The claimant quit in lieu of imminent discharge for continuing to call out of work despite repeated warnings about excessive absenteeism. She reasonably believed she was about to be discharged because she was suspended without pay pending discharge, which she understood was the employer's process for firing employees. Because the claimant was unable to report to work due to a medical condition, she established mitigating circumstances for her absences. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

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: 334-FHJT-6JKD

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 November 8, 2024. She filed a claim for unemployment benefits with the DUA, effective November 17, 2024, which was denied in a determination issued on December 26, 2024. 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 February 25, 2025. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 subsidiary findings of fact pertaining to the sequence of events that led to the claimant's separation. 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 had not shown that she reasonably believed that her discharge was imminent and did not take reasonable steps to preserve her employment because she resigned during her suspension period, 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 Bud Tender for the employer, a cannabis retail business, from 10/6/22 until she separated from the employer on 11/8/24.

2. The claimant worked part-time, 16-20 hours a week, earning $17.00 an hour.

3. The claimant left work because she believed that she had been terminated.

4. The employer began an investigation into the claimant's attendance. The claimant was scheduled to work on 11/5/24 but called out because she did not have childcare. She had also fallen down the stairs on this day, spraining her ankle. The claimant went to the emergency room that evening to have her ankle checked.

5. The claimant was provided with a doctor's note that indicated she was seen on 11/5/24 and should remain out of work until 11/7/24 when she could return. The claimant went into work and provided the note to the employer.

6. The claimant was scheduled to work on 11/6/24 but did not report to work because of her ankle injury.

7. The claimant was scheduled to work on 11/7/24 but did not report to work because of her ankle injury.

8. The claimant was scheduled to work on 11/8/24 but did not report to work because she believed she had been terminated.

9. On 11/8/24, the claimant's manager attempted to reach the claimant by email and voicemail to suspend her without pay, pending an investigation. An investigation usually takes about 5 days.

10. In the voicemail, the manager told the claimant she was being suspended, there would be an email that will be in her personal email and with regards to this, Human Resources will reach out to her after 14 days. The manager stated in the voicemail that if she had any questions when human resources reaches out, she can ask them when they call. The manager stated, bye and said good luck, wishing the claimant all the best.

11. The manager who relayed the suspension to the claimant did not have the authority to terminate employees. Only Human Resources can terminate an employee's employment.

12. The claimant reached out to another employee via text messaging that same night on 11/8/24, she was told she was suspended and asked him to gather her belongings so she could pick them up. The claimant came in and retrieved her belongings and returned her badge.

13. The employer never got the opportunity to speak to the claimant after 11/8/24. They never heard from the claimant again.

14. The claimant had received prior discipline for her attendance. The claimant was issued a final warning on 4/17/24. In the warning, the claimant was told the next action would be dismissal. The claimant signed the warning.

15. On 9/26/24, the claimant received a final written warning. The warning stated if her attendance did not improve, she would be issued further corrective action and would be suspended without pay. The claimant refused to sign this warning.

16. On 11/8/24, the employer issued the claimant a corrective action form suspending her. This corrective action did not contain any discussion of the employer's expectations for improvement. The corrective action stated that the claimant was being suspended without pay pending dismissal and that Human Resources would reach out once they have completed their investigation.

17. The final decision to terminate an employee is made by Human Resources. Human Resources had not decided to terminate the claimant prior to her quitting. She never reached out to the Human Resources department to inquire into her employment status before she quit.

18. The employer attempted to accommodate her childcare needs by changing her schedule. The claimant never requested FMLA or an ADA accommodation prior to her leaving.

19. Prior to the claimant's resignation, she had requested time off from 11/27/24 through 12/9/24 because she had no childcare for her son when her uncle who was the primary caregiver had to travel to Florida to care for a sick family member.

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 consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 8 that states that the claimant did not report to work because she believed that she was terminated as inconsistent with the evidence in the record. 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 not entitled to benefits.

The review examiner denied benefits after analyzing the claimant's separation under G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

This statutory provision expressly places the burden of proof upon the claimant.

Although the claimant's actions on November 8, 2024, were what ultimately caused her separation, she maintained that she engaged in such actions because she concluded that she was being discharged by the employer for her ongoing attendance issues. Consolidated Finding # 3. It is well-settled that an employee who resigns under reasonable belief that she is facing imminent discharge is not disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. *See* Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984). Thus, the first question is whether the claimant's belief that she was being discharged was reasonable.

Generally, a claimant must wait for her employer to complete its investigation into the claimant's actions before showing that she reasonably believed she was about to be discharged. Board of Review Decision 0002 2960 41 (Jan. 7, 2014) ("While the comments of the union president persuaded the claimant that her job could not be saved if the investigation progressed any further, the employer itself gave no indication that the claimant's job was necessarily in jeopardy. . . ."). In such a situation, "the employer had not completed its investigation or as yet identified the grounds it believed could substantiate for discharge, and it was the claimant's resignation that interrupted the investigatory process." Id. at 4. Given the specific facts of this case, however, the claimant's decision to resign before the employer's investigation was complete does not preclude her from showing that she reasonably believed that she was about to be discharged.

