The review examiner discredited the claimant's asserted reason for missing her second scheduled shift of the day. Although the Board rejected the credibility assessment as unreasonable in relation to the evidence presented, it could not make affirmative findings to establish mitigating circumstances for the missed shift. Though technically affirming the disqualification under G.L. c. 151A, § 25(e)(2), the claimant was merely subject to a constructive deduction. Because she worked so few hours for this subsidiary part-time employer, the claimant will be entitled to her full weekly benefit rate based upon her qualifying separation from her primary employer.

Board of Review
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Issue ID: 0021 7735 52

BOARD OF REVIEW DECISION

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 we affirm in part and reverse in part.

The claimant was discharged from her position with the employer on April 11, 2017. She filed a claim for unemployment benefits with the DUA, effective May 7, 2017, which was approved in a determination issued on July 26, 2017. The employer 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 denied benefits in a decision rendered on November 21, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, she 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 remanded the case to the review examiner to obtain additional evidence about the circumstances that caused the claimant to miss her last shift, and the average wages and hours that she worked for the employer and another employer. 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 original conclusion that the claimant is subject to a complete disqualification from benefits by G.L. c. 151A, § 25(e)(2), because of her failure to work her last scheduled shift with the employer 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 assessments are set forth below in their entirety:

1. The claimant worked per diem for the employer, a human services staffing agency, from August 9, 2016 to April 9, 2017 as a Residential Counselor. The claimant's pay rate was either $12.00 or $13.00 per hour depending on the shift.

2. The employer had a policy which prohibited absences without notification. The policy called for immediate termination for an instance of absenteeism without notification.

3. On August 18, 2016 and November 7, 2016, the claimant was absent without notification.

4. On November 11, 2016, the employer issued a warning via email with the direction to sign it and return it.

5. The claimant did not respond to the email.

6. On February 15, 2017, the employer placed the claimant into inactive status after not hearing from her.

7. On March 9, 2017, the claimant contacted the employer requesting to be placed back into active status.

8. On March 13, 2017, the Staffing Coordinator had a conversation with the claimant regarding her reliability, that she will be given another chance, and that she cannot have incidents like she did before. The claimant agreed.

9. On April 4, 2017, the Staffing Coordinator sent an open shift list out. The claimant responded that she was interested in the overnight shift on the list. The Staffing Coordinator replied that it was already taken, but there were two shifts on the 9th (8:00 a.m. to 3:00 p.m. and 3:00 p.m. to 11:00 p.m.). The claimant stated that she could do either. The Staffing Coordinator asked if she could do both. The claimant stated it was okay. The claimant and Staffing Coordinator discussed the location of each, which was in proximity of each other. The claimant did not protest or raise any concern about getting from one program to the other.

10. On April 9, 2017, the claimant worked the first shift at [Street Address] in [City A]. While at the program, the claimant's next shift was discussed at the nearby location. The claimant told individuals there that she was not scheduled for the 3:00 p.m. to 11:00 p.m. shift, but that she will do it.

11. The claimant's boyfriend of twelve years arrived to pick up the claimant around 3:00 p.m.

12. The claimant left the program no later than 3:15 p.m. due to the next shift's staff arriving late.

13. The claimant did not report to the next shift nearby. The claimant did not call the facility.

14. At 3:32 p.m., the claimant made a call to the employer's On-call Coordinator, but did not speak to anyone. At 4:12 p.m., the claimant made a call to the employer's On-call Coordinator to call out for a "medical emergency." At 4:16 p.m., the On-call Coordinator made a log entry that the claimant called out due to a medical emergency.

    a. The alleged "medical emergency" was that her boyfriend's daughter had a stomach bug/nausea.

    b. The claimant allegedly learned of the "medical emergency" when she got in the boyfriend's car around 3:15 p.m.

    c. The claimant has no medical records to substantiate the "medical emergency" (despite given two months to obtain and submit).

15. On April 10, 2017, the employer made attempts to contact the claimant via phone to find out what happened. The claimant did not reply.

16. On or about April 11, 2017, the employer discharged the claimant from employment via telephone. The claimant replied arguing that she did not think she should be fired. All communication thereafter took place via email.

