A claimant, who had a prior warning for failing to properly call out and report his absence from work, engaged in deliberate misconduct in wilful disregard of the employer's interest, and is disqualified under G.L. c. 151A, § 25(e)(2), because he again failed to tell his managers that he was not going to work a scheduled shift.

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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 affirm.

The claimant was discharged from his position with the employer on March 15, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 4, 2019. 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 July 13, 2019.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the review examiner an opportunity to review phone records submitted by the claimant with his appeal to the Board. 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 deny 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 claimant did not notify the employer that he was going to be absent from work on March 6, 2019.

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 full time technician for the employer, an electric and telecommunications construction company, between 02/21/2012 and 03/15/2019, when he separated.

2. The claimant's immediate supervisors were project manager A and project manager B. The claimant's upper level managers were the vice president (VP) and the president.

3. The employer maintains an "Attendance and Punctuality" policy (the policy) within the employee handbook. The policy requires employees to "speak to direct manager by phone" if one is unable to work as scheduled.

4. Per the policy, a violation "may lead to disciplinary action, up to and including termination of employment."

5. The employer expected employees to notify management directly by phone when one could not work as scheduled.

6. The purpose of this expectation was to track employee time and ensure project milestones are met for clients.

7. At times during the claimant's employment, he complied with the employer's expectation.

8. On 01/02/2019, the claimant contacted project manager A in the morning that he would be in late that day. The claimant did not arrive and did not contact the employer further regarding his shift on 01/02/2019. On 01/03/2019, project manager A issued the claimant a written warning for failing to notify a supervisor of changes in attendance.

9. On 03/05/2019 at 11:00 p.m., the claimant sent a text message to project manager A stating, "Will be running late tomorrow got to sit with the mediator for child support don't know if I have to take the whole day off I will let you know as the day goes by[.]"

10. On 03/06/2019, the claimant was scheduled to work beginning at 6:30 a.m.

11. On 03/06/2019, the claimant did not work any hours.

12. On 03/06/2019, the claimant and the president had a telephone conversation by way of the president's cell phone number at 9:11 a.m. This call lasted two (2) minutes in length because of a poor connection.

13. On 03/06/2019, the claimant and the president had a telephone conversation by way of the president's cell phone number at 9:13 a.m. This call lasted nineteen (19) minutes in length. The claimant and the president spoke about child support and their former significant others.

14. During these telephone conversations between the claimant and the president on 03/06/2019, the claimant did not inform the president that he would be absent for the day.

15. The president is not involved in day-to-day staffing or attendance for employees. Such a task is the responsibility of project managers.

16. There was not a meeting between the employer and a client (client A) on 03/06/2019. Project manager A was in the employer's shop "all morning" on 03/06/2019 available to speak to any employees calling out of a shift.

17. On 03/06/2019, the claimant did not contact the employer to report his absence.

18. The claimant's absence without notification to the employer on 03/06/2019 resulted in a missed project milestone for client A.

19. On 03/15/2019, the VP and project manager B met with the claimant and terminated his employment for failing to notify management that he would not be working his scheduled shift on 03/06/2019.

Credibility Assessment:

During the original hearing, the claimant testified several times that he called project manager A "early in the morning" on March 6, 2019 and that he spoke with project manager A on March 6, 2019. The documentation submitted with the claimant's appeal reported that he spoke with "[the president]" the "Boss/Owner" on March 6, 2019 after nine o'clock in the morning. The claimant explained this inconsistency at the remand hearing by correcting his testimony from the original hearing stating that retrieving the phone records and seeing the president's cell phone number listed for those two (2) calls at 9:11 a.m. and 9:13 a.m. refreshed his recollection that those calls were between himself and the president, and not between himself and project manager A. The claimant's corrected testimony on this point was corroborated by the president's direct testimony during the remand hearing that he participated in these two (2) calls with the claimant on 03/06/2019; project manager A's direct testimony during the remand hearing that he and the claimant did not speak on the phone with each other on 03/06/2019; and project manager B's hearsay testimony during the original hearing that the claimant did not speak with project manager A on 03/06/2019.

