

Although the claimant agreed to take the on-call shift over Thanksgiving weekend approximately two weeks before, and she did not report for that shift or notify the employer that she was not going to work, held she did not engage in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2), because the review examiner found that she merely forgot that she agreed to be on-call.

**Board of Review
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Issue ID: 0081 6348 05

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 November 28, 2023. She filed a claim for unemployment benefits with the DUA, effective November 26, 2023, which was approved in a determination issued on January 23, 2024. 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 February 17, 2024. We accepted the claimant's application for review.

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 remanded the case to the review examiner to afford the claimant an opportunity to testify and present other evidence. Both parties attended the remand hearing. 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 conclusion that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner has found that the claimant did not work on-call after the Thanksgiving holiday because she had forgotten that she had agreed to do so weeks earlier.

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 an Admit Nurse for the employer, a hospice provider. The claimant began work for the employer on September 26, 2023. She worked full-time and earned an annual salary of \$99,320.00.
2. The claimant was assigned to the employer's [City], MA office. When she was hired, her duties were to oversee intake, admission, and referrals of new patients. She was allowed to work from home. The claimant's immediate supervisor was the Director of Clinical Services.
3. The employer provided the claimant with a copy of her job description when she began work. Her job description does not include the requirement for on-call work.
4. The employer maintains an attendance policy that states: "If you know ahead of time that you will be absent or late, provide reasonable advance notice to your Leader. You may be required to provide documentation of any medical or other excuses for being absent or late where permitted by applicable law. Team members should provide 24-hour notice when reasonably able, and never less than one hour's notice before their scheduled starting time for absences, and as soon as tardiness or the need to leave early is apparent."
5. The employer has some on-call staff. The Director of Clinical Services managed on-call staff and maintained the on-call staff schedule on the employer's shared computer drive. The claimant did not know about the on-call schedule.
6. The employer has morning conference calls. Staffing assignments for the day are reviewed on the conference calls. The employer did not inform her that she must attend the calls. However, she attended the calls when she thought she would benefit from the information given on the call.
7. The employer uses a cell phone application to communicate with employees, which employees can also use to communicate with each other. The employer publishes an End-of-Day report at the end of each day, and a Daily Update each morning on the application. The End-of-Day report lists who is working the following day, including on-call staff. The Daily Update lists who is working that day, including on-call staff.
8. The employer did not tell the claimant she was required to read the Daily Update or the End-of-Day report.
9. Shortly after the claimant began employment, the Director of Clinical Services and one of the on-call nurses separated from the employer. The claimant's immediate supervisor became the [City] office Administrator.
10. Because of the shortage of nursing staff, the Administrator asked the claimant to take on case management duties as a nurse. The claimant agreed to do so. The Administrator asked the claimant to report to the employer's [City] office for

assignments. The claimant did so and also continued to perform intake duties. The Administrator did not give the claimant a job description for the case management position.

11. The claimant did not work a set schedule as a nurse. She wanted to do what she could to help out with the staffing shortage. She went to the [City] location and was assigned work by schedulers and the Administrators.
12. On Monday, November 6, 2023, the claimant and the Administrator exchanged messages on the cell phone application. The Administrator asked the claimant if she would work on-call on Saturday and then on November 25th and 26th. The claimant replied that she would “take” the Saturday and Thanksgiving weekend shifts. She asked if the Thanksgiving weekend shift would be 9 a.m. Saturday through 9 a.m. Monday. The Administrator responded that it was from Friday at 5 p.m. to Monday at 9 a.m. The claimant said she was in New York overnight on Thursday and would hopefully return by 7 to 8 p.m. on Friday. The Administrator responded that they could plan for that. He told her that if they needed to have a couple of hours covered, they could.
13. The claimant did not document that she agreed to work on call after Thanksgiving and forgot that she agreed.
14. The Administrator went on paternity leave. His supervisor, the Regional Director of Operations, took over as manager for the [City] location.
15. The claimant traveled to New York to visit family on Thanksgiving Day, November 23, 2023.
16. On Friday, November 24, 2023, the employer published their Daily Update that listed the claimant as on-call. The claimant did not see the Daily Update.
17. The claimant called into the morning meeting on November 24, 2023, but did not hear an announcement that she was on-call.
18. A nurse called the claimant in the early afternoon to tell her about a patient. She told the claimant she was on call. The claimant told her she was not on call.
19. The Regional Director of Operations messaged the claimant. She told the claimant she received a call from the nurse who told her she said she was not on-call. She told the claimant she was on the schedule and discussed it on the morning calls.
20. The claimant replied that it had never been discussed with her and that she had had weekend plans in New York for months. She said she would never have accepted it, and it was never offered to her. She said she was on the morning call and would have said something if someone said she was on call.

