Where the employer failed to provide substantial and credible evidence to show that the claimant engaged in the alleged misconduct of stealing business, and its motive for discharge appeared to be performance-related, the claimant is eligible to receive benefits pursuant to G.L. c. 151A, § 25(e)(2).

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

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0031 9373 66

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 his position with the employer on August 5, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 21, 2019. 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 27, 2019.

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 another opportunity to provide evidence and to question the parties further about the reasons for the claimant's discharge, the employer's business model, and the employer's expectations of the claimant. Both parties attended the remand hearing, which was held over the course of two sessions. 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 decision to award benefits pursuant to the provisions of G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the employer ultimately discharged the claimant after determining that it was dissatisfied with his work performance.

Findings of Fact

[1] The hearing took place over the course of two days. Both parties were at the first day of the hearing. Only the claimant attended the second day of the hearing.

The review examiner's consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant worked full-time for the instant employer as a National Account Manager from December, 2018, until his separation on 8/5/2019.

2. The employer's business is selling telecommunication packages to companies.

3. The employer processes their sales to companies through a 3rd party company called [Company A] since [Company A] is the largest distributor of telecommunication packages.

4. The employer and many other similar companies process the telecommunication packages through [Company A].

5. The employer is not in competition with [Company A].

6. At the time of hire, the employer and the claimant entered into a written agreement titled "Employment Agreement & Compensation Plan Senior Communications Consultant" and both parties viewed the document. The claimant did not retain a copy.

7. Within the Employment Agreement, it states that vacation time is subject to pre-approval with a minimum of two weeks advanced notice, no kickback [sic] are permitted, there is a non-solicitation clause for a period of two years following voluntary or involuntary separation from the company, employees must act in an honest and professional manner and projecting the employer and all approved vendors in a positive and truthful fashion.

8. The claimant wanted to work directly for the employer using his existing book of contacts instead if working for himself through [Company A] since the employer was going to compensate him a salary of $120,000 plus commissions.

9. The claimant's wife operates independently as a business selling telecommunication packages which are then processed through [Company A].

10. The claimant's job with the employer included the claimant using past clients or lead contacts in order to sell telecommunication packages through the employer.

11. The lead contacts would provide leads to the claimant, his wife, and various other businesses in order to get the best telecommunication package offered.

12. While working for the employer, the claimant sold a telecommunication package to a client through the employer while his wife completed [sic] for the

same client provided by the lead contact who knew both the claimant and his wife.

13. The claimant knew that the employer was aware that other businesses completed [sic] for the telecommunication packages which the customer or vendor might need.

14. The claimant was aware that he was expected to work on and close all telecommunication packages through the employer while working for them and not through his wife's business or any other personal business.

15. On 5/1/2019, the claimant received as text message from his lead referral partner which shows a potential client that needs a package [sic]. This text message is not evidence that the claimant was working on the side to close deals without the employer.

16. On 6/17/2019, a potential client which had [been] provided by a lead contact previously emailed the claimant stating he had a visit from vendors which were the claimant's wife and [an] unknown individual. The potential client asked if they were representing the claimant since the visit was unscheduled.

17. The claimant emailed the client back on 6/17/2019 stating, "yes sir. They should have called first…I will make sure if anyone needs to do anything like that in the future, they reach out first."

18. The employer partner the [sic] contacted [Company A] and reported that his wife's company was stealing lead [sic].

19. Based on such information, [Company A] terminated their business relationship with his wife and sister's company.

20. The claimant is not sure the current status between [Company A] and the business with his wife and her sister.

21. The employer partner met with the claimant on 7/16/2019 in person to discuss stealing of leads.

22. The claimant explained that his wife had a company and they both completed [sic] for the same leads provided by a lead referral partner when he used to live in Florida.

23. The claimant never admitted to the employer partner that he acted improperly during the meeting. The claimant did not "throw up his hands" and say "I knew this would happen."

24. The claimant did not ask or beg the employer for another chance.

25. The employer partner provided the claimant with employer information to give to the lead referral partner in order to continue to attempt to obtain business through the lead referral contact and the claimant continued to remain employed as the employer partner was satisfied that no client accounts had been stolen.

26. The claimant later closed and secured the client contract which was processed through the employer.

27. The claimant's wife's business and the employer completed [sic] for the same clients as they were in the same business.

28. After the 7/16/2019 meeting, the claimant did not attempt to steal or divert any business from the employer.

29. Prior to the claimant's separation, the CEO had been informing the claimant that he was dissatisfied with the claimant's job performance and that he was not seeing a return on the investment he made in paying the claimant a $120,000 a year salary.

30. On 8/5/2019, the CEO sent the claimant a voicemail message directly without calling.

31. In the voicemail message left for the claimant, the CEO told the claimant that 8/5/2019 would be his last day and the employer would pay him through Friday 8/9/2019.

32. The claimant was also paid out two weeks of vacation pay which had not been owed or accrued.

33. The CEO did not provide any reason for termination.

34. The CEO did not indicate the claimant had violated any company rule or policy.

35. The claimant called the CEO twice however his phone went to voicemail.

36. The CEO then sent the claimant an email informing him that his employment was terminated however no reason was stated.

37. The email stated that the CEO was unable to reach the claimant by email or voicemail however the CEO had only left one prior voicemail message.

38. The claimant was not provided a reason for his termination.

Credibility Assessment:

At the hearing, the company president contended that the claimant attempted to steal four clients after the 7/16/2019 [sic] however at the hearing, the company

> president did not produce any testimony or evidence of the theft of four clients after 7/16/2019. The claimant testified that he did not steal any client after 7/16/2019. Since the contention of the employer was unsupported in this contested area, the claimant's testimony is accepted as credible.
>
> At [the] hearing, the company president contended that the claimant threw up his hands and said he knew this would happen when accused of stealing clients on 7/16/2019. The claimant testified that he did not throw up his hands and say I knew this would happen. The claimant's testimony is accepted as credible in this contested area since no theft was established by the employer which would have led the claimant to make such statement.

