In light of the number of times the claimant had been told not to refuse to respond to client requests for help, even if she was busy performing other work, the claimant's final incident of refusing to take a client's call was deliberate and in wilful disregard of the employer's interest. It was not simply an exercise of poor judgment.

Board of Review
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Issue ID: 0019 6774 36

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Margaret Blakely, a review examiner of the Department of Unemployment Assistance (DUA), to award 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 August 31, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 9, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on August 16, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional evidence about the claimant's knowledge of the employer's expectations and any potential mitigating circumstances. Only the employer attended the remand hearing. Thereafter, the review examiner issued her 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 original conclusion that the claimant's refusal to take a client's call was due to poor judgment and not 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 consolidated findings of fact are set forth below in their entirety:

1. The claimant worked as a full time commercial lines account manager for the employer, a personal and commercial insurance agency, between June, 2014, and 08/31/2016, when she separated.

2. The claimant's direct supervisors were the executive vice president and the marketing director. The claimant's upper level manager was the president.

3. The employer maintains service standards which include "responsiveness" and "make working with [the employer] easy."

4. The service standards were provided to employees, including the claimant, upon hire, and are discussed during staff meetings.

5. The service standards do not identify what discipline, if any, will be imposed upon an employee who violates them.

6. The employer has a work performance policy stating "employees are expected to work diligently toward the achievement of service standards."

7. Per the work performance policy, "[d]ecisions concerning disciplinary action will be decided on a case-specific basis."

8. The employer also has an involuntary termination policy stating that the employer "may determine, in its sole discretion, when to discharge an employee."

9. During the claimant's employment, she received instances of client complaints and was coached about customer service including responding to customers.

10. The employer expected the claimant to shift her priorities during the day as issues with clients arose, and expected the claimant to assist said clients accordingly.

11. The purpose of this expectation was to maintain customer service and maintain customer retention.

12. This expectation was communicated to the claimant during prior coaching sessions.

13. The employer leaves the decision to account managers about when to put aside what one is doing to assist customers calling for information. On unknown dates, the employer discussed this with all employees, including the claimant, through discussing the service standards.

14. Employees are allowed to use the "do not disturb" indicators on their phones "sparingly." The claimant was informed of the circumstances under which interruptions were allowed despite the use of the "do not disturb" indicator.

15. On 08/30/2016, a client (client A) called the employer for immediate assistance. The receptionist transferred the call to the claimant because client A was one of the claimant's clients. The claimant's "do not disturb" setting was not on at this time. Client A's call transferred to the claimant's extension. The claimant said, "I'm not going to take the call" and pressed her "do not disturb" setting which transferred client A back to the receptionist.

16. Another employee (employee A) attempted to assist client A. However, employee A did not have the information that client A was seeking; only the claimant had such information.

17. Employee A asked the claimant for help. The claimant did not initially help employee A and was "snippity" and "snappy" about taking client A's call or helping employee A.

18. The claimant was working on obtaining information for another client ("client B"). There was no deadline or urgency regarding the information the claimant was obtaining for client B which delayed her in assisting with client A's call.

19. Five (5) to ten (10) minutes later, the claimant did provide the information to employee A that client A was seeking, and employee A completed the call with client A.

20. On 08/31/2016, the president terminated the claimant's employment because she did not shift her priorities to assist with client A on the telephone on 08/30/2016 when initially approached by employee A.

Ruling of the Board

In accordance with our statutory obligation, we review 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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible 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 relevant 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).

The employer fired the claimant because, on August 30, 2016, she did not stop what she was working on to help a client who called her on the telephone, even after being asked to do so by another employee. *See* Consolidated Finding # 20. The employer asserted that this was in violation of its service standards policy, which includes, *inter alia*, being responsive to client needs and making it easy for a client to work with the employer. *See* Consolidated Finding # 3 and Exhibits ## 9 and 12. As an initial matter, there is no evidence that the employer uniformly disciplined employees who engaged in the same behavior as the claimant did on August 30, 2016. For this reason, it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may demonstrate that the claimant's behavior was deliberate misconduct in wilful disregard of the employer's interest. In order to determine whether an employee's actions constitute deliberate misconduct, 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). 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) (citation omitted). In this case, the claimant failed to appear and give testimony at either hearing. Consequently, her state of mind must be inferred from all of the facts and circumstances in the case. *See* Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

In her original decision, the review examiner declined to disqualify the claimant because she concluded that the claimant's decision to prioritize the work she was doing on a project over immediately assisting the telephoning client was simply a lapse in judgment. The Supreme Judicial Court has stated:

> The apparent purpose of § 25(e)(2) . . . is to deny benefits to a claimant who has brought about his unemployment through intentional disregard of standards of behavior which his employer has a right to expect. When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits.

Garfield, 377 Mass. at 97. In Garfield, the claimant, a store manager, had rearranged a store schedule without notifying the district manager, but only because he believed the district

manager was out of town and unreachable, and he failed to leave a message with another "contact" store. Id. at 98. The Court held that, at worst, his failure to leave a message was a good faith error in judgment, and, therefore, not disqualifying. Id.

In this case, the employer expected employees to shift priorities in order to assist clients. *See* Consolidated Finding # 10. This customer service expectation is reasonable in light of the fact that the employer makes its money by serving and retaining its clients. *See* Consolidated Finding # 11. Nonetheless, the review examiner found that account managers, such as the claimant, have discretion about when to put aside their current task to assist customers calling in for information. Consolidated Finding # 13. Were this an isolated incident, as in Garfield, we might agree with the review examiner's assessment that the claimant's decision not to interrupt her other work to respond to the calling client was simply an exercise of poor judgment. However, it was not an isolated incident. Consolidated Findings ## 9–12 generally refer to the fact that, over the course of the claimant's employment, clients had complained about how she responded to them, and the claimant had been coached about customer service, particularly shifting her priorities as client issues arose. More specifically, Exhibit # 4 documents five separate occasions when a manager spoke to the claimant to convey that it was not appropriate to refuse to help or take a call from a client, even when she is busy. Three of these coaching sessions took place in the six months prior to her termination, including one on February 2, 2016, when the claimant was told that she would be discharged, if the behavior did not change.[1]

In light of the frequency with which the employer spoke directly with the claimant to explain that she was not to refuse client requests for help, even when busy, we conclude that her refusal to take the client's call on August 30, 2016 was part of a pattern of deliberately refusing to adhere to the employer's expectations. It was not an exercise of poor judgment, but wilful disregard of the employer's interest. *See also* Gupta v. Deputy Dir. of Division of Employment and Training, 62 Mass. App. Ct. 579, 584 (2004) (after numerous prior incidents and warnings, claimant's rude remark to customer was deliberate misconduct in wilful disregard of prior warnings).

We remanded the case, in part, to find out whether there may have been mitigating circumstances to excuse the claimant's behavior on August 30, 2016. Specifically, we asked whether there was a deadline or other urgent issue that she was in the middle of addressing at that moment. Consolidated Finding # 18 provides that nothing about the project she was working on for another client was urgent and there was no deadline. The claimant failed to appear at either hearing to present any other explanation for her conduct.

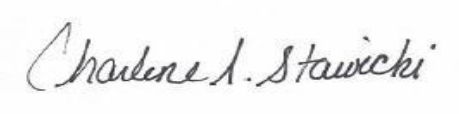
We, therefore, conclude as a matter of law that the employer has met its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

[1] While not explicitly incorporated into the review examiner's findings, Exhibit # 4 is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning August 28, 2016, and for subsequent weeks, until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 25, 2018

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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