The claimant reasonably believed that he had been fired when the employer took him off the schedule and ceased all communication with him. Because the employer contended that the claimant quit his employment, it did not establish that the claimant's discharge was due to deliberate misconduct or a knowing violation 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

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

Issue ID: 0050 3578 04

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 his position with the employer on or about July 29, 2020. He reopened an existing claim for unemployment benefits with the DUA and was approved in a determination issued on September 2, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer's agent, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on July 26, 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 afford the claimant an opportunity to testify and provide other evidence. Both parties participated in 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, as requested by the employer, the claimant reached out to the employer regarding his continuing employment, but the employer stopped responding to his messages.

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 security officer for the present employer, a security company, from August 1, 2016, to July 1, 2019, at which time he resigned. He worked for another company from July 1, 2019, until he was laid off on November 1, 2019. The claimant returned to work for the present employer on January 1, 2020.

2. The claimant was assigned to a client who made several complaints about him to the employer. On Monday July 20, 2020, the claimant arrived at work smelling of marijuana. When asked about this, he told two managers that his girlfriend had been smoking in the car. He offered to take a mouth swab test but was told that was not the employer's procedure. On Tuesday July 21, 2020, he was directed to report for a urine-based drug test on Wednesday July 22, 2020. He was told not to return to work until notified to do so. The claimant took the test as requested and the results came back negative.

3. The claimant was informed on Friday July 24, 2020, around noon, that the test results were negative and that he was expected to report for his 3 p.m. shift. The claimant informed the supervisor that he was not feeling well and therefore would be unable to work the shift that day. The supervisor notified the claimant that he would be receiving a verbal warning for not given [sic] notice 4 hours in advance that he would be missing his shift. The claimant did not feel this was fair, as he had not even been notified he would be expected to work until the 4-hour notice period had passed.

4. The claimant returned to work on Monday July 27, 2020. At 4:02 p.m., the claimant's supervisor sent him a text directing him to be visibly present for the first 10 minutes of an outdoor workout class at 5:30 p.m. and again at 6:30 p.m.. The claimant did not respond to this text. He did send a text to the supervisor, at 4:06 p.m., asking when the IT guy was coming.

5. The claimant was the acting supervisor on the site. He told the other security guard to be present for the 5:30 p.m. class. This guard instead took his meal break, and no guard went to class at 5:30 p.m..

6. At approximately 5:40 p.m., the client called the Account Manager complaining that there was a homeless person in the vicinity of the outdoor workout class refusing to leave and there was no security guard present. The claimant was notified of the issue and responded that he was on his way.

7. The claimant went to the area where the workout class was taking place. He asked the homeless person to leave the area. He then remained in the area to make sure there were no other problems. The other guard took over for the 6:30 class.

8. On July 28, 2020, the client informed the Account Manager that it wanted the claimant removed from its site. The Account manager informed the claimant

that he was removed from the site and should not report to work. He directed the claimant to call Human Resources.

9. The claimant called Human Resources on July 28th but no one responded. On July 29th, he sent the Human Resource Manager a text message noting that he was on the schedule but told he was moved from the schedule and that he was told to call Human Resources.

10. The Human Resources Manager responded, the same day, with the following text message, "You were removed from the site so you can't work anywhere with [employer's name]. Please let me know if you would like to schedule a meeting with HR. I will be out of the office but there are others who can assist in this phone meeting."

11. The claimant sent a text to the Human Resources Manager asking, "Removed from the site for what exactly?" He did not receive a response.

12. The claimant was frustrated with how much time he had been off the schedule, without pay first due to the employer's policies and procedures regarding drug testing and now for a reason that had not been shared with him. This frustration was increased by the fact that his rent was due that week. In his experience, Human Resources was also very hard to reach by phone and did not return phone calls. He chose therefore to wait for the Human Resources Manager to respond to his text with more information and to set up a meeting. This did not happen. The claimant also had doubts, based on prior experiences, that Human Resources would support him in any conflict between himself and an Account Manager.

13. The Human Resource Manager testified that she had left the claimant a phone message informing him that he was being permanently removed from the client's site and that she wanted to meet with him to discuss the situation and give him a written warning for the July 28 incident where he failed to report for the outdoor workout class. This testimony was not found to be credible, given the text message screen shot provided by the claimant which is quoted above. Given the existence of this text message, it is found that the Human Resources Manager remembered the events incorrectly. That she actually communicated with the claimant by text, not phone. It is also found that she offered him the chance to meet, if he wanted to discuss the situation, rather than directing him to contact her to set up a time for a phone meeting. She may have intended to convey the message that she wanted to meet with him, but this was not the message she actual delivered. It was also not found credible that she made additional attempts to reach the claimant before terminating his employment, as there is no physical evidence of such calls, and the claimant testified he did not receive such texts and as the Human Resources Manager's memory as to the original message from (it was text not phone call) was faulty.

