The claimant's final instances of tardiness were due to mitigating circumstances, as her parental obligations prevented her from leaving her home earlier in order to avoid the delays getting to her work station caused by the employer's COVID-19 protocols at its building entrance. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0046 9244 74

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 June 16, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 5, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties and a continued hearing, in which only the employer participated, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on June 7, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 the review examiner to give the claimant an opportunity to further testify and provide other evidence. 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, which concluded that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant's employment was terminated after she refused to accept a change to a *per diem* schedule.

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 Certified Nursing Assistant for the employer, a long-term care facility, from January 21, 2020, until becoming separated from employment on June 16, 2020.

2. The claimant was working 32 hours per week for the employer. The claimant worked a set schedule depending on the week (week one through week four).

3. The employer had a written Attendance Policy contained in the Employee Handbook. The Attendance Policy indicates in part "THE FACITLIY'S [sic] ability to operate efficiently and to provide necessary service and care to our residents depends upon your regular attendance and punctuality, which are necessary and required. Therefore, the Company cannot tolerate excessive absence or tardiness. Employees who failed to keep regular and punctual attendance will be subject to discipline action, up to and including termination of employment. Excessive absenteeism occurs whenever, and [sic] employee had (3) or more occurrences of unscheduled absence from work in any ninety (90) day period. For these purposes, multiple consecutive days of absence will be considered a single incident of absence. Employees who violate THE FACILITY'S Attendance policy may be subject to disciplinary action, up to and including termination of employment. Patterns of unreliable attendance such as a pattern of absenteeism around scheduled days off of holidays may also be considered excessive absenteeism."

4. The claimant signed for receipt of the Employee Handbook containing the Attendance Policy with a date of January 21, 2020.

5. The employer had three shifts available for the nursing staff, 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m. and 11:00 p.m. to 7:00 a.m. The employer did not allow for employees to change or alter their start and/or end time once assigned to a specific shift.

6. The claimant worked for the employer on the 7:00 a.m. to 3:00 p.m. shift.

7. Under the employer policy, if an employee punched in more than 7 minutes after the start of their scheduled shift, they would be considered late.

8. The claimant was residing in New Hampshire while working for the employer. The claimant worked at the employer's location in Massachusetts. The claimant's commute to work was 35 minutes.

9. The claimant lived with her three sons and one of her son's girlfriend. The claimant's 14-year-old son is special needs and was attending school. The claimant has a 19-year-old and a 24-year-old son.

10. Before leaving for work, the claimant would have to make sure that her 14-year-old son was getting ready for school, to be picked up by the special needs bus. The claimant's 24-year-old son would assist in the morning.

11. Due to COVID-19, the employer instituted some additional protocols upon reporting to work. Beginning in March, 2020, the employees were required to have their temperature and oxygen levels taken when entering the building. As a result, there would sometimes be a delay in getting into the employer building.

12. The claimant felt that she could not leave her home any earlier to have extra time to get into the building with the new COVID-19 protocols. If the claimant tried to leave her home earlier, by getting her 14-year-old son up and ready earlier for school, he would just return to bed.

13. The claimant presented the employer with a doctor's note dated March 17, 2020, indicating "(Claimant name) has a history of chronic back pain. She may only work 2 consecutive 8-hour days. She needs a day off for her back inflammation to wane."

14. The claimant worked in the employer's COVID-19 Unit.

15. The claimant had unscheduled absences from work on March 25th and March 27th, 2020.

16. The claimant returned to work on April 2, 2020. The claimant had a doctor's note dated April 1, 2020, indicating, "This patient was evaluated today 4/1/2020 at (location) and is asymptomatic and does not meet criteria for COVID-19 testing or home quarantine. Therefore, this patient may return to work. Please call the clinic with any questions."

17. Beginning April 27, 2020, the claimant's schedule was changed to allow her to only work two consecutive days in a row. (Thereafter the claimant was working approximately 32 hours per week for the employer and was no longer working more than two consecutive 8-hour shifts.)