17. The effective date of claim is May 7, 2017.

18. The claimant's benefit rate is $516.00.

19. In the claimant's primary base period, the claimant worked an average of 3.66 hours per week (period of August 7, 2016 to March 31, 2017) earning an average of $45.75 per week.

20. From April 1, 2017 to April 9, 2017 (in the alternate base period), the claimant worked an average of 17.65 hours per week earning an average of $220.69.

21. During the claimant's employment with the instant employer, the claimant declined an unknown number of hours offered by the employer.

22. The claimant was employed with [Employer A] from April 10, 2017 to May 8, 2017. The claimant was a Loan Representative with [Employer A]. The claimant worked forty hours per week. The claimant earned $570.00 per week.

23. The claimant did not work for the instant employer and [Employer A] concurrently.

[Credibility Assessment:]

The claimant was not credible. The claimant testified that the reason for the absence was that her boyfriend and his daughter arrived to pick up the claimant around 3:00 p.m. at [Street Address] in [City A] (leaving no later than 3:15 p.m.) and that he needed to take his daughter to the hospital ([Hospital Name]) for an unspecified illness arriving there at around 3:40 p.m. When asked why she could not call closer to 3:00 p.m. (versus after 4:00 p.m.), the claimant provided a convoluted answer. Not only was the claimant not credible for a variety of reasons to include failed recollection in general, but the nebulous reason for the absence was not compelling (especially given the testimony that the boyfriend waited at the claimant's work for approximately fifteen minutes with his ill daughter who allegedly needed to go to the hospital) and the reason for failing to call the employer at a reasonable time is unmitigated. Further, on remand, the claimant stated that the medical emergency was that her boyfriend's daughter had a stomach bug and was throwing up. Such a reason generally does not qualify as a medical emergency requiring treatment at a hospital, which was not substantiated despite given two months to obtain and provide any kind of proof of a hospital visit on the day in question. The reason for the absence is in further doubt because the hospital, to where she allegedly went, is no more than fifteen minutes by foot from the work location (notice taken), and it allegedly took the claimant approximately twenty-five minutes by vehicle. If a medical emergency existed, it is not reasonable, first, for the boyfriend to wait at the claimant's work for fifteen minutes and, second, to take twenty-five minutes to go half a mile by vehicle. Furthermore, at the initial hearing, the claimant testified that she called both the facility and the On-call Coordinator, but on remand, the claimant testified that she did not call the facility, which is substantiated by her phone records.

Ruling of the Board

In accordance with our statutory obligation, we review 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. It is unclear from the record whether the portion of Consolidated Finding # 13, which states that the claimant did not call the facility, is accurate.[1] In Consolidated Finding

[1] The claimant provided the telephone number that she called, with telephone records that confirm her calls to this number on the date in question. It is unclear from the parties' testimony and documentary evidence whether the

14, we disregard the review examiner's reference to the medical emergency and the claimant's learning of the medical emergency as "alleged," as well as the statement, "(despite given two months to obtain and submit)." These statements are not findings of fact. They are characterizations and arguments about the claimant's evidence. Finally, we reject Consolidated Finding # 23, as it is inconsistent with Consolidated Finding # 16 and other evidence in the record, as discussed below. We also disagree with the review examiner's legal conclusion that the claimant's separation from employment, even if disqualifying, renders her ineligible for unemployment benefits.

The review examiner disqualified the claimant pursuant to the following provision under G.L. c. 151A, § 25(e):

> [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 . . . .

Under this section of law, the burden of proof falls upon the employer. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). To determine whether an employee's actions constitute deliberate misconduct, 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).

In the present case, the consolidated findings indicate that the employer fired the claimant because she did not work her second shift on April 9, 2017, and did not call in the absence until after the shift began. We remanded the case, in part, to obtain more evidence about the claimant's efforts to communicate her absence with the employer and any circumstances that may have mitigated her failure to call sooner or to appear for her shift.