14. The employer officially terminated the claimant's employment effective on July 28, 2020, when he had failed to contact Human Resources to set up a meeting within what they considered a reasonable period of time.

15. On or about August 3, 2020, the claimant reopened his unemployment claim, effective July 19, 2020.

16. On September 2, 2020, DUA issued Notice of Approval 0050 3578 04-01, stating that under MGL c. 151A, Section 25(e)(2), the claimant was eligible to receive benefits for the period starting July 26, 2020.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portions of Consolidated Findings ## 9 through 13, which refer to text communications between the claimant and the employer on July 29, 2020, as the evidence in the record shows that these were email communications, not texts. *See* Remand Exhibit # 4. We further reject the portions of Consolidated Findings ## 9 through 13, which state that the claimant was communicating with a Human Resources Manager, as the evidence in the record shows that the claimant communicated with the Director of Human Resources. *See* Remand Exhibit # 4. We also reject the portion of Consolidated Finding # 13, which states that the Human Resources Manager provided testimony, as the employer's Agent was the only individual who provided testimony on the employer's behalf during the initial and remand hearings. Finally, we reject Consolidated Finding # 14, which states that the employer "officially terminated" the claimant's employment on July 28, 2020, as the evidence in the record shows that the employer was still communicating with the claimant about his employment status on July 29, 2020, and there is no clear indication in the record as to the exact date that the employer considered the claimant to have separated from his employment. *See* Remand Exhibit # 4.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment in Consolidated Finding # 13 is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant voluntarily left his employment, as the consolidated findings show that the claimant reasonably believed he had been discharged from his employment after the employer took him off the schedule and stopped communicating with him.

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.

The review examiner originally concluded that the claimant, who failed to participate in the initial hearing, had voluntarily left his employment without good cause or an urgent, compelling, and necessitous reason, when he stopped communicating with the employer without explanation. However, after hearing the claimant's testimony and reviewing his documentary evidence during the remand hearing, the review examiner made consolidated findings that do not support a conclusion that the claimant voluntarily left his employment. Specifically, the review examiner found that the employer's Account Manager notified the claimant on July 28, 2020, that he had been removed from the client site where he had been working, and that he was to call the human resources department. *See* Consolidated Finding # 8. In response, the claimant called the human resources department on July 28th, and, after failing to reach the employer, he sent an email to the Director of Human Resources on July 29th. *See* Consolidated Finding # 9.

In his email, the claimant noted the Account Manager's communication on July 28th. The Director of Human Resources replied that the claimant had been removed from his site and could not work at any of the employer's sites and asked that the claimant let her know if he would like to schedule a meeting with the human resources department. *See* Consolidated Finding # 10. The claimant responded with a question, asking why he was removed from his current site, but the employer did not respond to this final message from the claimant. *See* Consolidated Finding # 11. Because the review examiner's consolidated findings do not support a conclusion that the claimant left his employment, but, rather, that the employer initiated the claimant's separation by taking him off the schedule and subsequently ceasing all communication, 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 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.

It is the employer's contention that the claimant quit his employment when he failed to meet with the Human Resources Director, after being taken off the schedule due to an issue with the employer's client. However, as noted above, the claimant reached out to the employer to discuss his continuing employment, but the employer ceased all communication with the claimant after July 29, 2020, which tends to indicate that the employer initiated the claimant's separation from

employment. The employer did not present a witness with first-hand testimony at either the initial or the remand hearing, and, other than the July 29th email communication provided by the claimant, no documentary evidence pertaining to the parties' efforts to continue the employment relationship was presented. It is unknown why the employer stopped communicating with the claimant after July 29th, or exactly when and how the employer believed that the employment relationship had been severed by the claimant.

The claimant countered during the remand hearing that he did not quit his employment.[1] Rather, in an attempt to preserve his position, he continued his email communications with the employer about his employment status until the employer stopped responding after July 29, 2020. *See* Consolidated Finding # 12. Although the claimant did not specifically testify during the remand hearing that he believed he had been discharged by the employer, we can reasonably infer that this was his belief based on his testimony that he did not quit, and the fact that the employer removed him from the schedule and stopped communicating with him without explanation. Based on the totality of the evidence before us, we conclude that the claimant's belief that he had been discharged was reasonable. In short, given the employer's contention that it believed the claimant had quit, it did not present any evidence that the claimant was discharged for intentional wrongdoing.

We, therefore, conclude as a matter of law that the claimant was discharged without engaging in deliberate misconduct in wilful disregard of the employer's interest and without committing a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. He is eligible for benefits under G.L. c. 151A, § 25(e)(2).

[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 review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 1, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – December 30, 2021

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