

Claimant, who was fired for objecting to proposed uniform policy during a staff meeting, was eligible for benefits under G.L. c. 151A, § 25(e)(2), because her conduct did not amount to misconduct.

**Board of Review
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Issue ID: 0019 3398 95

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. Berube, 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 July 20, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 19, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 14, 2016. 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 claimant's objection to a proposed uniform policy during a staff meeting constituted deliberate misconduct in wilful disregard of the employer's interest, 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 claimant worked part-time as a housing search case manager for the employer, a homeless shelter, from 7/27/15 until 7/19/16. The claimant worked a varied schedule on Monday through Friday, averaging 20 hours per

week; she was paid \$12.50 per hour. The claimant previously worked for the employer as a student intern from September 2013 through mid-2014.

2. The employer maintains a workplace policy referred to as "Great Expectations". This policy reads in part: "(Employer) expect the best from our staff and hope to provide all of you with a working environment that is safe, productive and empowering. It is our expectation that all staff will observe a certain code of conduct during working hours..." The policy contains a section which contains a list of expected behaviors. Among these behaviors is: "Comport themselves in a professional manner (dress, language, etc.)" and "Treat all colleagues and clients with respect and dignity." On 7/29/15, the claimant signed a copy of the Great Expectations.
3. The employer's Great Expectations policy does not contain a specific consequence which will occur if an employee violates the policy.
4. The employer maintains an employee handbook which contains a policy related to "Conditions of Employment – Disciplinary Actions". This policy reads in part: "Employees are subject to disciplinary action, up to and including termination if they: Engage inappropriately with staff or clients." This policy also reads: "(Employer) may terminate an employee at any time for cause without following this procedure if deemed necessary for the continuing viability of the agency by the Executive Director and/or the Board of Directors." The policy explains that in most cases, progressive discipline, including oral warnings, written warnings, final warnings, and suspension will be issued prior to termination. However, the policy also provides that: "An employee may also be disciplined or terminated for failure to meet performance standards. If the failure to perform is egregious, immediate termination is a possibility."
5. On 7/29/15, the claimant signed an acknowledgement form, confirming her receipt of the employer's policy.
6. On 3/3/16, the program director received a complaint from a second employee, the case manager, who felt that the claimant had a bad attitude and was unprofessional when speaking with her.
7. On 3/16/16, the program director met with the claimant to discuss information on affordable housing programs. During the meeting the program director discussed the need for the claimant to focus on her job duties and not to interject when the case manager was meeting with clients. The claimant told the program director that she wished she could be the case manager. The program director told the claimant that was not the position she was hired into. The program director memorialized the discussion and noted that she would contact human resources to determine next steps because she did not believe the claimant would be successful in her position due to her insubordination and lack of job knowledge.

8. On 3/23/16, the program director issued the claimant a written warning for insubordination. The warning notice cited the claimant for failing to follow directions issued by the program director regarding the handling of applications and files.
9. On 4/4/16, the program director put the claimant on a corrective action plan. The plan included a list of the job duties and behaviors expected of the claimant by the employer. Included in this list were the following: "Record in the staff communication Log daily, detail your interactions with clients & efforts on their behalf in case notes using the SOAP format"; "Attend all [Town A] Housing and Neighborhood Development provider's meetings & [Name of Shelter] monthly Housing Advocacy Group meetings"; and "Treat all colleagues & clients with respect & dignity and comport yourself in a professional manner at all times." The plan also contains a section which reads: "This corrective action plan will be in effect immediately. Failure to accept and sign this plan will result in termination. If the CAP has been breached, the Executive Director and/or Personnel Committee has the right and responsibility to address a failure to comply with the CAP and disciplinary action in addition to the CAP, up to and including termination will be taken." The claimant signed the form which contained this statement. The claimant was informed that a re-evaluation meeting was scheduled for 4/27/16.
10. On 4/27/16, the program director met with the claimant to review her performance and the corrective action plan. The program director noted that the claimant had made "tremendous improvement" in the area of treating colleagues and clients with respect and dignity and behaving in a professional manner. The program director noted that the claimant was not completing any notes in the log, as instructed. The program director also noted that the claimant failed to attend both required meetings which had been detailed in the 4/4/16 plan. A re-evaluation meeting was scheduled for 5/24/16.
11. On 5/23/16, the program director met with the claimant to review her performance and the corrective action plan. The director noted that the claimant failed to attend the required monthly meetings and failed to record details of interactions with clients. The director noted that the claimant met expectations in all other areas. A re-evaluation meeting was scheduled for 6/21/16.
12. On 6/16/16, the employer's human resources representative sent the claimant an email stating that she was aware the claimant failed to attend the required monthly meetings which had been detailed in the corrective action plan. The claimant was told: "Please make note of the housing meetings that you are required to attend, as going forward you are required to attend all mandatory meetings."