Here, there is no question that the claimant had exceeded her allowable number of absences. Prior to the final absences leading to the claimant's separation, the employer had issued two final warnings and had explicitly cautioned the claimant that continued absenteeism would result in her dismissal. Consolidated Findings ## 15 and 16. The final warning issued on September 26, 2024, which was admitted into evidence as Exhibit 10, made it clear that the claimant's ongoing attendance issues were unacceptable and instructed the claimant to improve her attendance effective immediately.[1] Although the employer had previously attempted to work with her to accommodate her childcare needs, the September 26th warning mentioned nothing about accommodations. *See* Consolidated Findings ## 15 and 18. In the final warning issued on November 8, 2024, the employer issued disciplinary action despite having been provided with a doctor's note. There is no evidence suggesting that the employer would consider the reasons for the claimant's final absences as part of any investigation or when deciding whether to terminate her.

[1] Although the content of Exhibit 10 is not included in the consolidated findings, it is part of the unchallenged evidence introduced at the hearing and placed into the record. 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).

We also note that one of the claimant's managers called the claimant and left a voicemail explaining that the employer was suspending her without pay because of her absences in the previous days, and telling the claimant bye, good luck, and she wished her the best. *See* Consolidated Findings ## 9–10. Although the manager who left the voicemail did not have the authority to discharge the claimant on her own, nothing in the record indicates that the claimant understood that the manager lacked that authority. *See* Consolidated Finding # 11.

Moreover, after receiving the voicemail, the claimant texted another employee informing him that she would be collecting her personal items from her locker at the employer's location. Consolidated Finding # 8. Although not incorporated into the consolidated findings, the parties' testimony confirmed that this other employee was one of the employer's supervisors. In this text, which was admitted as page 5 of Exhibit 14, the claimant informed the supervisor she had been "'[s]uspended without pay' aka fired", to which the supervisor replied "[y]eah they let [other employee] go too".[2] Thus, it appears that both the manager and the supervisor shared the claimant's understanding that unpaid suspensions lead to discharge, confirming that she too was also about to be discharged. Given this record, we think that the claimant could reasonably have believed that she was about to be terminated.

When a claimant demonstrates a reasonable belief that she is about to be discharged, her separation is treated as involuntary and the inquiry focuses on whether, if the impending discharge had occurred, it would have been for a disqualifying reason under G.L. c. 151A, § 25(e)(2). For example, impending separations based on imminent layoff or poor job performance would not be for disqualifying reasons, and an employee who quits in reasonable anticipation of such would be eligible for benefits. *See* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-599 (1981); and Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion). On the other hand, if the impending separation had been for deliberate misconduct in wilful disregard of the employer's interest or a knowingly violation of a reasonable and uniformly enforced policy, then the employee would not receive benefits.

Because the employer has not presented evidence that all employees are discharged under these circumstances, we cannot conclude that the claimant's behavior was a knowing violation of a reasonable and *uniformly enforced* policy. Alternatively, the claimant will be disqualified if the reason for her separation would constitute deliberate misconduct in wilful disregard of the employer's interest.

In this case, the final incident precipitating the claimant's separation was her absence from work on November 8, 2024. *See* Consolidated Findings ## 5–8. Her decision to be absent on that day was self-evidently deliberate, as she notified the employer that she would be absent.

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

[2] This portion of the parties' testimony, as well as the claimant's testimony, Exh. 14, p. 5, and p. 132 referenced below, are also part of the unchallenged evidence in the record.

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).

From the two previous final warnings, the claimant was aware that the employer expected her to work her shifts as scheduled and refrain from calling out of work. *See* Consolidated Findings ## 14–15. Therefore, the claimant understood that, by being absent on November 8, 2024, she was acting contrary to the employer's expectations. We further believe this expectation was reasonable, as the employer needed to know its retail store would be appropriately staffed.

Finally, we consider whether the claimant presented evidence 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 claimant was absent from work on November 5, 2024, due to a lack of childcare and subsequently injured her ankle, impacting her ability to work in the following days. Consolidated Finding ## 4–7. The record also shows that the claimant injured her ankle further while providing care for her child, resulting in her needing additional treatment for her injury on November 8, 2024. Her doctor provided her with a medical note, admitted into evidence as page 132 of Exhibit 14, confirming that she was unable to work on November 8, 2024, for medical reasons. Because the claimant was unable to report to work for medical reasons on that day, the claimant has shown that she was precluded from complying with the employer's expectation to report to work as scheduled due to circumstances beyond her control.

We, therefore, conclude as a matter of law that the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), because she left her employment under the reasonable belief that she was about to be discharged for reasons that would not be disqualifying 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 of November 3, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 28, 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.

LSW/rh