During the original hearing, the claimant testified that he always talked with project manager regarding his attendance. At the remand hearing, the claimant alleged that he informed the president of his absence during their calls on 03/06/2019 because the claimant was told of "some meeting with [client A] so no one was available" to talk to, so the claimant "spoke to [the president] instead." However, the claimant's allegation is not plausible in light of the consistent,

> sequestered testimony of the president and project manager A during the remand hearing. Specifically, both the president and project manager A testified that there was not a meeting with client A on 03/06/2019. Project manager A detailed that he was in the shop "all morning" and it was undisputed (following the claimant's corrected testimony as identified above) that the claimant and project manager A did not speak at all on 03/06/2019. The president offered detailed direct testimony that he and the claimant did not discuss the claimant's absence during their calls on 03/06/2019, and spoke only of child support and their former significant others. The president offered a thorough explanation that the claimant's attendance was not discussed because the president does not handle day-to-day staffing or attendance for employees. Given the totality of the employer's testimony, the claimant's allegation (that he told the president of his absence during their calls on 03/06/2019 because a meeting with client A meant no one was available) is not as credible as the employer's testimony that the claimant did not notify the president of his absence during the 03/06/2019 telephone calls and did not contact the employer to report his absence on 03/06/2019.

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 original 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, as the review examiner did, that the claimant is not eligible to receive unemployment benefits.

Because the claimant was terminated 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 . . . .

Under this section of law, the employer bears the burden to show that the claimant is ineligible to receive unemployment benefits. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

The employer discharged the claimant for "failing to notify management that he would not be working his scheduled shift" on March 6, 2019. Consolidated Finding of Fact # 19. To carry its burden in this case, the employer must first show that this conduct occurred. On this point, there was conflicting evidence. The employer's witnesses testified that the claimant did not notify a supervisor, or anyone else, that he was not going to work on March 6, 2019. During the remand hearing, the claimant testified that he had a conversation with the employer's president on March

6, 2019, in which he spoke with the president about child support and in which he told the president that he was not going to be in to work that day.

As noted in the review examiner's credibility assessment, which accompanies the consolidated findings of fact, the review examiner viewed the employer's testimony and evidence as more credible than the claimant's testimony. Accordingly, she found that, on March 6, 2019, "the claimant did not contact the employer to report his absence." Consolidated Finding of Fact ## 14 and 17. At this stage of the administrative process, the "inquiry by the board of review into questions of fact . . . is limited . . . to determining whether the review examiner's findings are supported by substantial evidence." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979). We cannot set aside the review examiner's credibility determination, unless it is unreasonable or unsupported by the evidence before her. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). In unemployment proceedings, "[t]he responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985). We see no reason to disturb the review examiner's credibility assessment. She offered a reasoned analysis as to why she felt the employer was offering credible testimony. Thus, we have adopted the consolidated findings of fact.

Because the claimant did not contact the employer to report his absence on March 6, 2019, he violated the employer's expectation that employees need to notify the employer directly if they were not able to work as scheduled. *See* Consolidated Finding of Fact ## 5 and 6. In this way, the employer has shown that the claimant engaged in misconduct prior to his separation. However, a showing of misconduct alone is insufficient to deny benefits under G.L. c. 151A, § 25(e)(2). The employer must also show that the claimant acted with an intentional state of mind in order for benefits to be denied. In order to evaluate the claimant's state of mind, we "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). When considering these factors, we must keep in mind that the general purpose of G.L. c. 151A, § 25(e)(2), is to "deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Id. at 97.

As noted above, the employer expected that the claimant notify management if he was not going to work his scheduled shift. Consolidated Finding of Fact # 5. Such an expectation is certainly reasonable, as it is a means by which the employer can "track employees time and ensure project milestones are met for clients." Consolidated Finding of Fact # 6. The review examiner also made sufficient findings of fact to conclude that the claimant was aware of the expectation. He had complied with the expectation over the course of his employment. *See* Consolidated Finding of Fact # 7. In addition, the claimant was given a written warning in January of 2019 "for failing to notify a supervisor of changes in attendance," when he did not report to work after saying that he would be late one day. Consolidated Finding of Fact # 8.

Finally, there are no findings of fact from which we could reasonably conclude that the misconduct was mitigated. The claimant was able to use his phone on March 6, 2019, as his call to the employer's president shows. *See* Consolidated Findings of Fact ## 12–14. Although the claimant may have had a child support mediation meeting, it does not appear that this prevented

him from properly calling out from work. *See* Consolidated Finding of Fact # 9. The credibility assessment also indicates that the review examiner rejected other testimony from the claimant as to what happened on March 6, 2019. This, too, shows that the review examiner did not think that something prevented the claimant from complying with the employer's expectations on March 6, 2019.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the employer has carried its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest by failing to properly notify the employer that he would not be able to work at all on March 6, 2019.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning March 10, 2019, 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 – September 27, 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