

The review examiner found that the claimant did not mistreat a client, the misconduct for which he was discharged, concluding that the claimant's direct, consistent testimony was more credible than the employer's multiple level hearsay.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member**

Issue ID: 0020 9935 02

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Margaret Blakely, 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 his position with the employer on January 20, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 7, 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 April 5, 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 knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 testimony and evidence. Both parties 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 conclusion that the claimant is subject to disqualification for mistreating a client and threatening a coworker 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. The claimant worked as a relief direct care employee for the employer, a non-profit human services agency, between 11/02/2015 and 01/20/2017, when he separated.
2. The employer's clients are students with traumatic brain injuries.
3. The claimant's direct supervisor was the assistant director of community living (assistant director).
4. The employer had a list of zero tolerance offenses including "mistreatment of an individual in our care" defined as "any inappropriate interaction that leads to, causes, or has the potential to cause emotional, psychological or physical harm..." as well as "threats of violence against...employees."
5. The purpose of these prohibitions is to encourage clients in their daily living and encourage client growth.
6. Per the zero tolerance policy, "employees will be terminated upon a first offense..." for engaging in such offenses.
7. The employer made the claimant aware of the zero tolerance policy upon hire and through trainings.
8. The employer expected employees not to mistreat clients. The purpose of this expectation was to encourage clients in their daily living and encourage client growth.
9. The employer expected employees not to threaten each other. The purpose of this expectation was to prevent exposure of such behavior to clients.
10. The employer communicated these expectations to the claimant through the zero tolerance policy.
11. On 01/07/2017, the claimant was at a restaurant with another employee and two clients, including client A. Client A was slapping. The claimant told client A that he would "lose out on dinner." Client A tried to leave the area. The claimant put his body in front of client A. When client A was close to a car, the claimant put client A into a protective hold so that he would not get hit.
12. Upon returning to the residence, client A was slapping the claimant. The claimant told other employees, "If he slaps me again I will put him into a protective hold." Client A slapped the claimant again. The claimant asked other employees for help with a protective hold. The other employees did not do anything. Client A stopped slapping. The claimant did not place client A in a protective hold.

13. At the residence, the claimant did not make any comments about client A's mother. The claimant did not grab client A by the legs. Another coworker did not intervene. The claimant did not tell the coworker to "take it outside."
14. Two witnesses reported to their managers that on 01/07/2017, someone made comments about client A's mother, client A became agitated, the claimant grabbed client A by the legs, did not use any safety care techniques to deescalate client A's behavior, a coworker intervened, and the claimant told the coworker to "take it outside."
15. The managers notified the human resources generalist of what the witnesses reported. No written witness statements or manager statements were presented. Neither witness testified during the hearing, nor did any managers.
16. The assistant director and human resources generalist met with the claimant on 01/13/2017. The claimant asserted that he could not remember the incident in question and spoke about the events at the restaurant.
17. The claimant completed a fact finding questionnaire for the Department of Unemployment Assistance (DUA) dated 03/15/2017. The claimant asserted not "recall[ing] the incident" in question.
18. The claimant provided a rebuttal statement to the DUA on 03/01/2017. The claimant provided details about the incident at a restaurant, reporting, "The only thing I did was put the student in a protective hold because he ran out of the restaurant to the parking lot..." The claimant also reported, "I never talked about his parents or never threatened my co-worker, I also never grabbed the student around both legs when we got back to the resident location... Whoever said that they had witnessed me grabbing the student's legs and saying bad things about his parents and threatening my co-worker is lying, I never did that."
19. On 01/20/2017, the employer terminated the claimant's employment for violating the zero tolerance policy by engaging in mistreatment of a student and threatening a coworker on 01/07/2017 at the residence.

Credibility Assessment:

During the remand hearing, the claimant provided detailed, direct testimony about the sequence of events on 01/07/2017. The claimant's direct testimony denying making remarks about client A's mother, grabbing client A by the legs, and telling a coworker to "take it outside" was corroborated by the claimant's rebuttal statement when he reported "I never talked about his parents or never threatened my co-worker, I also never grabbed the student around both legs when we got back to the resident location... Whoever said that they had witnessed me grabbing the student's legs and saying bad things about his parents and threatening my co-worker is lying, I never did that." The human resources generalist's testimony in this case is based upon multi-level hearsay. No written witness statements or

manager statements were presented. No witnesses to the incident in question testified in this case, nor did any managers to which the witnesses' allegations were initially reported. As such, the claimant's direct testimony in this case is deemed to be more credible than the hearsay testimony of the employer

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 ultimate 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 reject the review examiner's legal conclusion that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2).

The review examiner denied benefits after analyzing the claimant's separation from employment 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). The record before us indicates the claimant was discharged for violating the employer's zero tolerance policy as to any mistreatment of its clients. Thus, it is the employer's burden to establish the claimant knowingly violated a reasonable and uniformly enforced rule or policy. To be a knowing violation at the time of the act, the claimant must have been "consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Id. at 813.

After the initial hearing, attended only by the employer, the review examiner denied the claimant benefits. We remanded the case in order to provide the claimant with the opportunity to testify. Following remand, the review examiner's consolidated findings establish that the claimant did not engage in the conduct for which he was discharged. The review examiner found that the claimant was with another employee and two clients at a restaurant for a dinner outing. One of the clients was slapping the claimant, and, after being told that he would lose out on dinner that weekend, the client tried to leave the area. The claimant placed his body in front of the client to stop him, but, when the client was close to a car, the claimant put him into a protective hold to keep the client from being hit. Later, back at the residence, the client began slapping the claimant again. The

claimant told his colleagues that, if the client slapped him again, he would put him into a protective hold, but the claimant didn't have to do so after the client stopped slapping the claimant.

In rendering her consolidated findings, the review examiner provided a credibility assessment deeming the direct testimony offered by the claimant to be more credible than the hearsay testimony of the employer. In so doing, the review examiner notes the testimony of the employer's human resources witness was based on multi-level hearsay. The record indicates that no witness to the alleged incident involving the claimant testified at either the initial or remand hearing, nor did any of the employer's managers to whom the allegations were initially reported. Additionally, the employer did not present any written statements from either a witness or a manager. The review examiner also found that the claimant's direct detailed testimony regarding the details of the final incident was corroborated by the claimant's rebuttal statement to the DUA. Credibility assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). We see no reason to disturb either the review examiner's credibility assessment or the findings she derived from said assessment.

The record and findings before us establish that the claimant did not engage in the conduct for which he was discharged. Consequently, the claimant did not knowingly violate the employer's zero tolerance policy, nor did he engage in deliberate and wilful misconduct, which was contrary to the employer's interest. We, therefore, conclude as a matter of law that the claimant is not subject to disqualification 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 January 15, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 31, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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.

SPE/rh