As for not notifying the employer about her absence before the shift started, as expected,[2] the evidence does not support a conclusion that the claimant acted deliberately or in wilful disregard of the employer's interest. On April 8, 2017, the claimant was scheduled for back-to-back shifts at separate locations. *See* Consolidated Findings ## 9–10. The simultaneous ending and start time of 3:00 p.m. for both shifts at different locations, even if they were up the street, rendered it impossible for the claimant to report to the second assignment on time. *See* Consolidated Finding # 9. She was also unable to leave the first assignment promptly at 3:00 p.m., because

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employer's on-call coordinator received the call because it came directly to him or her, or whether the call was forwarded from the facility because no one picked up.

[2] Although the policy was not introduced, this employer expectation was apparently communicated to the claimant on previous occasions. *See* Exhibit # 2. 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).

she waited for her replacement, delaying her departure for the second assignment until 3:15 p.m. *See* Consolidated Finding # 12. Up to that point, the evidence indicates that the claimant had every intention of reporting to her next assignment. *See* Consolidated Finding # 10. If she had merely reported to the second shift late, we think the employer would not have discharged her, and that it would have excused the fact that she did not call to say she would be late. We think this because it was the employer who scheduled the hours for the assigned shifts, and it was the claimant's diligence in ensuring coverage for the first shift that had made her late.

In his original decision, the review examiner concluded that, once the claimant knew she would not be reporting for the second assignment, she failed to call in her absence at a reasonable time, calling in at 4:20 p.m. instead of closer to the 3:00 p.m. start time. Aside from the fact that there would be no reason to call-in to report an absence at 3:00 p.m., because claimant, at that point, still intended to work the second assignment, we now know that the claimant did try to call the employer at 3:32 p.m. but did not get an answer. *See* Consolidated Finding # 14. Considering that it would have taken at least several minutes past her 3:15 p.m. departure from the first location to reach the second location, we do not agree that a 3:32 p.m. call was particularly untimely.

Even if we assume that it was, the real issue in this case is why the claimant did not report for her second assignment. If her failure to work was due to circumstances over which the claimant had no control, then she will not be disqualified. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). The review examiner's credibility assessment makes it clear that he did not believe what that the claimant had to say, including that her stepdaughter had a medical emergency.

Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we believe this credibility assessment is unreasonable in relation to the evidence presented. The review examiner is not a medical professional with the competence to decide, nor medical evidence to show, that the stepdaughter's stomach condition did not require treatment at an emergency room, or whether such treatment could or could not wait for the boyfriend to pick up the claimant. He penalizes the claimant for failing to obtain documentary medical evidence about the hospital visit, ignoring the fact that this was not the claimant's child and that the claimant needed her boyfriend's cooperation to obtain such records.[3]

[3] We have further concerns about other inaccurate statements in the credibility assessment which remained unchanged after remand. Specifically, the assessment states it allegedly took 25 minutes to get to the hospital by car, ignoring the claimant's clarifying testimony during the remand hearing that it did not take 25 minutes, but it took time to drop off her boyfriend and stepdaughter and park the car.

Despite our rejection of the review examiner's credibility assessment, we are constrained from rendering any affirmative findings about the validity of the medical emergency without conducting our own hearing. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). Because any disqualification under G.L. c. 151A, § 25(e), based upon the claimant's separation from the instant employer will not actually reduce her benefit amount, we see no reason to take any further action in this case.

The DUA has promulgated regulations which provide that, under certain circumstances, a constructive deduction, rather than a complete disqualification from benefits, shall be imposed if a claimant separates from a subsidiary part-time work for any disqualifying reason under G.L. c. 151A, § 25(e). *See* 430 CMR 4.73–4.75. The consolidated findings show that this was a part-time job, which overlapped the claimant's full-time employment with [Employer A], a different employer. *See* Consolidated Findings ## 15, 16, 19, 20, and 22. The findings further provide that the claimant earned significantly less and worked significantly fewer hours for the employer than at [Employer A]. *See* Consolidated Findings # 19, 20, and 22. Based upon this information, we conclude that the claimant's position with the instant employer was not her primary employment. It was subsidiary part-time work.

430 CMR 4.76 provides, in relevant part, as follows:

> (1) A constructive deduction, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under M.G.L. c. 151A, § 25(e), in any of the following circumstances:
>
> (a) if the separation is:
>
> 1. from subsidiary, part-time work during the base period and, at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work; or
>
> 2. if the separation from part-time work occurs during the benefit year . . . .

