Employer requested the claimant leave her keys and work password, and severed all communications with her. Board held she was discharged. The employer did not show that the claimant knew of employer's expectation not to use sick time for her childrens' illness. Nor did it prove that the claimant was absent for three consecutive days. Thus, the employer did not prove that claimant engaged in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0031 2261 46

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 separated from her position with the employer on Sunday, June 2, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 24, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on October 5, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was indefinitely ineligible for benefits under G.L. c. 151A, § 25(e)(1), because she voluntarily left employment without good cause attributable to the employer and absent urgent, compelling, and necessitous reasons. 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 obtain additional evidence pertaining to the circumstances under which the claimant left work on May 31, 2019, and the substance of the claimant's subsequent communications with her supervisor. Only the claimant 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, which concluded the claimant quit work as a result of a dispute with her employer over her use of sick time, 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 are set forth below in their entirety:

1. The claimant worked full time as a medical assistant for the employer, a dermatology office, from August 21, 2017 until May 31, 2019, when she separated from employment.

2. The claimant had a set schedule of hours Monday, Tuesday, Wednesday and Friday from 7:30 a.m. to 4:30 p.m.

3. The claimant was paid $18.00 per hour.

4. The claimant's immediate supervisor was the Nurse Practitioner (the NP).

5. The business was owned by three doctors.

6. The claimant worked for one doctor (Doctor A). The claimant did not work for the two other doctors. The two other doctors practiced in a different office than the claimant and he didn't have interaction with them.

7. The claimant was absent from work on May 8, 2019, and May 10, 2019, because her child was ill.

8. On May 10, 2019, Doctor A informed the claimant via text message that she was reducing the claimant's earned vacation hours.

9. Doctor A reduced the claimant's vacation hours in accordance with the average hours the claimant worked each week.

10. The claimant objected to her earned vacation hours being reduced. The claimant requested a copy of her personnel file. The employer did not provide her with a copy of her personnel file.

11. On the afternoon of May 31, 2019, Doctor A and the NP met with the claimant to address the claimant's absences from work. Doctor A told the claimant she would be placed on probation for excessive absenteeism. Doctor A accused the claimant of being absent from work 3 shifts in a row. The claimant had not been absent 3 days in a row. Doctor A told the claimant she was not permitted to utilize her earned sick time when the claimant's children were sick. The claimant has three children. The claimant told Doctor A she was legally permitted to utilize her earned sick time for her children. Doctor A told the claimant she should look for other employment, if she disagreed with her policy. Doctor A told the claimant she felt the claimant was trying to cause a problem with the medical practice and she needed to speak to the other two doctors to determine if the employer should continue the claimant's employment. Doctor A brought the Office Manager into the meeting and told her she didn't want the claimant at the office anymore.

12. The claimant asked the NP, if she could leave work for the day. The claimant requested to leave work for the day because she was upset that Doctor A accused her of being absent 3 shifts in a row and told her she was prevented from utilizing earned sick time for days when her children were ill. The claimant did not tell the NP she quit work. The NP granted the claimant permission to leave work for the day.

13. Before she left work, the Office Manager asked the claimant to leave her office keys and the pin number to access her work IPad. It was standard procedure for the IPad to remain at the office at the end of the claimant's work day. The Office Manager didn't tell the claimant the reason she asked her for these items. The claimant assumed she was asked for these items because the employer intended to terminate her employment.

14. The claimant left work at approximately 2:00 p.m.

15. On May 31, 2019, at 3:19 p.m., the claimant viewed a medical assistant job ad posted by the employer on a job site. The claimant assumed the employer decided to terminate her employment.

16. Sometime between when she left work on the afternoon of May 31, 2019, and June 1, 2019, the claimant asked the NP via text message to ask Doctor A if she could return to work on Monday, June 3, 2019, to give her notice and work for two weeks. The claimant wanted to continue working while she looked for new employment.

17. The claimant wanted to obtain new employment because she disagreed with Doctor A's attendance policy and accusation that she was absent from work 3 consecutive days.

18. On Sunday, June 2, 2019, the NP left the claimant a voicemail that she was not going to pose the claimant's request to Doctor A because Doctor A instructed everyone who worked in the office, including the NP, to refrain from communicating with the claimant.

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 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. However, as discussed below, we reject the review examiner's conclusion that the claimant left employment of her own volition and is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

The first question to address is whether the claimant resigned or was discharged from employment. Following the May 31st meeting, the employer instructed the claimant to turn over

her office key and pin number for her work iPad before leaving. Finding of Fact # 13. On previous occasions, the employer had only requested these items from an employee when they were intending to terminate that employee.[1] Further, the employer posted a listing for a position identical to the claimant's on a job site that same afternoon. Finding of Fact # 15. After the claimant requested to return to work, her supervisor explained that she was not going to discuss the claimant's request with Doctor A, because Doctor A had instructed everyone working in the office to refrain from communicating with claimant. Finding of Fact # 18. Additionally, the consolidated findings show that the claimant never informed the employer that she quit but rather actively sought permission from the employer to return to work. Findings of Fact # 12. We believe all of these facts, taken together, demonstrate that the employer severed the employment relationship

Because we conclude the claimant was separated from work involuntarily, her qualification for benefits is appropriately analyzed under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part:

> [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). We conclude that the employer has not met its burden.

The impetus for claimant's termination appears to be her absences and use of sick time on May 8 and May 10, 2019. Findings of Fact ## 7, 8, and 11. As the employer has failed to provide any policy pertaining to either attendance or permitted uses of sick time, the Board cannot conclude that the claimant knowingly violated a uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

The next inquiry is whether the claimant's actions on May 8th and 10th constituted deliberate misconduct in wilful disregard of the employer's interest. The central issue to this analysis is the claimant's state of mind at the time of the alleged misconduct. 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) (citation omitted). As it is unclear whether the employer objected primarily to the claimant's decision to use sick time or her consecutive absences, each will be taken in turn.

[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).

In regard to the claimant's use of sick time, the employer failed to provide any evidence showing that it informed the claimant of its expectation that she not use her sick time to care for her children's illnesses prior to May 31, 2019. *See* Finding of Fact # 11. The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield, 377 Mass. at 97. As the record does not contain evidence suggesting the claimant had advance knowledge of this employer's expectation regarding use of sick time, we cannot conclude that the claimant acted deliberately in wilful disregard of the employer's interests by using her sick time on May 8 and 10, 2019, because her child was ill.

With respect to the employer's expectations surrounding consecutive absences, the employer accused the claimant of excessive absenteeism for being absent from work on three consecutive days. Finding of Fact # 11. However, the claimant was only absent from work twice, on May 8th and May 10th. Findings of Fact ## 7 and 11. Thus, there is no indication the claimant actually engaged in the alleged misconduct.

We, therefore, conclude as a matter of law that the employer failed to show that the claimant's discharge was 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 within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 2, 2019 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 2, 2019

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

LW/rh