0015 7381 34 (Dec. 23, 2015) – Employer's directive that the claimant, a healthcare supervisor with 50 years of experience as a nurse, not discuss her discipline for objecting to its new protocol for a highly contagious resident with coworkers was unreasonable.

Board of Review
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Issue ID: 0015 7381 34
Claimant ID: 10358682

BOARD OF REVIEW DECISION

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 February 26, 2015. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 9, 2015. 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 11, 2015. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 employer reasonably expected the claimant not to discuss her discipline or concerns about the employer's treatment plan for a patient with a highly contagious condition, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer is a social services agency. The claimant worked as a healthcare supervisor for the employer. She worked for the employer from 6/15/05 until 2/26/15.

2. The claimant worked thirty hours per week. The employer paid her $27.03 per hour.

3. The employer created a "Standards of Conduct" policy. (Exhibit 4, pgs. 11-12). The policy read, "Each employee has a personal responsibility to observe and follow [the employer's] policies and to maintain proper standards of behavior at all times in the workplace. If an employee's behavior interferes with the orderly and efficient operation of our business, corrective action will be taken. This means that appropriate disciplinary action will be determined by Management based on the individual circumstances and severity of the incident."

4. The Standards of Conduct policy read, "Examples of unacceptable behavior, which is subject to disciplinary action, are listed below. At the discretion of [the employer], disciplinary action may include supervision, counseling/correction, written warnings, suspensions, demotion or other actions, up to and including termination." The list of forbidden behavior included insubordination. The claimant understood that she must not commit insubordination.

5. On 2/20/15, the employer held a meeting. The claimant's supervisor and the employer's vice president of day services explained a healthcare protocol for a certain patient. The claimant disagreed with the protocol. She continuously interrupted, spoke over others, and refused to listen to directions.

6. The employer decided to discipline the claimant for her behavior in the 2/20/15 meeting. On 2/23/15, the claimant's supervisor met with the claimant and reprimanded her for her behavior in the meeting. She gave a discipline document to the claimant. (Exhibit 3, pgs. 2-3). The claimant wrote a rebuttal on the document. The supervisor told the claimant to file the document away, move on, and continue with her job.

7. After the claimant left the discipline meeting, she spoke to several workers about the discipline that she received. She read the discipline document and her rebuttal out loud to other workers. She told the others that she was disciplined because she disagreed with the protocol.

8. The claimant's supervisor learned that the claimant broadcast her discipline and the document to the other workers. She told the employer's human resources vice president about it. The human resources vice president suspended the claimant with pay.

9. The human resources vice president investigated the claimant's behavior. He learned from the workers that the claimant indeed broadcast the discipline and the document to them. The employer concluded that the claimant committed insubordination when she broadcast the discipline and the document to the other workers.

10. On 2/26/15, the human resources vice president met with the claimant and discharged her for insubordination.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, because we disagree that the employer's expectation to refrain from discussing her discipline or the claimant's underlying safety concerns with coworkers was reasonable, the claimant may not be disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(2).

Since the claimant was discharged from employment, her eligibility for benefits 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 . . . .

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). In this case, the employer fired the claimant for insubordination. The review examiner concluded that the employer met its burden because it established that the claimant was told not to "broadcast" her disciplinary warning to coworkers and then she did so anyway. We disagree.

There is no question that the claimant was upset about receiving a warning for speaking up during a patient care meeting and that she shared her warning, including her written rebuttal to the warning, with coworkers after being told not to do so. However, establishing that a claimant acted deliberately and engaged in misconduct is not enough to meet the employer's burden of proof. Such misconduct must also be in 'wilful disregard' of the employer's interest. Acting in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest. Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). Thus, a critical component is the employee's state of mind at the time of her behavior. Grise v. Dir. 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 v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The findings of fact are somewhat ambiguous as to whether the employer fired the claimant for sharing with coworkers the fact that she had been disciplined or for voicing her disagreement about the employer's treatment protocol for a patient. However, in either scenario, the claimant's underlying concern was that the employer was making an exception to its established policy for treating a patient with a communicable disease and, thereby, placing the health of other patients, staff, and visitors at the employer's health facility at risk. Although the claimant was not present at the hearing to provide testimony, her concerns are fairly documented in the evidence. In her written rebuttal to the employer's warning, the claimant explains that C. Diff (*Clostridium difficile*) is highly contagious and that accepting the patient with a stool culture positive for this condition went against the employer's pre-existing protocol and the wishes of the patient's doctor for him to remain at home in isolation.[1] The claimant had been a healthcare supervisor for the employer for five years and she had over 50 years' experience as a nurse. *See* Exhibit 3 and Finding of Fact # 1. In rendering his decision, the review examiner glossed over this professional experience, the claimant's position of responsibility, and the serious nature of her objections.

Thus, when it directed her not to engage people in conversation about the "subject"[2] or, as stated in Finding of Fact # 6, to "file the document away" and "move on," effectively, the employer was directing the claimant to keep quiet about genuine safety-related concerns. We believe this expectation was unreasonable.[3] Accordingly, we conclude that the claimant may not be disqualified from receiving unemployment benefits for violating the employer's directive.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

[1] The claimant's statements contained in Exhibit # 3, a copy of the employer's initial warning and the claimant's response, while not explicitly incorporated into the review examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

[2] *See* Exhibit 2, Section 2, answer # 1 on the employer's completed DUA fact-finding questionnaire.

[3] The employer's discipline for sharing a genuine safety-related workplace concern with other employees may also have interfered with the claimant's federal right to engage in concerned activity for the purpose of mutual aid or protection. *See* Empire Steel Mfg. Co., Inc. 234 NLRB 530 (1978) (employee meeting to discuss job safety concern was a protected activity for the purpose of mutual aid or protection pursuant to § 7, and discharge for such activity violated § 8(a), of the National Labor Relations Act).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning February 22, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 23, 2015

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

AB/rh