

The claimant was late to work because he was assisting his brother, who had been in a car accident. However, he could not explain why he failed to notify his employer that he would be late prior to the start of his shift, as the employer expected. Held that the claimant's failure to do so constituted deliberate misconduct in wilful disregard of the employer's interest, and he was ineligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 352-MNR7-56P6

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 April 7, 2025. He filed a claim for unemployment benefits with the DUA, effective April 13, 2025, which was approved in a determination issued on July 28, 2025. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties and a continued hearing attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on October 27, 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). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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 presented mitigating circumstances for his tardiness and failure to notify the employer of his tardiness on April 7, 2025, due to visiting and helping a family member in the hospital with other arrangements, 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 as a full-time swim coach with the employer, a swimming classes company, from April 29, 2024, through April 7, 2025, when he separated from his employment.
2. The claimant's direct supervisor was the deck/operations manager (employee A).
3. No written rules or policies were presented.
4. The employer maintained an expectation that employees would work when scheduled.
5. The purpose of this expectation is to ensure appropriate staffing as the employer scheduled children for swimming classes.
6. The employer communicated the expectations to the claimant through the employee handbook.
7. The employer maintained an expectation that employees would call the employer approximately two (2) hours before a scheduled shift if the employee was going to be late or be unable to work.
8. The purpose of this expectation is to ensure appropriate staffing as the employer scheduled children for swimming classes.
9. The employer communicated the expectations to the claimant through the employee handbook.
10. In January 2025, the claimant received a verbal warning due to his lack of attendance.
11. On March 31, 2025, the claimant received and signed a written warning due to his lack of attendance.
12. On April 5, 2025, the claimant did not work his scheduled shift.
13. On April 7, 2025, the claimant was scheduled to work beginning at 1:00 p.m.
14. On April 7, 2025, the claimant and his mother (person A) visited his brother (person B) in the hospital following a car accident.
15. On April 7, 2025, the claimant did not arrive at work at 1:00 p.m.
16. The claimant did not call the employer prior to 1:00 p.m. to indicate he would be late for his scheduled shift.

17. At approximately 2:00 p.m., the claimant arrived at his residence after visiting person B, getting person B's medication, and trying to figure out how to get person B's car towed.
18. At approximately 2:00 p.m., the claimant sent a text message to employee A indicating that he was running late for his scheduled shift.
19. The claimant did not send a text message to employee A because he was visiting person B in the hospital, getting person A's medication, and trying to figure out how to get person B's car towed.
20. The claimant arrived at work at 3:00 p.m.
21. Upon arriving at work, employee A met with the claimant informing the claimant that he was being discharged from his employment due to excessive lateness and absences.
22. The claimant was discharged on April 7, 2025, upon arriving at work at 3:00 p.m., when his shift was to begin at 1:00 p.m. and for not calling the employer in advance of his tardiness.

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 entitled to benefits.

Because the claimant was discharged from his employment, his 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 did not present any evidence explaining how employees were disciplined under similar circumstances for violating its rules around attendance and calling out. *See* Finding of Fact # 3. Therefore, it did not meet its burden to show a knowing violation of a reasonable and *uniformly enforced* rule or policy.

Alternatively, we 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 discharged the claimant because he was late for the start of his shift on April 7, 2025, and failed to give the employer advanced notice that he would be tardy. Finding of Fact # 22. As the claimant confirmed that he was late to work on April 7, 2025, and did not notify the employer of his tardiness prior to the start of his shift, there was no dispute that he engaged in the misconduct for which he was discharged. *See* Consolidated Findings ## 16, and 18–20.

Further, the claimant confirmed that he knew he was going to be late to work on April 7, 2025, because he was assisting his brother. However, when asked why he did not contact the employer prior to the start of his shift, the claimant stated only that he “just thought [he] would show up late for the class.”¹ Absent some other explanation for the claimant's actions on April 7th, we can reasonably infer that his failure to communicate with the employer 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).

Although not explicitly incorporated into the review examiner's findings of fact, the claimant confirmed that he understood the employer expected him to report to work on time or otherwise provide advanced notice if he was going to be late to or absent from his shift.² He, therefore, understood that his tardiness on April 7, 2025, and failure to notify the employer of his status was contrary to the employer's expectations.

We next consider whether the record showed that mitigating circumstances prevented the claimant from adhering to the employer's expectation. 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).

¹ The claimant's testimony in this regard is part of the 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).

² This portion of the claimant's testimony is also part of the unchallenged evidence introduced at the hearing.

The claimant was tardy to work on April 7, 2025, because he was assisting his brother, who had been hospitalized following a car accident. Findings of Fact ## 14 and 17. Given these specific facts, the need to assist his brother may have constituted mitigating circumstances for his tardiness. However, the claimant's tardiness was not the only reason he was discharged. *See* Finding of Fact # 22. There was no indication from the record that the steps that the claimant took to help his brother prevented him from timely notifying the employer that he would be late to his shift on April 7, 2025. Accordingly, the claimant has not shown that mitigating circumstances precluded him from complying with the employer's expectation that he provide advance notice if he was going to be late for his scheduled shift.

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to 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 of April 13, 2025, 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 - February 4, 2026



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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