13. On 6/28/16, the program director met with the claimant to review her performance and the corrective action plan. The program director noted that the claimant attended one of the two mandatory meetings during the month; started to document case notes; and met expectations in the area of treating colleagues and clients with respect and dignity. A reevaluation meeting was scheduled for 7/26/16.
14. On 7/14/16, the claimant overheard the case manager speaking with a client. The claimant interrupted and spoke over the case manager, telling the client about what to expect regarding an adjustment to the client's food stamps. The case manager notified the program manager about the incident, writing in part: "I understand she is trying to help but as we have spoken about many times you have told me she is only to speak to clients about housing and nothing else." The case manager reported this incident to the program manager.
15. On 7/19/16, the claimant was scheduled to work from 12:00pm until 4:00pm. The claimant reported to the workplace at 9:00am in order to attend a staff meeting. The claimant left the workplace at 11:00am and did not return. The employer made a written record of the claimant's time, indicating that the claimant left at 11:00am and "Dr apt not coming back + will make up late in the week."
16. On 7/19/16, the claimant attended a staff meeting where the program director presented an idea for staff to wear a uniform polo shirt while at work, along with their ID tags. The claimant complained aloud, stating that she paid a lot of money for her work wardrobe and that if she was forced to wear a uniform she was quitting. Other employees spoke to the claimant, explaining aspects of the proposal that they thought would be beneficial. The claimant continued to complain, stating that the program manager and her requirements were "ridiculous." The program manager told the claimant that hers is a professional position and employees need to conduct themselves accordingly, including appearance and hygiene. The claimant responded, again telling the program director that the idea of uniforms was ridiculous and she would not wear one. Following the meeting, the program director overheard the claimant complaining to other employees about the idea of uniforms.
17. The claimant is affected by bipolar disorder. The claimant does not consider herself to have issues with self-control.
18. On 7/20/16, the employer notified the claimant that her employment was terminated due to insubordination and unprofessional conduct.
19. The claimant filed an initial claim for unemployment insurance benefits, effective 7/24/16. The instant employer was the claimant's primary base period employer and the only employer for whom she performed services during the last three quarters of her base period.

20. On 7/27/16, the employer completed a DUA fact finding questionnaire, indicating that the claimant had been discharged on 7/20/16 for insubordination and unprofessional conduct during a staff meeting on 7/19/16.
21. On 7/27/16, the claimant completed a DUA fact finding questionnaire, indicating that she had been discharged for asking questions about the proposed uniforms during the 7/19/16 staff meeting. The claimant wrote in part: "I guess not even ask a question? Yet, why should I not be allowed to ask a question and my Co-workers be allowed to? That is discrimination if my co-workers can joke with my boss, curse at work, talk about the uniforms, but if I mention it, it is considered unprofessional and insubordination and I am terminated. I usually already kept pretty quiet around there since I was new there, but I feel I have a RIGHT to ask questions and A RIGHT To be ANSWERED."
22. On 9/19/16, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 25(e)(2) of the law.
23. On 9/23/16, the claimant appealed the Notice.

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, we conclude, contrary to the review examiner, that the claimant is eligible for benefits.

Because the claimant was terminated from 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] . . . (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).

We agree with the review examiner that, because the employer exercised discretion in imposing discipline for policy violations, the employer has failed to establish a violation of a reasonable and uniformly enforced policy. However, we do not agree that the employer has sustained its burden to show, in the alternative, that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The threshold question is whether the claimant engaged in misconduct. Although the record includes a number of concerns that the employer was having with the claimant's work performance and interactions with colleagues and clients, the findings indicate that the employer had been addressing these concerns with the claimant through a corrective action plan and follow-up review meetings. *See* Findings of Fact ## 6–13. The review examiner concluded that the employer fired the claimant due to her conduct during a staff meeting on July 19, 2016, and not due to the earlier deficiencies. *See* Finding of Fact # 20. For this reason, we must consider only the behavior which triggered her discharge and not “‘cumulative deficiencies’ in other areas of her work performance.” Nantucket Cottage Hospital v. Dir. of Division of Employment Security, 388 Mass. 1006 (1983) (rescript opinion).

The claimant's behavior at the July 19, 2016, staff meeting is captured in Finding of Fact # 16. In it, the review examiner found that, when the employer presented its idea that staff would wear a uniform polo shirt at work, the claimant complained aloud, stated that she paid a lot of money for her work wardrobe and that if she was forced to wear a uniform, she was quitting. The claimant further stated that the uniform requirements were “ridiculous” and that she would not wear one. Nothing in this finding suggests that the claimant was yelling, threatening, or disruptive. While there is no question that the claimant voiced her disagreement with the employer's proposed new policy, we cannot conclude that her objection, which was raised during a staff meeting and not in the presence of clients, was so inappropriate as to constitute misconduct. As described in Finding of Fact # 16, there was nothing insubordinate or unprofessional about the claimant expressing her opinion about the proposed policy during this staff meeting.¹

Inasmuch as the employer has not shown that the claimant engaged in misconduct, it has failed to sustain its burden of proof. 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, pursuant to G.L. c. 151A, § 25(e)(2).

¹ Since the new dress code was simply an idea being discussed at that point, we attribute little weight to the claimant's speculative assertion that she would not wear the polo shirt. We might view the case differently if the new policy had been implemented and thereafter the claimant refused to wear the uniform.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 17, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 27, 2017



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