

**Where the employer's case under G.L. c. 151A, § 25(e)(2), consisted entirely of uncorroborated hearsay, the review examiner was reasonable in making findings which credited the claimant's reasonable testimony and which found the employer's reasons for discharge to be only allegations. Without more evidence from the employer about the alleged misconduct, the employer failed to carry its burden to show that the claimant violated any HIPPA-related policy or expectation prior to her discharge.**

**Board of Review  
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**Issue ID: 0022 3930 89**

## **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 July 17, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 16, 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 November 30, 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. 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 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 review examiner's consolidated findings of fact indicate that the claimant offered friendly advice to one of the employer's patients at a Bible study class, but did not initiate or pursue a discussion of the patient's medical issues in such a way as to violate any employer policy.

## Findings of Fact

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

1. The claimant worked full-time for the employer, a medical practice within a medical system, from January 16, 2017 to July 17, 2017 as a Receptionist.
2. The employer had a confidentiality policy, which included the provisions of HIPAA.
3. The purpose of the policy was to prevent the sharing of confidential medical information for non-business purposes.
4. The claimant received the policy and was oriented to the policy during the claimant's on-boarding in December of 2016. The claimant knew the policy.
5. The employer had a progressive system of discipline as it related to HIPAA violations, which consisted of a final warning and/or termination of employment depending on the severity of the infraction.
6. On June 25, 2017, an employee arrived at the practice as a patient and started talking about the news regarding another employee being brutally stabbed two days prior. The employee expressed how awful it was and asked the claimant if she heard anything and whether it was a particular nurse. The claimant responded (based on what she heard from others and not medical records) that she thought it was the particular nurse.
7. On June 26, 2017, the claimant received a final warning for violation of the HIPAA policy, which alleged that the claimant furnished the name of a patient.
8. Prior to July 13, 2017, the husband of a patient, who had a bad track record of keeping appointments, came into the office seeking to pick up sample medication for his wife. The claimant, per direction of the Office Manager, stated that in order to receive sample medication, a patient needs to have a follow-up appointment, which upset the husband.
9. The same patient recently attended a bible study as a guest of one of the regular members and talked about her medical issues. The claimant attempted to avoid those discussions, but on occasion would offer friendly advice like "I tried [treatment], so maybe it would be helpful for you too."
10. On July 13, 2017, the claimant's Office Manager received a complaint from a patient alleging that the claimant openly discussed the medical care of the patient and her husband outside of work. The patient allegedly asked the claimant to stop, but the claimant persisted. The Office Manager informed the

Human Resources Manager who then informed the Human Resources Director.

11. The employer did not question the claimant about the allegation prior to issuing discipline.

12. On July 17, 2017, the employer discharged the claimant from employment.

### 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. As discussed more fully below, we conclude that the claimant is not disqualified from receiving 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:

[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, the review examiner concluded that the employer had carried its burden. After reviewing the entire record, including the testimony from the remand hearing and the consolidated findings of fact, we disagree.

Whether this case is analyzed under the knowing violation or the deliberate misconduct portion of the above-cited statute, the employer has the initial burden to show that the claimant engaged in the conduct which led to her separation. Here, the employer discharged the claimant for an alleged violation of its confidentiality policy, which contained provisions taken from the Health Insurance Portability and Accountability Act (HIPAA).<sup>1</sup> The review examiner found that the claimant was generally aware of this policy. Consolidated Finding of Fact # 4.

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<sup>1</sup> The review examiner's consolidated findings of fact do not indicate why the employer discharged the claimant. However, the subject of both hearings was clear: the claimant's alleged breach of confidentiality with a patient outside of work. While the circumstances of the alleged violation are disputed, the employer's testimony about the reason for the discharge is not in doubt. Accordingly, we have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

As to the final incident, the review examiner found that the employer's office manager "received a complaint from a patient alleging that the claimant openly discussed medical care of the patient . . . outside of work." Consolidated Finding of Fact # 10. After little to no investigation, the employer discharged the claimant. The employer's evidence of the alleged misconduct consisted entirely of the hearsay complaint from the patient. No evidence to corroborate what the patient reported was presented during the hearing, such as testimony from a witness, a written statement from the complainant, or contemporaneous notes from any conversations the employer had with the claimant or other employees prior to the termination. This lack of evidence weighs against a conclusion that the claimant actually engaged in the conduct alleged by the employer.

The review examiner found that, based upon the testimony of the claimant during the remand hearing, the claimant and the patient participated in a Bible study. During those meetings, the patient would often openly talk about her medical issues, and the claimant tried to avoid specific discussions about that topic. Nevertheless, in an apparent effort to assist the patient, she offered some friendly advice. The claimant made clear during the remand hearing that the Bible study meetings were confidential, and that she tried to avoid the patient, but that the patient solicited advice from others in the Bible study.

Clearly, the review examiner's findings of fact have changed from his original decision. Unfortunately, he offered no credibility assessment with his consolidated finding of fact.<sup>2</sup> However, his assessment of the evidence is fairly ascertainable from the findings he has made. He has credited the claimant's explanation of her interactions with the complaining patient during the Bible study sessions. He has also found that the employer's discharge was related to allegations only, rather than to specific incidents of wrongdoing. *Compare* Consolidated Finding of Fact # 9 with Consolidated Finding of Fact # 10. The wording of his findings suggests a credibility assessment favoring the claimant over the employer. Such an assessment would be reasonable based upon the evidence presented. As noted above, the employer's case that the claimant violated the confidentiality/HIPPA policy is far from substantial. Where the review examiner has credited the claimant's testimony that the patient was openly discussing her medical issues, and the employer has provided little information about the final incident other than the hearsay complaint, we cannot conclude that there is substantial and credible evidence to show that the claimant violated the employer's policy and expectations about confidentiality.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the employer has failed to present sufficient evidence to show that the claimant engaged in misconduct prior to her discharge.

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<sup>2</sup> Given the issues with the hearsay nature of the employer's evidence, in our remand order we specifically instructed that "the review examiner shall issue a credibility determination" with the consolidated findings of fact. The review examiner did not give the requested determination. Nevertheless, we can deduce from the findings of fact and the review examiner's questioning what he thought of the evidence before him.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 16, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 20, 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](http://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