Although the employer believed that the claimant was not fulfilling her job responsibilities, the review examiner found credible the claimant's testimony that she did her job the best she could, she did not refuse to do her work, and she was helping out when she could. Accordingly, the employer did not show any misconduct, and the claimant cannot be denied benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0025 3449 19

BOARD OF REVIEW 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 April 20, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 22, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties,[1] the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 9, 2018.

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 accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to have its witnesses provide testimony regarding the claimant's separation. Both parties attended the remand hearing. 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 to allow benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the employer discharged the claimant for allegedly not fulfilling her job responsibilities and the review examiner has made findings indicating that the claimant was not intentionally refusing or failing to do her work.

[1] Only the employer's agent attended the hearing conducted on November 5, 2018. No direct witness from the employer offered testimony.

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 as an Internal Care Manager, for the employer, a Homecare Agency, from September 1, 2017 until April 20, 2018, when she was separated from her employment.

2. The claimant worked Monday, Tuesday, and Friday, 9 a.m. until 4:30 p.m. The claimant also occasionally worked on-call.

3. The claimant did not have any other jobs.

4. The employer expects all employees to fulfill all of their job responsibilities at all time in order to run the company well.

5. The employer is a small company and the claimant's roles had changed a bit over her tenure with the employer.

6. The three original main duties of the claimant's job included scheduling, helping with on-call, and mentoring caregivers.

7. The claimant originally performed all three duties without any issues.

8. Around Christmas time, the claimant was asked to be on-call for over 100 hours in a row.

9. The claimant did as asked, but it was very difficult for the claimant and took a lot out of her.

10. After working the entire on-call shift, the claimant was not feeling well and had to go to her doctor. The claimant and the doctor agreed that it made sense for the claimant to speak with her employer and ask for a reasonable accommodation where the claimant would no longer be required to work on-call shifts anymore.

11. The employer met with the claimant on January 19, 2018 to go over her 90-day performance review. The overall performance review was positive. While in the meeting, the claimant brought up the on-call issue. The claimant stated that due to medical issues, she would no longer work on-call on the *weekends* and that she did not want to discuss it further. The claimant asked if the employer was going to fire her. The employer replied that the claimant would not be fired, but that this would put the company in a difficult position.

12. After the meeting on January 19, 2018, the claimant was never required to work a weekend on-call shift again.

13. The claimant continued to work on-call during the weeknights.

14. The claimant never refused to work an on-call shift.

15. At the end of February 2018, the employer received a phone call from a client's son. The son stated that he had previously called the office due to a scheduling error on the employer's part and spoke to the claimant about it. The son stated that the claimant accused the son of being the one who made a mistake and was rude to him. The son informed the employer that he no longer felt comfortable calling the office and would only communicate via e-mail in the future.

16. The owner spoke to the claimant about the complaint she had received from the client's son. The owner told the claimant that the employer would not tolerate rudeness to clients. The claimant responded that she had not been rude to the son.

17. The claimant believed that she spoke appropriately to the client's son and was not rude.

18. In March 2018, the employer hired a full-time scheduler. The claimant helped to train the new scheduler and continued to help do actual scheduling.

19. The employer assumed that the claimant would share "her knowledge" about the position with the new hire.

20. The employer never gave the claimant specific instructions on how the claimant should share "her knowledge" with the new hire.

21. The claimant was never directly told that she was required to train the new hire.

22. When the new hire first began work, she asked the claimant about which caregivers would be good matches for clients, caregiver personalities, and caregiver skill levels. The claimant answered the new hire's questions.

23. The new hire did not think the claimant was particularly friendly towards her.

24. The claimant would answer any questions that the new hire asked her, but did not take it upon herself to offer to help the new hire.

25. The claimant never refused to help the new hire if she asked her for help.

26. The claimant never refused to perform her scheduling duties.

27. During the claimant's tenure, the claimant always mentored the caregivers to the best of her ability.

28. The claimant never refused to mentor the caregivers.

29. The claimant always tried to be professional at work.

30. The employer was very disappointed that the claimant had not taken a more active role in helping to acclimate the new hire to her job.

31. The employer decided to discharge the claimant because they felt that the claimant was not fulfilling her job responsibilities.

32. On April 20, 2018, the employer asked to meet with the claimant. The employer told the claimant that, "it was not working out". The claimant asked for clarification. The employer stated that she thought the claimant was rude and she did not perform the job that she was supposed to do. The claimant became very upset because she did not think she was rude and she took pride in the work she had done there.