18. The claimant had unscheduled absences from work on May 2nd and May 13th, 2020.

19. When returning to work on May 15, 2020, the claimant received a Corrective Action Notice, Written Warning, due to "Excessive Tardiness 23 tardy in 30 days 9 call offs in 90 days". It indicated that the claimant "needs to report to work on time" and that further occurrences would result in "Continued Corrective Action up to and including termination." The claimant signed the warning.

20. From May 15th to June 16th, 2020, the claimant had no further absences from work but was tardy from [sic] work on eight occasions during that period. The

claimant reported to work as follows: May 16th at 7:19 a.m., May 18th at 7:08 a.m., May 25th at 7:20 a.m., May 27th at 7:20 a.m., May 28th at 7:11 a.m., May 30th at 7:20 a.m., May 31st at 7:14 a.m., June 2nd at 7:23 a.m.

21. On June 4, 2020, the claimant was issued a Corrective Action Notice, Final Warning indicating "Your job is in jeopardy failure to comply with the conditions of this warning will result in termination". The warning was issued by the Director of Nurses and the Assistant Director of Nurses. The warning indicated that the claimant "continues with excessive tardiness after counseled by DNS. Second write up in 3 weeks 9 call offs in 90 days". It indicated that the employer will be revisiting the situation in 2 weeks and that if not corrected "termination". The claimant signed the final warning.

22. Thereafter, the claimant arrived to work on June 5th at 7:11 a.m., June 8th at 7:10 a.m. and June 10th at 7:16 a.m. The claimant's late arrival was due to her standing in line to get into the employer's building due to the COVID-19 protocols.

23. During the first week of June, 2020, the claimant asked the scheduler if she would be able to change her shift to work the 11:00 p.m. to 7:00 a.m. shift. The scheduler informed the claimant that she would speak with the Assistant Director and the Nursing Director. Within a few days, the scheduler notified the claimant that she could not change shifts. (The claimant did not go directly to the Assistant Director and/or the Nursing Director, as she believed the scheduler had spoken to them.)

24. On June 16, 2020, the claimant was scheduled to work from 7:00 a.m. to 3:00 p.m. for the employer. As of the June 16, 2020 date, the claimant was tardy for work 67 days, had 13 sick days and had 2 days where she left work early due to illness. (The claimant had informed the employer that she had family obligations, caring for her special needs child, in the morning before work.)

25. On June 16, 2020, the claimant reported to work, punching in for work at 7:03 a.m. (Under the employer policy, the claimant was not considered late as it was less than 7 minutes after the scheduled start time.)

26. After the claimant arrived to work on June 16, 2020, the employer made the decision to meet with the claimant to discuss her options for continued employment.

27. At the conclusion of her shift on June 16th, the claimant was called into a meeting with the Director of Nurses and the Assistant Director of Nurses. The claimant was informed that she continued to have attendance issues. The claimant was informed that she had the option of working per diem, resigning her position, or being terminated. (As a per diem employee, the claimant would start work at 7:30 a.m. but would have no guarantee of hours each week.)

28. At no time did the employer offer the claimant a change in shift in her regular full-time position of Certified Nursing Assistant. The claimant was able to work the 11:00 p.m. to 7:00 a.m. shift.

29. The claimant responded that she was not going to accept the options presented and the employer should fire her. The claimant was presented with a Corrective Action Notice (of termination) dated June 16, 2020, which she refused to sign. The Notice presented to the claimant at that time, indicated that the claimant was "unable to report to work on scheduled days". It further indicated that the claimant was terminated.

30. The claimant filed her claim for unemployment benefits on June 23, 2020. The effective date of the claim is June 21, 2020.

Credibility Assessment:

The employer witness testified to the final incident resulting in the claimant's separation from work, when she was given and refused the option of a change in schedule in her regular position. However, the employer's testimony was deemed not to be credible, based upon the totality of the circumstances.

