The claimant failed to report to work because his car broke down. His lack of resources to find reasonable alternative transportation constituted mitigating circumstances. Thus, his actions were not done in wilful disregard of the employer's interest, and he is eligible for benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 334-FHHT-J9VN

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 was discharged from his position with the employer on December 3, 2024. He filed a claim for unemployment benefits with the DUA, effective December 1, 2024, which was denied in a determination issued on January 15, 2025. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on May 10, 2025. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. 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 personal circumstances, including a lack of transportation to work, did not mitigate his failure to report for his scheduled shifts, 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 employer is a delivery service partner (DSP) for an e-commerce company. The e-commerce company contracts the employer to deliver packages on behalf of the e-commerce company. The more reliable a DSP is, the more work they will get from the e-commerce company.

2. On October 21, 2021, the claimant began working as a full-time (4 days per week, 40 hours per week) delivery driver for the employer.

3. Most recently, the claimant's rate of pay was $24.00 an hour.

4. The claimant's direct supervisor was the owner of the company.

5. The claimant lives in [City A], Massachusetts.

6. The employer's warehouse is in [City B], Massachusetts.

7. The warehouse is not on any public transportation line.

8. The claimant would need to drive from his house to the warehouse, from which he would get his work van that he could use for deliveries. After the deliveries, the claimant would then return the van to the warehouse.

9. A taxi ride from the claimant's home to the warehouse costs about $30.00 one way.

10. The claimant received the employer's employee handbook when he was hired.

11. In the employee handbook is an attendance policy that states, in relevant part: "To maintain a safe and productive work environment, the Company expects employees to be reliable and punctual in reporting for scheduled work. Absenteeism, tardiness, and early departures place a burden on other employees and on the Company and its customers….Poor attendance, excessive tardiness, and excessive early departures are disruptive to productivity and negatively impact customer service. Poor attendance and tardy violations may lead to disciplinary action up to and including termination."

12. On October 15, 2021, the claimant signed off on the employer's handbook via DocuSign.

13. The employer expects that delivery drivers will report to work on their scheduled days.

14. Poor attendance by delivery drivers compromises the employer's reliability, which could lead to the employer losing business from the e-commerce company. The e-commerce company evaluates DSPs, and "docks" unreliable DSPs. Therefore, the "viability" of the employer's business depends on the employer's reliability.

15. Throughout his employment, the claimant had multiple attendance issues involving unscheduled absences.

16. In the summer of 2024, the claimant missed many days of work due to car trouble. Specifically, his car engine had blown up, and he did not have alternative transportation to get him to work, granted [sic] that he felt that the about [sic] $60.00 taxi charge was unaffordable for him.

17. Sometimes, the employer covered the claimant's taxi cost so the claimant could work.

18. After the summer of 2024, the claimant got a new car.

19. Most recently in November and December 2024, the claimant was absent on November 17, November 18, November 19, November 20, and November 24. He worked on November 25, then was absent again on November 26, and November 27.

20. On November 27, 2024, after the claimant called out, the supervisor messaged him stating: "…We're in Peak season now. Reliability needs to be 100% going forward." The claimant messaged back, stating "Understanding should be good for here on out."

21. After the November 27, 2024, message from the supervisor, the claimant missed work again on December 1, and December 2, 2024.

22. The claimant's recent absences in November and December 2024 were because the claimant's car had broken down. A part that was needed to fix the car was in the claimant's mechanic's possession. The mechanic was hospitalized for about three weeks and was therefore unavailable to fix the car or to provide the part the claimant needed. The mechanic was discharged from hospital on/around December 3, 2024, and was able to give the claimant a ride to work on December 3, 2024.

23. As the mechanic was driving the claimant to work on December 3, 2024, the claimant stated that he hoped that he would not get fired.

24. When the claimant reported to work on December 3, 2024, the employer discharged him.

25. The employer discharged the claimant for excessive absences.

26. The claimant applied for unemployment insurance (UI) benefits, effective December 1, 2024. The Department of Unemployment Assistance (DUA) disqualified the claimant from receiving UI benefits. The claimant appealed the DUA's disqualification.

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. 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 not eligible for benefits.

Because the claimant was discharged from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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 . . . .

"[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).

