

When a manager was demoted for not meeting a performance improvement plan, she was told to tell others it was for personal reasons and not to give the real reason so as to avoid embarrassment. Held the claimant did not act in wilful disregard of the employer's interest when she confided the real reason for her job change to a distressed subordinate, because the claimant believed the only person harmed was herself.

**Board of Review
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Issue ID: 0021 1620 35

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric M. P. Walsh, 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 23, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 24, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 23, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had 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, she 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 for clarification and further subsidiary findings of fact relevant to the claimant's state of mind and the circumstances surrounding her discharge. 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 conclusion that the claimant's failure to keep confidential the fact that her demotion was due to performance and not a personal issue constituted disqualifying misconduct under G.L. c. 151A, § 25(e)(2), 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 for the employer, an insurance company, from June 3, 1991 to February 23, 2017, most recently as a Claims Manager.
2. The employer had a policy, which prohibited insubordination.
3. The purpose of the employer's policy was to ensure an efficient and orderly work environment.
4. The claimant knew the policy due to the position she held.
5. The employer did not apply a progressive system of discipline to that which gave rise to the claimant's separation and the employer applied the policy to all employees.
6. In October of 2016, the claimant was placed on a Performance Improvement Plan (PIP) to address some shortcomings in her role as a Manager.
7. On January 20, 2017, the employer extended the claimant's PIP.
8. After a couple of weeks, during a weekly supervision meeting to discuss her progression, the claimant's manager asked the claimant if she believed whether [sic] she could meet the expectations laid out in the PIP within the timeline. The claimant expressed her belief that she did not think so. The claimant's manager discussed the possibility of the claimant stepping down from her role as a Manager and into a role better suited for her despite the employer's usual practice of terminating employment for failing to meet expectation [sic] under a PIP. The claimant agreed and a timeline of transition was discussed. The claimant's manager directed the claimant not to discuss the matter with anyone and it was agreed that the reason for the transition would be stated as personal reasons.
9. The purpose of the directive was so that it did not cause the claimant embarrassment (to protect her privacy) or cause a disruption in the workplace.
10. The claimant made a general announcement to her team that she was stepping down for unspecified personal reasons.
11. At a later date in February of 2017, the claimant met with a member of her team to discuss his performance, at which time the claimant divulged that she was on a PIP and the reason for her transition was due to being on a PIP. The claimant expressed that she informed the employee because he was upset about his PIP and was concerned about losing his job and that she was attempting to empathize with him.

12. The claimant rationalized that it was okay to divulge her situation to the employee despite the directive because, as she testified, "To me, [stepping down] was a personal reason."
13. The team member then expressed anger about the claimant's situation to another team member, which included statements about causing harm to the claimant's manager. The employee stated that the claimant discussed all that was going on in the workplace during a one-on-one, that the claimant told him the truth [which caused him to believe that the claimant's supervisor was a heartless person], and that he was sure that the claimant will tell the other employee because she has been telling people who ask in private.
14. The team member who received the messages felt uncomfortable with the situation due to the employee's additional statements that he wanted to punch the claimant's supervisor in the face, that the claimant's supervisor was a horrible person, and that he hopes the claimant's supervisor gets what is coming to her. The team member reported the matter to the employer on February 23, 2017.
15. Other employees learned of the claimant's situation due primarily to rumor-mill, but also due to the claimant divulging her situation when asked in private.
16. It is unknown if the claimant made direct disparaging remarks about her supervisor.
17. The claimant's manager confronted the claimant about the matter. The claimant admitted to divulging the matter to the team member.
18. Later that day, the employer discharged the claimant from employment.
- [19.] In regards to subsidiary question #1, the purpose of telling employees that the change in position was for personal reasons was two-fold as stated by the employer's two sequestered witnesses and corroborated by the claimant, who testified that it was for a smoother transition and to lessen embarrassment.
- [20.] In regards to subsidiary question #2, the claimant testified that she made the general announcement to her team, which was unrefuted by the employer and therefore, it is credible.
- [21.] In regards to subsidiary question #5, the claimant testified that she only told the one employee during the implementation of his PIP and then others also learned of it. The employer testified to its conclusion due to the one employee's messages that the claimant discussed all that was going on in the workplace during a one-on-one, that the claimant told him the truth, and that he was sure that the claimant will tell the other employee because she has been telling people who ask in private. Such an unfiltered and uninfluenced