21. The Director of Operations replied that she did mention it and that it was on the Daily Update and End-of Day reports. The claimant replied that she was never asked to do on-call and did not understand how her name got there. She repeated that she was never asked and never heard her mention it on the morning call.
22. The employer found other coverage.
23. The claimant considered that she might be considered as having done something wrong by the employer. She called the nurse and offered to work. She said she could be there in six hours. The nurse told her they had already replaced her.
24. Overnight, the claimant became ill. On Saturday, November 25, 2023, she was diagnosed with pyelonephritis and fibroids and hospitalized for two days.
25. The Director of Operations met with the Administrator and the VP of human resources. They agreed to discharge the claimant for violating the attendance policy and refusal to work on-call.
26. On Tuesday, November 28, 2023, the Administrator met with the claimant. He said he was disappointed that she did not cover the shift over the Thanksgiving weekend. He said it was unacceptable and that he felt personally responsible. He said the Director of Operations was upset.
27. The Administrator told the claimant she was discharged. The claimant signed a Separation Notice stating she was discharged for violating their attendance policy and refusing to cover a shift.

Credibility Assessment:

The employer witness at the hearing was the Director of Human Resources. She was not present at the events leading up to the separation. Therefore, the claimant's direct testimony of the events is accepted as credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. 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 is ineligible for 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 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. *See Still v. Comm'r of Department of Employment and Training*, 423 Mass. 805, 809 (1996) (citations omitted).

The employer discharged the claimant for violating its attendance policy and refusing to cover an on-call shift. Consolidated Findings ## 25 and 27. Because the findings reflect that the employer is a hospice provider and relies on nursing staff to provide client services, we believe that the reasonableness of this policy is self-evident. *See* Consolidated Findings ## 1, and 5–7. While the record establishes that the employer maintained an attendance policy, it did not provide evidence demonstrating that it discharged all other employees who failed to work an on-call shift under similar circumstances. Absent such evidence, the employer has not shown that the claimant knowingly violated a reasonable and *uniformly enforced* rule or policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged.

During the remand hearing, the claimant and employer disputed whether the claimant had been informed by the administrator that she was scheduled to work the on-call shift after the Thanksgiving holiday. However, the claimant conceded that she had informed the administrator by text message, dated November 6, 2023, that she would “take” the Thanksgiving weekend on-call shift. Consolidated Finding # 12.¹ Therefore, the record establishes that the employer had reasonably expected the claimant to be on-call over the Thanksgiving weekend. Although informed of the dates and timeframe of this on-call shift, the claimant did not report to work over the Thanksgiving weekend. *See* Consolidated Findings ##16–21. Nothing in the record shows that the claimant ever informed the employer that she was unable to work the shift. Thus, she engaged in the misconduct for which she was fired.

The dispositive factor in this case is whether the claimant had the state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2). To determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of

¹ Remand Exhibit 14 consists of the text message communications between the claimant and administrator on November 6, 2023. 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).

mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984).

After the remand hearing, the review examiner found, based on the claimant's testimony, that she did not report to work the on-call shift over Thanksgiving weekend, because she had forgotten that she had agreed to do so. *See Consolidated Finding # 13*. Since the claimant forgot about the on-call shift, we cannot conclude that she deliberately failed to report for it. *See Board of Review Decision 0031 1109 42* (Nov. 15, 2019) (where claimant's failure to comply with employer's attendance expectations arose from forgetfulness, Board held claimant lacked necessary state of mind to engage in deliberate misconduct); *see also Board of Review Decision 0025 3567 20* (Jan. 14, 2019) (although employer discharged claimant because she did not attend or notify employer she was not going to attend a scheduled training, Board held claimant not subject to disqualification because review examiner found claimant forgot to attend and did not act deliberately).

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant knowingly violated a reasonably and uniformly enforced policy and engaged in deliberate misconduct in wilful disregard of the employer's interest 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 November 26, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 2024



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.

JMO/rh