33. The claimant did not think that she had done anything wrong.

34. The claimant filed for unemployment benefits and received an effective date of April 15, 2018.

Credibility Assessment:

Overall, the employer was not happy about the claimant's job performance with the employer during her tenure. Specifically, the employer did not like the fact that the claimant informed the employer that she would no longer work weekend on-calls, beginning in February 2018. The employer also thought, despite the claimant's contention to the contrary, that the claimant had been rude to the client's son on the telephone when he called the employer. Although the employer may have thought the claimant had been rude, the claimant presented persuasive testimony that she was never intentionally rude to the client's son. Furthermore, although the owner testified that she thought the claimant should have known she wanted her to train the new hire and how she wanted the claimant to train the new hire, there was no evidence presented that any clear expectations were ever communicated about this to the claimant.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the evidence in the record is insufficient to show that the claimant should be denied unemployment benefits.

Because the claimant was terminated from her employment, her qualification 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). After the initial hearing, the review examiner concluded that the employer had not carried its burden. Following our review of the testimony from both the initial and remand hearings, as well as the consolidated findings of fact and the documentary evidence in the record, we agree with the review examiner's decision.

The employer discharged the claimant, because it "felt that the claimant was not fulfilling her job responsibilities." Consolidated Finding of Fact # 31. During the hearings, the employer noted three specific job responsibilities which the claimant allegedly failed to do: working weekend on-call shifts, communicating appropriately with clients and their families, and training a new scheduler. We address each item in turn.

As to declining to work weekend on-call shifts, we cannot conclude that the claimant deliberately did anything wrong. Although she may have been hired to do them, the claimant told the employer in January of 2018 during a performance review meeting that she would no longer work the weekend on-call shifts. The claimant was still able to take weekday on-call shifts. The claimant specifically asked if she would be fired for not taking the weekend on-call shifts, and the employer told her that she would not be fired. Thereafter, the claimant continued to work weekday on-call shifts, and she never refused such a shift. Consolidated Findings of Fact ## 11–14. The claimant was discharged approximately three months later, in April of 2018. Given that she was allowed to continue working for several months after the January, 2018, meeting, we cannot conclude that the claimant deliberately or knowing engaged in misconduct. Indeed, it appears that the employer accommodated her request to not work weekend on-call shifts. This may have been a difficult situation for the employer, but we cannot say that there was misconduct related to this issue.

Regarding the alleged inappropriate phone call with a client's son, we also cannot conclude that the claimant did anything wrong. The review examiner found that the client's son reported that the claimant had been rude. The claimant denied this allegation. The review examiner did not

actually find that the claimant was rude or that she otherwise behaved in an inappropriate manner with the client's son. Based on the findings made regarding the incident, *see* Consolidated Findings of Fact ## 15–17, which essentially address what the client's son reported, we cannot conclude that the claimant actually engaged in misconduct. Therefore, the claimant cannot be denied benefits due to this issue either.[2]

Finally, we come to the claimant's interactions with the new scheduler, who was hired by the employer in March of 2018. Generally, the employer offered testimony that the claimant did not sufficiently help, train, or work with the new employee. The employer alleged that the claimant had refused to help the scheduler. The claimant testified to just the opposite. The review examiner believed the claimant's version of events. The scheduler herself testified on the second day of the remand hearing. She offered that she felt that the claimant resented her and that the claimant would not take the initiative to train her. However, the claimant would respond to questions and some training did occur, even if the claimant was not enthusiastic about having to help the new scheduler. This testimony supports the gist of the claimant's testimony, which was that she did not refuse to help. In sum, the consolidated findings reflect that the claimant did not engage in any misconduct. The claimant helped to train the new scheduler. Consolidated Finding of Fact # 18. The claimant answered questions posed to her by the new employee. Consolidated Findings of Fact ## 22 and 24. She never refused to help the new employee and never refused to perform her part-time scheduling duties. Consolidated Findings of Fact ## 25 and 26. Moreover, she tried her best to fulfill her other duties as well. Consolidated Findings of Fact ## 27–29. The employer's disappointment in how the claimant trained the new employee does not amount to misconduct, much less deliberate or wilful misconduct.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the employer did not show that the claimant deliberately, knowingly, or intentionally engaged in misconduct prior to her separation from employment.

[2] Even if Consolidated Finding of Fact # 15 was accepted as a finding which indicates that the claimant actually was rude to the client's son, we could not deny benefits. A claimant's state of mind is of utmost importance in discharge cases. In this case, the review examiner found that the claimant "believed that she spoke appropriately to the client's son and was not rude." Consolidated Finding of Fact #17. The claimant was not aware of any rudeness or inappropriateness. Therefore, she could not have deliberately engaged in any misconduct or knowingly violated any policy, and she would not be subject to disqualification under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning April 15, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 19, 2019

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 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.

SF/rh