

Because the review examiner found that the claimant complied with the employer's expectation that she work as scheduled and respond timely to her manager's communications, the employer has not proven misconduct, and she is not disqualified from the receiving benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0083 2651 38

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 June 28, 2024. She filed a claim for unemployment benefits with the DUA, effective July 21, 2024, which was approved in a determination issued on August 27, 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 September 27, 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 give the claimant an opportunity to testify and provide 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 engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant worked as scheduled and responded timely to the employer's communications.

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 full-time as a stabilization advocate for the employer, a housing search agency, from July 17, 2023, until June 27, 2024.

2. The claimant's supervisor was the rapid rehousing manager (the Manager).
3. The employer maintained an attendance policy prohibiting employees from being excessively late or unresponsive when working remotely. Violators of this policy are punished at the employer's discretion based upon the circumstances of the violation.
4. The employer maintained an expectation that employees arrive to work on time, be present in their office when working remotely, and communicate with supervisors in a timely manner. The employer maintained this expectation to ensure that employees were working according to their schedule. The employer informed the claimant of this expectation through the policy and verbally and by email during the claimant's employment.
5. The claimant was scheduled to work Monday through Friday, from 9:00 a.m. to 4:00 p.m.
6. On February 20, 2024, the claimant was issued a written warning for excessive absences and tardiness.
7. In April, 2024, the claimant was transferred to a different office. The claimant was verbally told that her prior warnings would be expunged.
8. On May 23, 2024, the claimant was issued a verbal warning for excessive tardiness.
9. On June 20, 2024, the claimant was out of work on a scheduled absence. The claimant placed an out of office message on her email account.
10. On June 21, 2024, the claimant returned to work. The claimant forgot to remove her out of office message.
11. On June 24, 2024, the claimant was scheduled to work remotely from 9:00 a.m. to 4:00 p.m. The claimant began working as scheduled at 9:00 a.m.
12. At 10:13 a.m., the Manager reached out to the claimant by email concerning her timesheet from the previous week. The Manager received an automatic out-of-office reply from the claimant.
13. At approximately 10:13 a.m., the Manager sent the claimant another email stating that she needed to update her out of office message.
14. At approximately 10:14 a.m., the claimant replied to the Manager with her timesheet and stated that she forgot to turn off her out of office message.

15. At 11:51 a.m., the Manager called the claimant by phone. The claimant was in a client meeting and did not answer.
16. At 12:06 p.m., the Manager called the claimant again. The claimant was still in a client meeting and did not answer.
17. At 12:35 p.m., the claimant called the Manager back and reached her voicemail. The claimant called back two more times and reached the Manager's voicemail.
18. The Manager called the human resources department about the claimant not responding. The human resources department reached out to the claimant about her lack of response.
19. At approximately 3:00 p.m., the claimant responded to the Manager by email stating that she had been working, that she had been making calls, and that was why she had not responded.
20. At 6:43 p.m., the claimant sent a text message to the Manager asking why she needed to speak to human resources.
21. On June 28, 2024, the claimant was discharged for violating the employer's attendance policy by being nonresponsive on June 24, 2024.

Credibility Assessment:

The claimant did not attend the initial hearing. The claimant attended the remand hearing.

The human resources manager and an agent attended the initial hearing on behalf of the employer. The human resources manager, the director of finance, and an agent attended the remand hearing on behalf of the employer.

The employer alleged that the claimant was discharged for being nonresponsive on June 24, 2024, while she was scheduled to be working. The employer testified that the claimant did not respond to the Manager's emails and that call logs showed that the claimant had not been actively making calls until after 12:30 p.m. The employer did not present the emails in question or the call logs at the initial hearing or the remand hearing. The employer alleged that the claimant did not return the Manager's call until "much later in the day." The Manager did not testify for the employer. The employer's witnesses, the human resources manager and the director of finance, did not provide firsthand testimony on the claimant's conduct on June 24, 2024, and instead relied on the Manager's statement, and emails and call logs which were not presented as exhibits.

The claimant denied that she was unresponsive to the Manager's emails. The claimant testified that she responded to the initial email shortly after it was sent. The claimant also testified that she was working on June 24, 2024, beginning at

9:00 a.m., and that she was in a meeting when the Manager called her around noon. The claimant testified that she called the Manager back when her meeting concluded. The claimant presented a screenshot of outgoing calls which, while blurry, show calls made at 12:35, 12:37, and 12:47. The claimant's testimony was consistent with itself and with the documentary evidence.

Given that the claimant's testimony was supported by documents submitted during the hearing, and that the employer's hearsay testimony did not have other indicia of reliability to bolster its credibility, the claimant's testimony was accepted as more credible, and findings of fact were made accordingly.

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 is not eligible for benefits.

Because the employer terminated the claimant's employment, her 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).

In the instant case, the employer maintains a policy that requires employees to work as scheduled and respond timely to managers when they reach out. Consolidated Finding # 3. However, because discipline for violations is issued on a case-by-case basis depending on the circumstances of the violation, we cannot conclude that the claimant violated a reasonable and *uniformly enforced* rule or policy of the employer. *See id.* 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 discharged the claimant because she allegedly did not respond timely to her manager's messages on June 24, 2024, and was not working during the morning hours for which she was scheduled that day. *See Consolidated Findings ## 11, 18, and 21.* However, after hearing the claimant's testimony and reviewing her documentary evidence during the remand hearing, the review examiner found that the claimant worked her scheduled hours on June 24th, and she responded timely to her manager's communications. Consolidated Findings ## 11, and 12–17. Inasmuch as the employer expected the claimant to work her scheduled hours and respond timely to her manager's communications, and the claimant complied with these expectations, we disagree with the original conclusion that the claimant engaged in the misconduct for which she was discharged. *See Consolidated Finding # 4.* The employer has not met its burden.

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 June 30, 2024, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 24, 2025



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 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