

Claimant's medication error at client hospital was unintentional, the mistake due in part to her dyslexia and transposing birthdates for two patients with the same name. She is not disqualified under either the deliberate misconduct or knowing violation prongs of G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0019 7439 39

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Richard Conway, 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 7, 2016. She filed a claim for unemployment benefits with the DUA, effective September 11, 2016, which was approved in a determination issued on July 12, 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 overturned the agency's initial determination and denied benefits in a decision rendered on September 15, 2017. 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 afford the claimant an opportunity to present 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 original conclusion that the claimant telephoned the wrong patient about a medication change deliberately and 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 consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. On 2/29/16, the claimant began working for the employer's temporary help firm. She was placed into a full-time assignment as a medical assistant in a medical office.
2. The claimant has dyslexia.
3. On 7/5/16, the claimant was processing a doctor's orders and found two active patients with the same name. The birthdates were different but, due to her dyslexia, she misread the numbers in the year of birth and attached the doctor's order to the wrong patient.
4. On 7/5, the claimant called the patient to explain the new medication.
5. At the time she made the call, the claimant was not aware she was describing the wrong medication. The claimant believed she was properly following the work directives of her supervisors and was properly following the doctor's orders.
6. The patient, concerned about the change in medication, telephoned the office to complain. The employer investigated.
7. Initially, when the employer was investigating the medication changes at issue, the claimant indicated that she had left a voicemail message regarding the medication change but, at the time, did not recall speaking directly with the patient.
8. Later, the claimant checked the written note that the claimant had placed in the patient's medical record and saw that she had in fact spoken with the patient.
9. After reading her note in the medical record, the claimant immediately contacted her supervisor to correct her investigation statement. When questioned by the employer, the claimant explained why she had made the mistake (reading the patient's birthdate wrong due to dyslexia).
10. When questioned by the employer during the medication error investigation, the claimant acknowledged that she had made a good faith mistake and that her mistake was serious and had placed the health of the patient at risk.
11. The client company informed the employer that they no longer wanted the claimant to work for them because her mistake could have caused harm to the patient.
12. The employer discharged the claimant because the client company would no longer allow the claimant to work on assignments with them and the employer had no other work to offer the claimant.

13. On 07/07/16, the claimant was informed that she was being discharged because her mistake, due to her disability, had shown that having her work with patients was too much of a risk management liability for the employer.

14. The claimant filed a claim for unemployment benefits effective on 09/11/16.

CREDIBILITY ASSESSMENT

The claimant's testimony (that she made a good faith mistake on 07/05/16 in contacting the wrong patient regarding their medication), was accepted by this review examiner as credible. The claimant suffers with dyslexia and her error in seeing the correct date of birth credibly explains how the mistake occurred. The claimant's statement that she would never intentionally harm a patient was unrefuted and credible.

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. The reference to "employer" in Consolidated Findings ## 6, 7, 9, and 10 is misleading, as the employer is the temporary staffing service that assigned the claimant to the client hospital. In light of the testimony and the remaining content of each finding, we believe the review examiner mistakenly referred to the employer and meant to write "client hospital" in these instances. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the consolidated findings do not support the review examiner's legal conclusion that the claimant is disqualified from receiving unemployment benefits.

As the findings show, the employer discharged the claimant because the client hospital abruptly ended her assignment and the employer did not have any other work for her. Consolidated Finding # 12. There was no dispute that the underlying cause was that on July 5, 2017, the claimant called the wrong patient with a medication change that had been prescribed for someone else. Consolidated Findings ## 3 and 4. It is self-evident that the client hospital does not condone such an action as it puts the patient at risk. We are not deciding whether the client hospital or the employer should have terminated the claimant's employment, but whether the claimant's actions rendered her ineligible for unemployment benefits.

Because she was discharged, 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 . . . 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 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). “Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer's interest. Deliberate misconduct 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). In order to prove that the claimant's conduct was a knowing violation at the time of the act, the employee must have been “. . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996).

After considering the claimant's testimony at the remand hearing, the review examiner found that the claimant simply made a mistake. Specifically, he found that at the time the claimant made the medication call, she did not realize that she was talking to the wrong patient, but believed she was properly following a doctor's orders and the client hospital's directives to notify the patient of the change. Consolidated Finding # 5. This means that when the claimant gave the wrong medication information to the patient, she was not consciously aware that she was doing anything wrong. She believed she was acting in furtherance of the employer's interest in communicating a doctor's orders. Simply put, the claimant did not have the requisite state of mind for disqualification under either the deliberate misconduct or knowing violation prongs of G.L. c. 151A, § 25(e)(2). *See* Board of Review Decision BR-106310 (July 16, 2008) (regardless of the gravity of the error in failing to check a patient's IV catheter, it was negligence and not an intentional act; claimant was entitled to benefits).

Further subsidiary findings of fact support the review examiner's state of mind findings. The claimant is dyslexic. Consolidated Finding # 2. This explains how the claimant might have mistakenly inverted the digits in the birthdates of two patients with the same name and attached the doctor's order to the wrong file.¹ *See* Consolidated Finding # 3.²

¹ Dyslexia is described as a “condition in which an individual with normal vision is unable to interpret written language.” Taber's Cyclopedic Medical Dictionary at 545 (Clayton L. Thomas, M.D., M.P.H. ed., F.A. Davis Co. 1989) (1940).

² Although it did not make it into the findings, the claimant also reported that she was under stress at the time because her computer had not worked properly earlier in the day, forcing her to perform a lot of work in a short amount of time. This portion of the claimant's testimony 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).

Similarly, when the claimant reported that she had left a voicemail message in response to the client's question about the medication change in question, and that she had not actually spoken with the patient, her mistake was not deliberate. Consolidated Finding # 7 states that, at the time she was asked, the claimant did not remember speaking with the patient. The unintentional nature of this error is supported by the fact that the claimant immediately contacted her supervisor to correct the statement after the claimant checked her note in the medical record. *See* Consolidated Finding # 9.

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to show that the claimant's misconduct was deliberate and in wilful disregard of the employer's interest or that it was done knowingly in violation of the client hospital's rule or policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning September 11, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 11, 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