The claimant was not aware of the employer's expectation that she respond to the employer's email by 12:00 p.m. on the deadline date to avoid termination of her employment. Because the claimant was not aware of the expectation, she did not act in wilful disregard of the employer's interest when she responded to the employer after 12:00 p.m. Held the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
100 Cambridge Street, Suite 400
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: 0082 6019 20

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 January 19, 2024. She filed a claim for unemployment benefits with the DUA, effective March 24, 2024, which was approved in a determination issued on May 15, 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 June 27, 2024. 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 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 decision, which concluded that the claimant quit her employment, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant maintained contact with the employer but was ultimately terminated.

Findings of Fact

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

1. The claimant worked for the instant employer, a healthcare company, as a scribe, beginning December 9, 2022. The claimant was paid $16.00 per hour.

2. The claimant had a contract with the instant employer to work 16 daytime hours per week.

3. The claimant was assigned to assist physicians with producing medical documentation for the instant employer's clients.

4. The claimant was assigned to an employer client, [Client A]

5. The instant employer's contract with [Client A] was expiring on May 31, 2024.

6. The instant employer informed employees they would be connected to another instant employer client in [City A], Massachusetts.

7. The claimant spoke with the instant employer['s] Chief Scribe for [City A], Massachusetts ([CS-A]) about transferring to an instant employer client in [City B], Massachusetts and return[ing] to work in the [City A], Massachusetts area in the fall.

8. The claimant needed to be in [City B], Massachusetts for the summer due to personal family matters.

9. [CS-A] referred the claimant to the Chief Scribe for [City B], Massachusetts ([CS-B]).

10. In May, 2023, the claimant was offered and accepted employment with [Employer B] in [City B], Massachusetts, with a June 5, 2023, start date.

11. The claimant was hired per diem as a cardiology EKG technician in the stress lab.

12. The claimant's rate of pay was set at $21.00 per hour.

13. The [Employer B] Cardiology Nurse Manager emailed the claimant stating:

    Hello [Claimant],

    I just received notification from HR that your start date is June 5. Welcome to the team. Can you please give me your availability to work for June?

14. The [Employer B] employment was not connected to the claimant's employment with the instant employer.

15. On May 24, 2023, the claimant spoke with [CS-B].

16. The claimant was required to undergo lab tests to be assigned to an instant employer [City B], Massachusetts client.

17. On May 31, 2023, the instant employer's contract with [Client A] ended.

18. The instant employer had no further work for the claimant with [Client A].

19. On June 2, 2023, the claimant underwent lab tests.

20. The claimant was to receive an email from the instant employer's [City B], Massachusetts client, [Client B], when the lab tests were received.

21. The claimant sub-leased her apartment in [City A], Massachusetts for the Summer.

22. On June 3, 2023, the claimant moved to [City B], Massachusetts.

23. On June 5, 2023, the claimant began her employment with [Employer B].

24. On June 5, 2023, [CS-B] offered the claimant a transfer to an employer client, a [Client B] outpatient oncology office in [City B], Massachusetts.

25. A start date was set for June 10, 2023.

26. The claimant did not start on June 10, 2023, because her lab tests had not been received by the instant employer.

27. On June 20, 2023, [CS-B] asked the claimant to check with Information Technology (IT) due to an account number issue.

28. The claimant could not be scheduled with [Client B] because [Employer B] and [Client B] were under the same "umbrella" and the claimant had the same account number with each.

29. On June 27, 2023, IT resolved the account number issue.

30. On or about June 30, 2023, [CS-B] asked the claimant about working an overnight shift.

31. The claimant did not accept the overnight assignment.

32. The claimant had agreed to work outpatient daytime hours, 9:00 a.m. to 5:00 p.m.

33. The claimant called [CS-B] about daytime hours, but [CS-B] had left her position.

34. On July 26, 2023, a new chief scribe (NCS) contacted the claimant about the next steps.

35. NCS asked the claimant to update her availability.

36. The claimant did not update her availability for [City B], Massachusetts because it was late July and she would be returning to [City A], Massachusetts.

37. [CS-A] contacted the claimant asking if her availability for [City A], Massachusetts was the same.

38. The claimant confirmed her availability was the same.

39. The claimant was not contacted by [CS-A] about an assignment.

40. On September 4, 2023, the claimant's employment at [Employer B] ended.

41. The claimant went on medical leave from September 14, 2024, through October 24, 2023, to undergo a surgical procedure out of the country.

42. On November 3, 2023, the employer emailed the claimant informing her no positions were available in [City A], Massachusetts, but there were positions in [City B], Massachusetts.

43. The claimant, who does not drive, tried to commute from [City A] to [City B], which required taking the train, the subway, and a bus to get to work.

