

We do not view the wording of the claimant's voicemail message to a contractor to constitute threatening language. Even if it was, the review examiner found that the claimant's behavior was attributable to not taking medication for a significant mental illness at the time. Therefore, the claimant was not acting in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0021 7534 87

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 May 5, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 25, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 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, 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 obtain additional testimony and other evidence pertaining to the claimant's state of mind and the circumstances surrounding her discharge. 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 disqualified for leaving a threatening voicemail message for one of its contractors is supported by substantial and credible evidence and is free from error of law, where, following remand, the record indicates the claimant's action was attributable to mental health issues.

Findings of Fact

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

1. The claimant worked as a Navigator for the employer, an insurance company, from 3/9/15, until 5/5/17, when she became separated.
2. The claimant was hired to work full time, 8:30 a.m. to 5:00 p.m., Monday through Friday, earning an annual salary of \$40,000.
3. The claimant was discharged for leaving a threatening voicemail message for a contractor with whom she worked. The employer has no written, uniformly enforced policy or rule, accompanied by specific consequences, which addresses this behavior. Whether an employee is termed [sic] for this reason is left to the discretion of the Manager in conjunction with Human Resources.
4. Under the employer's workplace violence policy, the employer expects employees not to engage in threats (direct or indirect), acts of violence (including intimidation, harassment and/or coercion) or to make harassing or threatening phone calls. The employer also maintains a workplace conduct policy where they expect employees not to engage in unprofessional behavior including the use of profane or abusive language or causing, creating or participating in a disruption of any kind during work hours or on health plan property. These policies are necessary for the employer to provide employees and visitors with a secure environment and to promote an atmosphere of honesty and prevent perception of illegal or unprofessional conduct in the workplace.
5. The claimant was aware of the employer's expectations in this regard. All employees are required to review the policies annually and acknowledge their receipt of the policies. The claimant acknowledged her receipt of the policies on 11/7/16. The claimant had been made further aware of the policies through prior discipline she received on 6/30/15, for similar behavior.
6. In the afternoon on 5/3/17, the claimant left a voice message for one of the contractors from her work phone. The claimant had called the contractor on their personal phone. In the message the claimant states "You don't do shit like that. I don't like how things played out." In the voice message the claimant goes on to say, "I don't trust you guys, you are evil and you work for the devil."
7. The claimant left the message because she was upset. The claimant felt that contractor was instigating the claimant to the point that she lost her cool and left the message. She intended to let the contractor know how she felt at that moment when she was upset. She had gone to the office on the day in question to drop off a book and planned on speaking to the contractor about leaving her in the street drunk walking after partying with her that night, however when the contractor ignored the claimant, the claimant decided to leave her the message.

8. The claimant did not think the employer would find the message she left the contractor inappropriate because she was not in her right mind and was not thinking straight.
9. The claimant worked in the same building as the contractor and would attend home visits with her. The contractor felt the voicemail message left was harassing and threatening and notified her Supervisor of the message on 5/4/17. The contractor's Supervisor notified the instant employer who began an investigation.
10. The employer spoke to the contractor and subsequently met with the claimant. The claimant confirmed that she had made the call to the contractor after hours on her work phone and left her a voice message on her personal phone.
11. On 5/5/17, the employer concluded the investigation.
12. [Preceding] the voice message that was sent, the claimant had also sent text messages containing a similar context to the same individual. The employer had asked the claimant to stop communicating with the contractor the Thursday prior to the voice message being sent.
13. The claimant's Manager terminated her employment on 5/5/17, during a meeting at the corporate office.
14. Prior to the claimant leaving the voice mail message of May 3, 2017, at issue, the claimant was not aware of the contractor posting anything about her on Facebook. The contractor had made fun of the claimant and her disability on Instagram. It is unknown what was said or posted on Instagram as the claimant did not want to discuss the matter and had no documentation to substantiate any such conduct on the part of the contractor.
15. The claimant has been diagnosed with Schizoaffective Disorder, Bipolar type, Depression and Anxiety. The claimant's action of leaving the voice mail message on May 3, 2017, was influenced by her mental health illness. The claimant was not taking her medications during this time.

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's actions amounted to disqualifying misconduct under G.L. c. 151A, § 25(e)(2).

Because the claimant was discharged from employment, we consider whether she is eligible for benefits pursuant to 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). At issue in this case is whether the employer has met its burden to demonstrate that the claimant engaged in deliberate misconduct in wilful disregard of its interest or knowingly violated a policy that was both reasonable and uniformly enforced.

The review examiner concluded that the consequences for a violation of the employer's workplace violence policy are left to the discretion of the Manager, and, therefore, the employer did not establish that its policy is uniformly enforced. Consequently, the employer did not show that the claimant knowingly violated a reasonable and uniformly enforced rule or policy within the meaning of G.L. c. 151A, § 25(e)(2). We agree.

We next consider whether the employer has shown that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The review examiner found that the claimant was discharged for leaving a threatening voicemail message for a contractor with whom she worked. The claimant phoned the contractor on May 3, 2017, and left a message stating, among other things, “You don't do shit like that. . . I don't like how things played out. . . I don't trust you guys, you are evil and you work for the devil.” (Consolidated Finding of Fact # 6.)¹ The claimant left the message because she was upset when the contractor ignored her and refused to provide an explanation for why she left the claimant on the street, drunk-walking, after partying with her night before. (Consolidated Finding of Fact # 7.)

The issue before us is not whether the employer was justified in terminating the claimant's employment, but whether the claimant's action in leaving the voice message is grounds for denying her unemployment benefits. On these findings, the employer has simply not established that the

¹ While not explicitly incorporated into the review examiner's findings, the entire transcript of the claimant's voice message (Exhibit # 4) to the contractor indicates that they had an ongoing friendship outside of work, going to each other's homes and socializing frequently. The message further indicates that the claimant was severing their friendship, as she ended the message by stating, “God bless you, take care of yourself and I wish you the best. And I'm not calling you again.” This transcript 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).

claimant engaged in threatening behavior, as the language itself does not appear to pose a direct threat. While an employer is understandably sensitive to potentially threatening behavior and can choose not to tolerate it by casting a wide net, this does not mean that unemployment benefits should be denied, where an employee's language was not actually threatening.

Even assuming, *arguendo*, that the claimant's actions in leaving the message could be deemed deliberate misconduct, we must still ascertain her 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 [her] knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

The review examiner originally concluded that the claimant offered no explanation for her behavior sufficient to mitigate her actions. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Sheperd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987). In her appeal to the Board, however, the claimant raised mental health issues that potentially mitigated her conduct. These issues were sufficient for us to remand the matter back to the review examiner to make further inquiry. After remand, the review examiner found that the claimant suffered from schizoaffective disorder, bipolar type, depression, and anxiety. She further found that, at the time the claimant left the voicemail message for the contractor, she was not taking her medications, and her actions were influenced by her untreated mental illness. In light of these new findings, we believe that the claimant's misconduct, if any, on May 3, 2017, was attributable to her mental illness and not any wilful disregard of the employer's interests.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced 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 week beginning May 7, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 13, 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.

CAS/rh