

Claimant is subject to disqualification under the deliberate misconduct provision of G.L. c. 151A, § 25(e)(2), because she admitted to using the employer's phone for personal, rather than business, reasons. No mitigation existed, because, although she needed to make personal calls to address the needs of her son and mother, the employer had a system in place for making such calls on a personal phone in a private area, and the claimant did not abide by that procedure.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rose McDuffy, 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 affirm.

The claimant was discharged from her position with the employer on May 5, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 27, 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 9, 2017.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding her separation from employment. 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 pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant admittedly used the employer's business phone for personal use to deal with family medical issues and related circumstances, but she did not follow the procedures the employer put in place for employees to take personal calls during business hours.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant worked as a medical claims representative for the employer, a medical billing organization, from September 10, 2015 until May 5, 2017, when she was discharged.
2. The claimant worked from 7:15AM to 4:45PM and was paid \$21.50 per hour. The claimant's immediate supervisor was the employer's medical billing supervisor (the supervisor).
3. The claimant's duties were following up and resolution of all outstanding unpaid balances for assigned insurance payers via telephone.
4. The employer maintained a computing and communication policy which states, "Each individual using [Name A] Systems has a responsibility to use the Systems for business purposes and to avoid inappropriate use. Each computer user is required to have his or her own account. Group accounts are not permitted without a waiver from the IT Manager of Infrastructure Services. All passwords are property of [Name A]." "Incidental personal use of [Name A] Systems is permissible if the use: does not consume more than a trivial amount of resources that could otherwise be used for business purposes, does not interfere with employee productivity, and does not preempt any business activity." The purpose of this policy was to prevent the employer from incurring a financial loss due to a lack of productivity.
5. The consequence for violation of this policy was first offense a conversation, second offense a verbal warning, third offense a written warning, and fourth offense a final warning. The claimant signed an acknowledgment of receipt for the policy upon hire.
6. The employer had an expectation that the claimant would not use the employer's business phone for personal phone calls. The purpose of the expectation was to prevent the employer from incurring a financial loss due to a lack of productivity by the claimant. The claimant received a copy of the policy upon hire.
7. During the claimant's employment, the employer had the employees update their emergency contact numbers annually in the employer's shared system.
8. The claimant provided her fiancé's cellphone and work number for the emergency contact numbers at hire.
9. During the claimant's employment, her son had ADHD disability [sic]. The claimant needed to maintain contact with her son's school during work hours

- because he started middle school in [City A] and the school would often need to contact her for medical emergencies.
10. During the claimant's employment, the claimant's mother suffered from Alzheimer's disease. The claimant's mother lived with her.
 11. The claimant's fiancé brought her mother to a dayhab.
 12. Sometime in the summer of 2016, the claimant informed the supervisor she needed to maintain communication with her mother's doctors during work hours as a result of her illness. The supervisor told the claimant that if she had a family emergency to inform her and she would find an office for the claimant to make the calls in.
 13. The employer prohibited employees to use their personal cell phones at their desk.
 14. The medical billing manager (the manager) frequently saw the claimant in the hallway on her personal cell phone and reported it to the supervisor.
 15. Sometime after the manager reported the claimant to the supervisor, the supervisor instructed employees to use the company phone for personal calls at their desk instead of their personal cell phones.
 16. Sometime after the supervisor instructed employees to use the company phone for personal calls, the manager informed the supervisor that the employees were not permitted to use the company phone for personal use.
 17. Sometime after the manager informed the supervisor employees were not permitted to use the company phone for personal use, the supervisor informed employees that if they had to make personal calls to use their personal cell phones in a conference room.
 18. On April 10, 2017, a team leader notified the supervisor that she observed the claimant using the employer's phone for a personal call. The supervisor informed the claimant that she was not permitted to use the company phone for personal phone calls because it would violate HIPPA Laws by subjecting the person on the other end of the phone to possibly hear the confidential information being said throughout the office.
 19. The supervisor instructed the claimant to use her personal cell phone outside of the office in a designated area, if she had an emergency. The supervisor provided the claimant with a policy that states employees cannot use company equipment for personal use.
 20. At the end of April, 2017, a lead staff member informed the supervisor that the claimant had been on personal calls on the business phone.

21. The manager went to the claimant's desk and pressed the history button on her desk phone. By pressing the arrows down on the history button it showed the claimant's recent phone calls. The manager identified the claimant's fiancé's work number and cell phone number from the emergency contact numbers the claimant had provided.
22. The manager instructed the telecommunication department to run a phone report on the claimant's incoming and outgoing calls within the months of March and April.
23. The phone report showed that in the month of March 2017, the claimant made 26 outgoing personal calls and received 34 incoming personal calls. In the month of April 2017, the claimant made 28 outgoing personal calls and received 44 incoming personal calls. The personal calls were identified under her fiancé's work number, his cell phone number which the claimant had provided to the employer, also her father's number and her aunt's number.
24. The claimant was discharged for excessive use of the business phone for personal use.
25. The claimant reported in the Department of Unemployment Assistance (DUA) questionnaire that she violated a telephone policy.

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.¹ 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.² As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is subject to disqualification from the receipt of unemployment 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:

¹ Although there was disputed testimony, the review examiner did not include a credibility assessment with her decision. Generally, we note that the review examiner appears to have credited the employer when faced with disputed evidence. For example, there was disagreement as to whether the April 10, 2017, conversation took place. As to evidence for which only the claimant had knowledge, such as her son or mother, the review examiner made findings according to the claimant's testimony. While an explicit credibility assessment would have been helpful, we have accepted the findings with this understanding of the record.