contemporaneous statement to another is bolstered by the claimant's testimony that "to her," stepping down "was a personal reason," and thus, she had no principled reason to keep such information in confidence as the employer directed.

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 assessments¹ except as follows and as explained more fully below. We reject the portion of Consolidated Finding # 9, which includes as a purpose of the directive not to cause a disruption in the workplace, as it does not accurately represent the testimony of the employer's witness who gave the directive to the claimant. Consolidated Finding # 12 is incomplete, as it fails to capture the claimant's full testimony and explanation as to why she believed that her conversation with the member of her team was acceptable. We accept Consolidated Finding # 15 only insofar as it is a finding that other employees became aware that the reason for the claimant's transition was related to being on a performance improvement plan (PIP).² Any inference suggested by Consolidated Finding # 15, and what we have labeled as Consolidated Finding # 21, that the claimant divulged her situation in private to more than one person is rejected as not supported by substantial evidence. We also decline to attribute any negative connotation to the review examiner's statement in Consolidated Finding # 16, that it is unknown if the claimant made disparaging remarks about her supervisor, because there is nothing in the record to suggest that she did. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we disagree with the review examiner's legal conclusion that the claimant is ineligible 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 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

¹ Three unnumbered paragraphs in the review examiner's consolidated findings contain a mix of factual findings and credibility assessments. We have numbered them as additional findings in brackets.

² The review examiner's reference to a "rumor-mill" is his own characterization. More precisely, the record shows that their knowledge was based upon the apparent exchange of text messages that originated with one employee. See Exhibit 14.

“[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 Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

As for showing that the claimant is ineligible under the knowing violation prong of G.L. c. 151A, § 25(e)(2), the findings are limited and unclear. Consolidated Findings ## 2 and 4 refer to the employer’s insubordination policy and the claimant’s awareness of it. Consolidated Finding # 5 states that the employer applied the policy to all employees, however we cannot draw any meaning from the rest of the finding. Specifically, it is not at all evident what “that which gave rise to the claimant’s separation” is referring to, whether the employer ever encountered a similar set of circumstances, or, if it did, what sort of discipline was imposed. For this reason, we decline to conclude that the claimant knowingly violated a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

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). We remanded this case, in part, to flesh out the claimant’s state of mind.

The events which led to the claimant’s discharge began with a one-on-one meeting between the claimant and her supervisor at some point in early February, 2017. The consolidated findings show that during this meeting, they discussed the fact that she was not making sufficient progress on her PIP and that in lieu of being terminated for poor performance, the claimant would step down as manager into to a non-managerial position. Also during that meeting, they agreed that others would be told that the transfer was for personal rather than performance reasons, and the manager directed the claimant not to discuss the actual reason with anyone. *See* Consolidated Finding # 8.

Accordingly, the claimant announced to her subordinates at a group meeting that she was stepping down for personal reasons. However, at a later performance review meeting with one subordinate who was not doing well on his own PIP, the claimant divulged to him that she also was on a PIP, not being successful, and that this was the real reason for her position change. *See* Consolidated Findings ## 10 and 11. That employee sent a text message to a coworker, saying that the claimant told him the truth about what was going on and threatening to punch the claimant’s manager in the face. *See* Consolidated Finding # 13 and Exhibit # 14.³ Concerned about the threat in the text message, that coworker contacted the claimant’s supervisor. *See* Consolidated Finding # 14. Later that day, the claimant was fired. Although not specifically stated in the findings, it is apparent from the record that the employer fired her for violating her manager’s directive and causing a disruption in the workplace.