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, except for the month noted in Consolidated Findings of Fact ## 21 and 28, and as in the credibility assessment. The record indicates that a meeting happened in June of 2019, not July.[2] 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 claimant is 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 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 ineligible to receive unemployment benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996). Following the initial hearing, the review examiner concluded that the employer had not carried its burden. After reviewing the full record, including the testimony from the remand hearing, we agree.

[2] The employer president's testimony as to when the alleged misconduct occurred and when he learned of it all was not totally clear. It appears that the president learned of some of the claimant's alleged misconduct and met with him in June of 2019. In mid-July of 2019, he learned of more alleged misconduct. From the best we can tell from the record, although the employer learned of some of it in July of 2019, all of the alleged misconduct happened prior to the June meeting. *See* Exhibits ## 11 and 13, which suggest that the employer was aware of things in June and that the claimant had met with the employer in June to discuss the matter.

At the outset, we must clarify what the Board's role and standard of review is at this stage of the administrative process. The "inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, 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). To satisfy the substantial evidence requirement, the review examiner's findings, conclusion, and decision "need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon reasonable evidence, that is, 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Gupta v. Deputy Dir. of Department of Employment and Training, 62 Mass. App. Ct. 579, 582 (2004). Since the Board did not hold a hearing in this matter, we cannot make findings of fact. We also cannot set aside the review examiner's credibility determination, unless it is unreasonable or unsupported by the evidence before him. 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). In other words, even if the Board could have viewed the circumstances surrounding the claimant's separation differently, and even if the Board would have made different findings of fact, we cannot substitute our judgment for the review examiner's view of the evidence.

With this standard of review in mind, we turn to the case before us. As an initial matter, in order to carry its burden under G.L. c. 151A, § 25(e)(2), the employer must first show that the claimant engaged in misconduct or a violation of the employer's policies. Here, the employer alleged various types of misconduct and/or violations, including that the claimant was untruthful, that the claimant did not properly request vacation time, that the claimant violated the employer's Code of Ethics (as laid out in an employment agreement), that the claimant violated its prohibition on kickbacks, and that the claimant violated a contractual non-solicitation clause. Over the course of the hearings, the employer's witnesses narrowed the alleged misconduct to a few acts. More specifically, the employer asserted that the claimant had attempted to close sales deals/contracts outside of the employer (through a different company), thereby potentially denying revenue to the employer, and the employer alleged that the claimant performed poorly and showed disregard for the employer.[3] The several hours of testimony focused on these items mostly, and the parties vigorously disagreed as to whether the claimant engaged in the alleged misconduct.

It is clear from the consolidated findings of fact that the review examiner credited the claimant's testimony and decided that the employer had not presented sufficient evidence to show that the claimant did what the employer alleged. We note that there is *some* evidence in the record, which might support a conclusion that the claimant acted inappropriately. First, the employer's president testified how the claimant allegedly set up a side company, [Company B], with the claimant's wife to compete with the employer for its clients. He suggested, for example, that, even though the

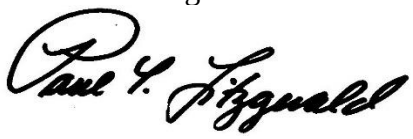
[3] Issues with the claimant's performance came to a head just prior to the claimant's discharge when the claimant requested a week off from work for vacation. This appears to have been the final event prior to the discharge. *See* Exhibit # 4, p. 2. Both parties agreed that this occurred, and that the claimant was discharged soon after. The review examiner did not specifically mention the vacation issue in his findings of fact, but the information is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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). We do note, however, that the parties disagreed as to whether the claimant properly gave notice that he was taking the time off.

claimant may have closed a sale through the employer with a client, *see* Consolidated Finding of Fact # 26, he then tried to close more deals with the client through a different company. This would cut the employer out of commissions and income. Documentary evidence in the record supporting the employer's case consisted of: Exhibit # 11, an email from an employer client, possibly suggesting that the claimant's wife was representing the claimant (through the side company) to make a sale without the employer; Exhibit # 13, an email from the employer to [Company A] about the claimant admitting to trying to sell product to the employer's customers through a different company; and Exhibit # 14, texts between the claimant and another individual after the claimant was fired from the employer. The claimant produced e-mails, text messages, and spreadsheets of his own to counter the employer's allegations. Although we acknowledge the employer's sincerely held belief that the claimant was engaged in unethical behavior, and some evidence supports its case, we cannot conclude that the review examiner erred in deciding that the employer's evidence was insufficient to show that the claimant engaged in the alleged misconduct. We conclude that the review examiner's view of the evidence and testimony is reasonable and, therefore, decline to disturb the findings of fact or the credibility assessment.

We also note that the employer's president suggested, especially during the remand hearing, that the employer had learned of the claimant's alleged misconduct by mid-July of 2019. However, it allowed him to continue working. It was not until the employer felt that the claimant was not pulling his weight and the claimant requested his vacation that the employer decided to terminate him. Although we assume the earlier alleged misconduct was still fresh in the minds of the employer's managers and owners, the employer's motive for discharging the claimant (the final event or conduct just prior to the separation) appears to have been performance-related, rather than directly related to the claimant's alleged attempts to steal business. *See* Consolidated Findings of Fact ## 29 and 33–34. "When a worker is ill equipped for his job . . ., any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence in the record and free from error of law.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning August 4, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS Paul T. Fitzgerald, Esq.
DATE OF DECISION - May 20, 2020 Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020[4]. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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

[4] *See* Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.