In the present case, the claimant's base period covers the period April 1, 2016, through March 30, 2017. *See* Remand Exhibit # 5. Her benefit year began on May 7, 2017. The claimant's separation from the instant employer on April 11, 2017, fell between the end of her base period and the beginning of her benefit year, a period which DUA refers to as the "lag period."[4] The regulation at 430 CMR 4.76 fails to mention separations from subsidiary part-time work during the lag period. However, the DUA Service Representative Handbook provides guidance in the form of an example of how to determine a constructive deduction. Section 1407(B) states:

> *Example*: A claimant worked for two employers at the same time. He is separated from the primary employment under non-disqualifying circumstances and is also separated from the subsidiary employment under disqualifying

[4] *See* 430 CMR 4.83.

> circumstances during the last **four** weeks of employment prior to filing a claim. The claimant is eligible for benefits based on the separation from the primary employment. However the weekly benefit amount will be reduced by the average gross weekly earnings received from the subsidiary employer. Average earnings will be calculated by dividing gross earnings reported for the most recent completed quarter of the base period. The partial earnings disregard will then be applied to this amount when making the deduction.

DUA records show that the employer fired the claimant on April 11, 2017, four weeks before she filed her unemployment claim on May 9, 2017.[5] Her claim followed a qualifying separation from her primary employment at [Employer A]. *See* Issue ID # 0021 9144 47. Therefore, the claimant remains eligible for benefits based upon her separation from the primary employment but subject to a constructive deduction due to a disqualifying separation from her subsidiary job.

To arrive at the amount of the constructive deduction, we return to the regulations at 430 CMR 4.78, which provide, in relevant part:

> (1)(a) If the claimant's separation from subsidiary work occurred in the last four weeks of employment prior to filing of the unemployment claim; the average part-time earnings will be computed by dividing the gross wages paid by the subsidiary employer in the last completed quarter by 13. If there are less than 13 weeks of work, then the gross earnings shall be divided by the actual number of weeks worked. . . .
>
> (2) The constructive deduction shall be computed by applying the earnings disregard standards provided for in M.G.L. c. 151A, § 29(b) to the average partial earnings as calculated in 430 CMR 4.78(1)(a) through (c).

In the last completed quarter prior to filing her claim, January 1–March 31, 2017, the employer paid $112.50 in gross wages to the claimant.[6] *See* Remand Exhibit # 5. At $13.00 per hour, $112.50 gross wages amounts to 8.65 hours of work, which we assume was a single shift performed during one week. Thus, the claimant's average part-time earnings were $112.50. ($112.50 gross earnings divided by 1 week of work.) This amount is less than the claimant's earnings disregard of $172.00. Therefore, she would be entitled to her full benefit rate in any week of total unemployment.

We, therefore, conclude as a matter of law that the claimant's separation from the employer, even if disqualifying under G.L. c. 151A, § 25(e), is merely subject to a constructive deduction, rather than a complete disqualification from benefits, pursuant to 430 CMR 4.71–4.78.

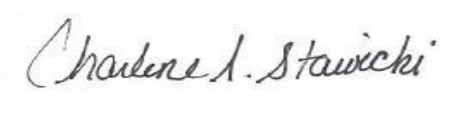
[5] We take administrative notice of the claimant's filing date contained in the DUA's electronic record-keeping system, UI Online.

[6] Because the findings show that the claimant did not perform services for the employer between November, 2016 and her conversation with the Staffing Coordinator on March 13, 2017, we infer that these wages were paid between March 13, 2017, and the end of that month. *See* Consolidated Findings ## 3 – 8.

Because we are unable to conclude that the claimant had mitigating circumstances for missing a scheduled shift, the disqualification under G.L. c. 151A, § 25(e)(2) is affirmed. However, the portion of the review examiner's decision which imposed a complete disqualification from receiving benefits is reversed. Beginning with the week of April 9, 2017, the claimant shall be subject to a constructive deduction, until she meets the requalifying provisions of the law.[7]

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 30, 2018

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

AB/rh

[7] *See* 430 CMR 4.76(2) and (3).