained her childcare responsibilities to Manager 1. Manager 1 asked the employer's doctor (Doctor 1) if the claimant could start work at 8:30 a.m. Doctor 1 decreed that the claimant must start at 8:15 a.m. The employer did not grant an exemption to the claimant. The employer did not give permission to the claimant to start work after 8:15 a.m.

9. The claimant continued to arrive late for work on multiple occasions after the employer changed her start time to 8:15 a.m. The employer warned the claimant about her tardiness several times. The employer told the claimant that it expected her to arrive at work by 8:15 a.m.

10. The employer created a chart. The chart lists all of the days when the claimant was absent from work and all of the days when she arrived late for work.

11. The employer created a document titled "Employee Warning Notice." This document is dated 10/17/2024. The document features a section titled "Type of Violation." In this section, the document lists "attendance" and "lateness or early quit." The document reads "Date of Incident." Next to this, the employer wrote, "10/09/2024 and 10/18/2024." The employer wrote, "9/19/24 and 9/16/2024 Mondays absent. Employee has been consistently late for work and called out sick for work. Many previous discussions regarding poor attendance and arriving to work late has been discussed with employee." The document features a section titled "Action to be taken." In this section, the employer wrote, "May include termination should employee arrive to work late or be out of work without prior discussion and approval from manager or supervisor." In the document, the employer wrote, "Employee states she cannot get to work on time." Manager 1 presented the warning notice to the claimant on 10/17/2024. The claimant explained her situation with her children and reported that she could not arrive at work earlier than 8:30 a.m.

12. The employer assigned the claimant to work on 10/18/2024. The claimant arrived at work at 8:22 a.m. The claimant arrived late because she had to situation [sic] her child on his bus at 7:45 a.m.

13. The employer assigned the claimant to work on 10/21/2024. The claimant arrived at work at 8:57 a.m. The claimant had worked another job until midnight. The claimant overslept. The claimant then had to execute her childcare responsibilities. The claimant arrived late because she overslept and then had to execute her childcare responsibilities. The claimant called the employer at 8:30 a.m. to report her late arrival.

14. The employer assigned the claimant to work on 10/22/2024. The claimant arrived at work at 8:20 a.m. The claimant arrived late because she had to situate her child on his bus at 7:45 a.m.

15. The employer assigned the claimant to work on 10/23/2024. The claimant arrived at work at 8:29 a.m. The claimant arrived late because she had to situate her child on his bus at 7:45 a.m.

16. The employer discharged the claimant because she arrived late for work on 10/18/2024, 10/21/2024, 10/22/2024, and 10/23/2024 after it had warned her on 10/17/2024 for her previous absences.

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. Further, as discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is entitled to benefits.

Because the employer terminated the claimant's employment, her separation is properly analyzed under 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).

In the instant case, the employer maintains a policy that requires employees to report to work on time. Consolidated Finding # 5. However, because discipline for violations is issued on a case-by-case basis depending on the circumstances of the violation, we cannot conclude that the claimant violated a reasonable and *uniformly enforced* rule or policy of the employer. *See* id. Alternatively, we 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.

As a threshold matter, the employer must demonstrate that the claimant engaged in the misconduct or policy violation for which she was discharged. In this case, the employer discharged the claimant on October 23, 2024, because she was late for work on October 18, 2024, October 21, 2024, October 22, 2024, and October 23, 2024, after receiving a written warning for attendance on October 17, 2024. Consolidated Findings ## 1 and 16. Inasmuch as the employer expected the claimant to arrive to work on time, and the claimant failed to comply with this expectation, we conclude that the claimant engaged in the misconduct for which she was discharged.

Our next inquiry is whether the claimant's misconduct was deliberate. Because the employer did not discharge the claimant until October 23, 2024, we will focus our inquiry on this final instance of tardiness, which triggered her discharge. The review examiner found that, on October 23rd, the claimant was 14 minutes late to work because she took her son, who is disabled, to the bus stop to be picked up at 7:45 a.m. Consolidated Finding # 15. After ensuring that her son got on the school bus, the claimant also had to drive her other child to school before driving to work. Consolidated Finding # 6. These childcare responsibilities prevented the claimant from arriving at work by her start time of 8:15 a.m., which was implemented by the employer in August, 2024; the prior start time was 8:30 a.m. Consolidated Findings ## 6 and 8. We note that the claimant had a history of late arrivals with the employer, even when her start time was 8:30 a.m., which the claimant also

attributed to her childcare responsibilities.[1] Because the claimant chose to take her son to the bus stop and her other child to school prior to going to work in the morning, it is evident that her misconduct was deliberate.

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).

The claimant was aware of the employer's expectation that she arrive at work by 8:15 a.m., as this was communicated to her in August, 2024. Consolidated Finding # 8. At that time, the claimant requested to retain her start time of 8:30 a.m., but the employer could not accommodate her request. *See* id. The employer's expectation that the claimant arrive at the employer's new start time of 8:30 a.m. was reasonable, as it ensured that the employer's business operated properly and efficiently.

Finally, we consider whether the claimant presented mitigating circumstances for her tardiness on October 23, 2024. 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).

As noted above, the claimant arrived late to work on October 23rd because she had to take one child to the bus stop and another child to school prior to heading to work. Consolidated Findings ## 6, 11, and 15. Her child's bus picked him up no earlier than 7:45 a.m., and so the claimant only had 30 minutes to take her other child to school and arrive at work by 8:15 a.m. The claimant made it clear to the employer that this schedule did not allow her sufficient time to arrive at work on time. Consolidated Findings ## 6 and 8. We can reasonably infer that the claimant could not control the time that her son's bus picked him up, as bus drivers have specific routes to follow and other children to pick up, so the claimant could not get her children off to school early enough to make it to work by 8:15 a.m. We further note that there is no indication in the record that the claimant had help available to assist her with getting her children to school in the morning. Because these circumstances were beyond the claimant's control, they are mitigating.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the claimant established mitigating circumstances for the final instance of misconduct which caused her discharge.

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending October 26, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
*** DATE OF DECISION - July 14, 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.

SVL/rh