² The location of the claimant's son's school was unclear from the record. *See* Consolidated Finding of Fact # 9. Some testimony suggested that the son's school was supposed to be in [City A] but was actually located in [City B]. Other testimony suggested that the school was in [City A]. We accept the finding, because the location of the school is not relevant to the disposition of the case.

[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

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Following the initial hearing, at which only the employer attended, the review examiner concluded that the employer had met its burden. After our review of the record, the documentary evidence, and the review examiner's consolidated findings of fact, we agree with the review examiner's conclusions.

As to whether the employer carried its burden under the knowing violation prong of the above-cited statute, we conclude that it has not. Under the knowing violation standard, the employer must show that it has applied a reasonable and uniformly enforced policy. In this case, the employer alleged that the claimant violated its written policy relating to the use of the employer's systems and equipment. *See Consolidated Finding of Fact # 4.* Specifically, the employer alleged that the claimant used the employer's phone for personal reasons. The review examiner found that the claimant received the written policy. She also found that the discipline imposed for violating the policy include a conversation, verbal warning, written warning, final warning, and discharge. *See Consolidated Finding of Fact # 5.* In this case, however, no written warnings were issued for violations of the employer's policy. The employer did not follow its own progressive discipline policy. Because the employer did not show that the written policy is uniformly enforced according to the terms of the employer's own guidelines, the employer has not carried its burden to show that the claimant was separated from her job for a knowing violation of a reasonable and uniformly enforced rule or policy.

We move next to the deliberate misconduct standard. Under this standard, the employer must first show that the claimant engaged in the alleged misconduct which led to the discharge. Here, the employer alleged that the claimant excessively used the business phone for personal reasons. During the hearing, the claimant admitted that she did this. She admitted that the sixty personal uses in March of 2017 and over seventy personal uses in April of 2017 was excessive. The claimant also admitted that she knew that the employer expected that she not use her phone for personal reasons. Therefore, the claimant engaged in deliberate misconduct.

However, our analysis does not end there. The employer must also show that the claimant engaged in the conduct in wilful disregard of the employer's interest. This inquiry requires us to examine the claimant's state of mind at the time she engaged in the misconduct. To assess the claimant's state of mind, we examine the claimant's knowledge of the employer's expectations, the reasonableness of the expectations, and the presence of mitigating factors. *See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979). As noted above, the claimant admitted to the misconduct. She admitted during the remand hearing that she knew that

she was not to use the business phone for personal use.³ The expectation that employees only use the employer's phone for business purposes is certainly reasonable. It is a means by which the employer can ensure that its employees are productive and that its equipment is used for appropriate matters and functions.

As to mitigating circumstances, the review examiner found that, in 2017, the claimant needed to keep in contact with her son's school, as well as the family members and medical professionals who were treating and caring for her mother. We note that the claimant testified that, each time she needed to have a personal phone call in March and April of 2017, (*see* Consolidated Finding of Fact # 23,) it was an emergency. The review examiner did not find this to be true. Thus, the findings suggest that, on some occasions, the claimant was choosing to make or take personal calls on the employer's phone, rather than being compelled to use the phone due to an emergency. The findings also indicate that the employer put into place a system for employees to make personal calls. Prior to April 10, 2017, the claimant's supervisor told employees that they were not permitted to use the employer's phone for personal calls, but they could go to a conference room to make a personal call on their own cell phones. Consolidated Finding of Fact # 17. The claimant was reminded again about this procedure on April 10, 2017. Consolidated Finding of Fact # 19. Although given a reasonable way to take or make her personal phone calls, the claimant continued to use the employer's phone to make her personal calls. We conclude that the need to talk with her son's school or mother's healthcare providers was not a mitigating circumstance here, because the employer had a reasonable system in place for allowing the claimant to make personal calls. She did not abide by that procedure. Again, the review examiner did not find that the calls were emergencies, such that the claimant could not put off the call, talk to her supervisor, and then make or take the call in an area away from her desk. Therefore, no circumstances are present which prevented the claimant from complying with the employer's reasonable expectations.

We, therefore, conclude as a matter of law that the review examiner's decision to disqualify the claimant from receiving benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the claimant deliberately made personal phone calls from her desk in wilful disregard of the employer's reasonable expectation that she not do so.

³ The claimant's testimony about this point was inconsistent. At the start of her testimony during the remand hearing, she was asked whether she knew that the employer expected her not to use the business phone for personal use. She responded, "I did." Later in her testimony, when asked why she did not use her personal cell phone to make her personal calls, she testified that she was told that she could not and that her supervisor said to use the business phone. Generally, the claimant also denied that the April 10, 2017, conversation took place and also denied that "the supervisor informed employees that if they had to make personal calls to use their personal cell phones in a conference room." *See* Consolidated Findings of Fact ## 17 and 18. Because the review examiner made the findings that these things did occur, we assume that the review examiner did not believe the claimant's testimony about this point, including whether the expectation of using the employer phone was clear to her. The review examiner's credibility assessment is implicit in her other findings of fact. *See Swansea Water District v. Dir. of Unemployment Assistance*, No. 15-P-184, 2016 WL 873008 (Mass. App. Ct. Mar. 8, 2016), *summary decision pursuant to rule 1:28*. Our review of record further indicates this implicit credibility assessment is not unreasonable in relation to the evidence presented. Therefore, we will not disturb it on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning April 30, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 22, 2017



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.

SF/rh