44. The claimant could not afford the commute which took 4 hours one way.

45. On Monday, January 15, 2024, at 15:49, [CS-A] emailed the claimant:

    Hi [Claimant],

    Hope you have been doing well. We have not heard back from you in a while. The last piece of information we got was that you have been transferred back to [Client A] back on September 14th. Do you plan on continuing to work as a scribe? Please respond by this Friday January 19th. If we do not hear from you, we will proceed with termination. I'm looking forward to hearing from you.

46. On Friday, January 19, 2024, at 12:22, the claimant emailed [CS-A]:

    Hi [[CS-A]]!

    Yes, that's correct! I thought [Client A] ended the partnership with [Employer] and then you informed me that there were no open positions at the moment.

    Please let me know what opportunities there are!

47. The claimant responded to [CS-A]'s email by Friday, January 19, 2023, as requested in [CS-A]'s January 15, 2024, email.

48. [CS-A]'s Monday, January 15, 2024, email to the claimant did not state the claimant's response must be received by 12 noon on Friday, January 19, 2024.

49. The employer terminated the claimant from her employment effective January 19, 2024, as indicted in a separation document which addressed Equipment, Unemployment, 401K, and Benefits, which stated, in part:

    Greetings,

    Thank you for your time spent at [Employer]. As you transition from the Company, there are some key reminders we want to share with you (Equipment, Unemployment, 401K, and Benefits).

    Business Process: Terminate: [Claimant] (Terminated) (XXXXX)

    Subject: [Claimant) (Terminated) (XXXXXX)

    Details: Terminate for [Claimant) (Terminated) (XXXXXX) effective on 01/19/2024

    ---

50. From May 31, 2023, the end date of the instant employer's contract with [Client A], until January 19, 2024, the claimant continued to be in active status and employed by the instant employer.

51. On January 19, 2024, the claimant was terminated.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portions of Consolidated Findings ## 5 and 41 that refer to the dates of May 31, 2024, and September 14, 2024, respectively, as the 2024 year is a scrivener's error. The correct dates are May 31, 2023, and September 14, 2023. We also reject the portion of Consolidated Finding # 47 that refers to the date of January 19, 2023, as this, too, is a scrivener's error. The correct date is January 19, 2024. Lastly, we reject the portion of Consolidated Finding # 44 that refers to a four-hour commute, as the claimant testified to a three-hour commute during

the remand hearing.[1] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant is not eligible for benefits.

The review examiner initially decided this case as a resignation and analyzed the claimant's separation under the following provisions under G.L. c. 151A, § 25(e), 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.

After hearing the claimant's testimony and reviewing her documentary evidence during the remand hearing, the review examiner found that the employer's contract with the client to which the claimant was assigned ended on May 31, 2023. Consolidated Finding # 17. After May 31, 2023, the claimant did not perform work for the employer again, but she remained in contact with the employer in an effort to obtain a new and suitable assignment. Consolidated Findings ## 19, 24, 27, 30–34, 37–38, and 42–46. Further, although the claimant had not worked for the employer since May 31, 2023, she remained in active status and employed by the employer through January 19, 2024, when she was terminated. Consolidated Findings ## 50–51.

Because the employer terminated the claimant's employment on January 19, 2024, we disagree with the review examiner's original conclusion that the claimant quit. Accordingly, the claimant's separation is properly analyzed under 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. . . .

"[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).

[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 the instant case, the employer did not submit any policies related to the claimant's termination from employment. Accordingly, we cannot conclude that the claimant violated a reasonable and uniformly enforced rule or policy of the employer. Alternatively, we consider whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must demonstrate that the claimant engaged in the misconduct or policy violation for which she was discharged. In this case, the employer sent the claimant an email on January 15, 2024, which stated that if the claimant did not respond to the email by January 19, 2024, the employer would proceed with termination of her employment. Consolidated Finding # 45. During the remand hearing, the employer testified that the claimant was expected to reply by 12:00 p.m., otherwise the termination would go through. Because the claimant responded to the email at 12:22 p.m. on January 19, 2024, her termination was processed on that day. Consolidated Findings ## 46–47, and 49. Inasmuch as the employer expected the claimant to respond by 12:00 p.m. on January 19th, and the claimant responded 22 minutes after 12:00 p.m., we agree that she engaged in misconduct. Further, it appears that the claimant's conduct was deliberate, as there is no indication in the record that she intended to respond to the employer's email by 12:00 p.m.

However, the Supreme Judicial Court has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior." Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). 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).

Here, the claimant was not aware that the employer expected her to respond to its January 15th email by 12:00 p.m. on January 19th, as the employer's email did not contain an instruction to respond by 12:00 p.m. *See* Consolidated Findings ## 47–48. Because the claimant was not aware of the employer's expectation, she did not act in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant did not knowingly violate a reasonable and uniformly enforced rule or policy of the employer or engage in deliberate misconduct in wilful disregard of the employer's interest, 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 beginning January 14, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2025

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
(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