Since the employer's attendance policy indicates that the employer retains discretion over the type of corrective action it applies to employees with poor attendance, there is no basis to conclude that any employee who violates this policy under similar circumstances would be treated the same as the employer treated the claimant. *See* Finding of Fact # 11. For this reason, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may establish that the claimant engaged in deliberate misconduct in wilful disregard of its interest. Here, the employer discharged the claimant because he failed to report for work for several days in November, 2024, and had been absent from work again most recently on November 27, 2024, December 1, 2024, and December 2, 2024. *See* Findings of Fact ## 19 and 21. There is no dispute that the claimant did not show up for his scheduled shifts, in violation of the employer's expectation that the claimant report to work. *See* Findings of Fact ## 11 and 13. Thus, he engaged in misconduct when he failed to report for these shifts.

However, our analysis does not end there. We must consider whether the claimant's actions were deliberate and in wilful disregard of the employing unit's interest. The review examiner made no specific findings as to whether the claimant acted deliberately when he failed to report for his shifts in November, 2024, and December, 2024. However, Finding of Fact #16 shows that the claimant perceived that the cost of using a ride share service was unaffordable for him. *See also* Exhibit 6.[1] Therefore, we can reasonably infer that the claimant made a deliberate choice not to go to work on

[1] Exhibit 6 consists of text message exchanges between the claimant and the owner of the employer business, which contain several requests by the claimant that the employer provide him with transportation, via ride-sharing services, to and from work. This Exhibit is 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).

November 27, 2024, December 1, 2024, and December 2, 2024, due to the cost of transportation to and from the employer's location.

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).

Here, the findings demonstrate that the claimant was aware of the employer's expectation that he report for his scheduled shifts. *See* Findings of Fact ##10 and 12. In addition, Finding of Fact # 20 shows that, after the claimant called out on November 27, 2024, he indicated that he understood that the employer expected him to be "reliable" going forward. Thus, the claimant was aware of the employer's attendance expectation. The employer established that this expectation is self-evidently reasonable, given its business operational needs. *See* Findings of Fact ## 1 and 14.

Next, we consider whether the claimant's failure to report to work was due to 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 review examiner found that the claimant's recent absences in November and December, 2024, were because the claimant's car had broken down, and that a part that was needed to fix the car was in the claimant's mechanic's possession. Further the mechanic had been hospitalized for about three weeks and was unavailable to fix the car or to provide the part the claimant needed until he was discharged from hospital on or around December 3, 2024. Finding of Fact # 22. As of December 3, 2024, the claimant still did not have a functional vehicle and had not been able to report to work due to a lack of transportation. He was only able to report to work on December 3, 2024, because his mechanic gave him a ride. Id.

The findings also show that public transportation was not a feasible option, because the employer's warehouse is not on any public transportation line. *See* Finding of Fact # 7. The only option available to the claimant was to use a ride-share service, which would have cost approximately $60.00 for a round-trip fare. *See* Finding of Fact # 9. During the hearing, the claimant provided extensive testimony concerning his financial and personal hardships, which included an inability to pay for ride-share services in November and December, 2024, due to having depleted his resources while addressing the July, 2024, transportation issue, as well as the increasing unreliability of friends and family.[2] Given the information contained in this record, we think that he reasonably deemed this cost to be too expensive. These facts demonstrate that claimant's failure to report to work on November 27, 2024, December 1, 2024, and December 2, 2024, was not done out of wilful disregard of the employer's need for regular attendance by its employees but due to circumstances beyond the claimant's control.[3]

[2] This portion of the claimant's testimony is also part of the unchallenged evidence introduced at the hearing and placed in the record.

[3] In its response to the Board's request for written argument, the employer stated, in part, that the claimant had only experienced personal transportation issues during the high-volume summer and peak holiday seasons of 2024. With

We, therefore, conclude as a matter of law that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 1, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 25, 2025

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

JMO/rh

this statement, the employer seems to suggest that the claimant had a pattern of deliberately avoiding the performance of his job duties during these times. However, we cannot agree with this characterization of the claimant's transportation issues, because there is no testimonial or documentary evidence in the record showing that the claimant had experienced similar personal transportation issues during any other high-volume season when he worked for the employer.