“The issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . 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

³ Exhibit # 14 is the text message exchange between the subordinate and coworker.

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.) On the record before us, we do not believe the claimant engaged in intentional conduct that she knew was contrary to the employer's interest.

To understand the claimant's state of mind, it is important to consider the reason for giving the directive. The manager who gave her the directive testified that its purpose was to shield the claimant from the embarrassment of being demoted, so as not to "tarnish her reputation."⁴ Notably, the manager did not state that avoiding disruption in the workplace was another reason. The review examiner's inclusion of the latter in Consolidated Finding # 9 as a purpose for giving the directive derives only from the testimony of the employer's human resources witness. The human resources witness did not give the directive and she was not present when the supervisor gave her instructions to the claimant. Because avoiding disruption appears to have been offered in hindsight by a witness who got involved only after the claimant's action led to a disruption, such testimony is not substantial evidence of the employer's expectation that was communicated to the claimant at the time the directive was made. Therefore, we reject the portion of Consolidated Finding # 9 that suggests that avoiding disruption was part of the claimant's understanding of the employer's expectation in telling her to keep the real reason for her transfer confidential.

Where the claimant was told to keep the reason confidential for her own protection, the claimant's actions make more sense. In Consolidated Finding # 12, the review examiner quotes the claimant out of context when he writes simply that she thought it was okay to divulge her situation to the subordinate for "a personal reason." During the hearing, the claimant explained that she told this subordinate to show empathy with his distress over his own failure to succeed on a PIP. *See* Consolidated Finding # 11. She further explained that she saw no harm in revealing the truth because she felt her reasons were personal. Since the directive was meant to save the claimant from embarrassment, she felt that the only person whose confidentiality would be broken by revealing the performance issue was herself, and people were wrongly assuming that her demotion was for health reasons.⁵ Thus, instead of acting in wilful disregard of the employer's interest, the claimant believed that she was the only person who would be harmed by her action.⁶

We also note that nothing in the record suggests that the claimant disparaged her manager to the subordinate or anticipated that he would send out threatening text messages as a result of sharing the real reason for her transfer. At most, it appears that she exercised poor judgment in confiding in this employee. "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 v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

⁴ Although not explicitly incorporated into the review examiner's findings, this portion of the manager'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).

⁵ This portion of the claimant's testimony is also part of the unchallenged evidence in the record.

⁶ The claimant provided further undisputed testimony that she was upset when she saw the text message from her subordinate and tried to notify her manager immediately, but the manager was unavailable.

In rendering our decision, we decline to accept the review examiner's inference in Consolidated Findings ## 15 and 21 that the claimant was also telling other people about being demoted for performance issues when they asked in private. The claimant admitted to revealing the confidence only to the one subordinate. See Consolidated Finding # 17. In Consolidated Finding # 21, the review examiner relies upon the subordinate's text message to infer that the claimant was telling other people the real reason for her demotion in private. Since the claimant denied saying this to the subordinate, the assertion that she told others that is based upon solely upon totem pole hearsay — a writing from an individual who did not appear at the hearing about a statement that he allegedly heard from another individual. It is unreliable and does not constitute substantial evidence.⁷ See Covell v. Department of Social Services, 439 Mass. 766, 786 (2003) (hearsay evidence can constitute substantial evidence in informal administrative proceedings if it contains "indicia of reliability.") quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988).

We, therefore, conclude as a matter of law that, because the employer has failed to demonstrate that the claimant acted in wilful disregard of the employer's interest, she may not be disqualified 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 February 19, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 16, 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:

⁷ As discussed above, the review examiner's statement that the claimant "had no principled reason to keep such information in confidence as the employer directed," is contrary to the evidence before him. It does nothing to bolster his reliance on the unproven assertions in the subordinate's text.

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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