First, the employer witness could not recall specifically what was offered to the claimant when allegedly discussing a schedule change on the June 16th date. The witness further could not recall the claimant's response to the alleged offer to change her schedule. Second, the witness asserts that she had no knowledge of the claimant speaking to the scheduler about changing her hours prior to June 16th, yet she admits that during one of the warnings issued to the claimant, the claimant did request to change her start time to 7:30 a.m., which was denied. Finally, although the employer presented the June 16th Corrective Action Notice to support her testimony as to what was discussed, as [sic] within the Notice it referenced the employee being given the option to change her schedule, the claimant provided direct and consistent testimony that such information was not on the document when it was presented to her on June 16th.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant initiated her separation from the employer and that it was disqualifying.

The review examiner initially denied benefits after analyzing the claimant's separation under G.L. c. 151A, §§ 25(e) and 25(e)(1), which provide, 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

In her original decision, the review examiner concluded that the claimant, who did not participate in the initial continued hearing, voluntarily left employment when she chose to separate from the employer rather than accepting a change to a different shift or a change to a *per diem* schedule.

However, after hearing the parties' additional testimony during the remand hearing and reviewing the documentary evidence, the review examiner made consolidated findings that do not support a conclusion that the claimant voluntarily left her employment. Specifically, the review examiner found that the claimant was having trouble with her attendance, either missing work or arriving to work late on many occasions. *See* Consolidated Findings ## 15 and 18 through 22. The claimant's attendance infractions were due to a number of reasons, including her health issues, her son's health issues, and delays entering the employer's building due to the safety protocols that were implemented as a result of COVID-19. *See* Consolidated Findings ## 10 through 13, 16, 22 and 24. As a result of the claimant's continued attendance issues, the employer informed the claimant on June 16, 2020, that her only option to continue her employment was to switch to a *per diem* schedule that would allow the claimant to have a later start time. *See* Consolidated Finding # 27. The claimant refused to accept a *per diem* schedule, as such a schedule would not guarantee her a minimum number of hours per week and, consequently, her employment was terminated. *See* Consolidated Finding # 29.

Because the review examiner's consolidated findings do not support a conclusion that the claimant left her employment voluntarily, but, rather, that the employer initiated the claimant's separation by presenting her with a Corrective Action Notice terminating 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or for deliberate misconduct in wilful disregard of the employer's interest. 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 review examiner found that the employer's attendance policy allowed it discretion in determining what discipline to impose for violation of the policy. *See* Consolidated Finding # 3. Based on this finding, we cannot conclude that the claimant was discharged for a knowing violation of a reasonable and *uniformly* enforced policy of the employer. Thus, the issue before us is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests when, as of June 16, 2020, she had been late for work on 67 occasions, left work early on two occasions due to illness, and had been absent on 13 occasions because she was sick. *See* Consolidated Finding # 24.

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about [her] own unemployment through intentional disregard of standards of behavior which [her] employer has a right to expect." Garfield v. Director of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Director 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, 377 Mass. at 97.

As noted above, the review examiner found that the claimant's attendance issues were due to a number of reasons, including her health issues, her son's health issues, and delays entering the employer's building due to the safety protocols that were implemented as a result of COVID-19. Specifically, the claimant's 14-year-old son has special needs that the claimant had to attend to, and this prevented the claimant from leaving her home earlier in order to avoid the delays getting to her workstation, which were caused by the COVID-19 protocols implemented by the employer at its building entrance. *See* Consolidated Findings ## 9 and 12. Additionally, the claimant's chronic back pain caused her to miss work on other occasions. *See* Consolidated Finding # 13. After the claimant received a final warning for excessive tardiness on June 4, 2020, the claimant was late for work on three occasions through June 10th, because her entry into the building was delayed by the employer's COVID-19 safety protocols. *See* Consolidated Findings ## 21 and 22.

Given the number of warnings for being late and absent, it is evident that the claimant was aware of the employer's reasonable expectation that she arrive to work on time. However, the findings establish that the claimant chose not to leave her home earlier in order to arrive to work on time, because she had obligations to her youngest child. Thus, the claimant's final instances of tardiness were caused not only by her inability to leave her home earlier due to her parental obligations, but also by the delays in entering the workplace due to the employer's COVID-19 protocols. These were mitigating circumstances over which the claimant had no control. For this reason, we conclude that the claimant did not act in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has failed to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced policy as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 20, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 21, 2022

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
(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.

SVL/rh