After the employer changed the claimant's shift start time from 2:00 p.m. to 6:00 a.m., the claimant was often late to work. Although the claimant received multiple warnings for this conduct, she is not subject to disqualification under G.L. c. 151A, § 25(e)(2), because she was making sincere, good faith efforts to try to get to work on time, but was not able to do so on many occasions.

Board of Review
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Issue ID: 0030 2225 88

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 reverse.

The claimant was discharged from her position with the employer on March 22, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 18, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 17, 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 claimant an opportunity to provide evidence regarding her separation from employment. 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, following multiple warnings regarding her attendance, the claimant overslept on March 19, 2019, and reported to work forty-five minutes late.

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 full time as a Residential House Parent for the employer, a nonprofit human services agency, from 08/07/17 until 03/22/19. The claimant's rate of pay was $16 per hour.

2. The employer has a written attendance policy that governs absences and tardiness. The policy states that the employer assigns attendance points as follows:

   "Tardy* = ½ point, plus additional ½ point per 15 minutes
   Leave Early = ½ point
   Full Day Absence = 1 point
   Full Day Absence during Inclement Weather = 1.5 points
   No Call/ No Show** = 2 points

   *You are considered tardy if you are not present and ready to work one (1) minute past your scheduled work start time. Unforeseen emergency situations will be evaluated on case-by-case basis.

   **3 consecutive No Call/No Show will be considered a voluntary resignation."

3. The purpose of the policy is to ensure adequate staffing.

4. The claimant was aware of the policy having signed off on receipt of it upon hire.

5. The employer's attendance policy outlines a progressive disciplinary steps/point system for violators: (1) 2 points = 1st Level Warning (2) 3 points = Written Warning; (3) 5 points = Final Written Warning; and (4) 6 points = Termination.

6. In February 2019, the claimant accepted a temporary assignment to a different program working 6:00 a.m. – 2:00 p.m.

7. The claimant had difficulty going to bed and waking up earlier than she was used to doing.

8. The claimant regularly set her phone's alarm clock to go off at 4:30 a.m., 5:00 a.m., and 5:30 a.m.

9. The claimant tried to go to bed at 8:00 p.m. but was not always successful.

10. The claimant lived 15 minutes from her place of employment.

11. In February – March 2019, the claimant was attempting to get a car and car insurance following an accident the previous September. After she left work at 2:00 p.m., the claimant usually "ran errands" pertaining to getting a car and insurance.

12. The claimant did not believe that the six hours between her shift ending and her 8:00 p.m. desired bedtime was enough time for her to accomplish her errands and get to bed early enough.

13. On multiple occasions, the claimant went to be later than planned, overslept, and reported to work late.

14. The claimant did not like working the 6:00 a.m. shift; she did not ask for another shift because she had been told it was temporary.

15. On 03/04/19, the employer issued the claimant a Final Written Warning for attendance. After the Final Warning was issued and signed, the employer realized the claimant had 6 attendance points and the wrong level of discipline was issued to her.

16. That same day, the supervisor notified the claimant that she would be terminated upon any further attendance policy violations.

17. On 03/19/19, the claimant was scheduled to work at 6:00 a.m.

18. At approximately 6:15 a.m., the Program Manager telephoned the claimant because she had not reported to work. The Program Manager's call woke the claimant up.

19. The Program Manager asked the claimant if she was reporting to work that day; the claimant told the Program Manager she had overslept and would report to work as soon as possible.

20. The claimant reported to work at 6:45 a.m.

21. On 03/20/19, the claimant met with the employer to tell them she did not like the shift/house she was working and asked to be changed to "relief."

22. The employer informed the claimant that the Director of Residential was investigating her 03/19/19 tardiness and she could be terminated for it.

23. On 03/22/19, the employer discharged the claimant for the 03/19/19 incident that resulted in her exceeding 6 attendance points.

[Credibility Assessment:]

> Both parties attended the remanded hearings. In her testimony, the claimant did not dispute that she was on a final warning for attendance and she understood that further instances of tardiness could jeopardize her employment. The claimant's testimony was credible as to her dislike and difficulty working the temporary 6:00 a.m. – 2:00 p.m. schedule but she did not provide a reason that was beyond her control that contributed to her chronic tardiness or, more specifically, the 03/19/19 incident.

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 reject the review examiner's legal conclusion that the claimant is disqualified from receiving 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. *See* Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). The review examiner concluded, after the initial hearing, that the employer had carried its burden. After our full review of the record, we disagree.

The employer discharged the claimant for continued problems with her attendance. The claimant had reached the maximum number of points, pursuant to the employer's attendance policy, and the employer terminated her accordingly. We think that there is little dispute that the claimant violated the employer's expectations regarding reporting to work on time. After multiple warnings, the claimant was still unable to report to work by her 6:00 a.m. start time. The findings show that the claimant violated the employer's written policy and expectation that employees "be present and ready for work, on time, every day." *See* Exhibit 7, p. 3.[1] Therefore,

[1] 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).

the claimant engaged in misconduct and violated the written policy given to the claimant by the employer.

However, the crux of this case does not so much turn on whether the claimant violated the employer's policy and expectations so much as it turns on whether the claimant had the state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2). The violation must have been a *knowing* violation, or the misconduct must have been *deliberate* misconduct in order for the claimant to be disqualified. "The critical factual issue in determining whether an employee's discharge resulted from his wilful or intentional misconduct is the employee's state of mind at the time of his misconduct." Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 779 (1982). Specifically, "'knowing' implies some degree of intent, and . . . a discharged employee is not disqualified unless it can be shown that the employee, at the time of the act, was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still, 423 Mass. at 813. In cases decided under the deliberate misconduct standard, to determine if the conduct was deliberate and wilful, 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 whether the claimant acted deliberately or knowingly, we interpret the statutory language liberally. *See* G.L. c. 151A, § 74.

Here, although the review examiner noted that the claimant did not have a specific reason why she overslept on March 19, 2019, we, nevertheless, conclude that the consolidated findings of fact do not show that the claimant was intentionally and deliberately reporting to work late. On the contrary, it appears that, after her regular shift was changed from starting at 2:00 p.m. to starting at 6:00 a.m., she made sincere efforts to wake up and get to work to work on time. The claimant tried to go to bed early. Consolidated Finding of Fact # 9. She set multiple alarms, so that she would get up on time. Consolidated Finding of Fact # 8. However, she had continued difficulty getting up on time anyway. Consolidated Finding of Fact # 7. We note that the claimant was not late every day for work. She was given a final warning on March 4, 2019, and the final incident occurred on March 19, 2019, approximately two weeks later. This suggests that she was certainly able to get up and get to work on time, but also, we think that it shows that the claimant was not intentionally disregarding the employer's interests, policies, and expectations about her attendance.

Our conclusion would be different if, for example, the consolidated findings of fact showed that the claimant "had intentionally adopted a routine that inevitably would result in tardiness from time to time." Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 628 (1984). But, that does not seem to be the case here, where the claimant tried to alter her lifestyle to get to work on time, but was unsuccessful. Naturally, if the review examiner had not made findings of fact about the claimant's efforts to get up on time, the result may have been different. We think that, given the claimant's history of good faith attempts to get to work on time, the evidence in the record and the consolidated findings of fact are insufficient for us to conclude that the claimant engaged in deliberate misconduct or a knowing violation of the employer's policies, as those terms are defined in G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because, although

the claimant was continuously late to work, the claimant was making efforts to arrive at work on time, thus showing that her misconduct was not intentional, knowing, or deliberate.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 22, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – August 30, 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