

Claimant personal care assistant who sent a barrage of threatening text messages, emails, and voicemails to the employer after being removed from a client because a nurse had complained, was discharged for deliberate misconduct, where the review examiner rejected his attempts to justify his actions, found his testimony not credible, and noted that his conduct during the hearing confirmed the employer's rationale for discharging him.

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

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0025 0282 97

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 affirm.

The claimant was discharged from his position with the employer on February 26, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 11, 2018. 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 June 21, 2018. 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 take additional evidence. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's actions in failing to report for scheduled shifts and communicating to the employer a series of unprofessional emails, text messages, and phone calls constituted deliberate misconduct in wilful disregard of the employer's interest, 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, a home health agency, from September 25, 2017 to February 26, 2018 as a Home Health Aide.
2. The employer did not have an applicable policy that addressed the conduct of the claimant which resulted in his termination.
3. The employer had an expectation that employees will not confront the employer in a hostile and threatening manner.
4. The purpose of the employer's expectation was to ensure a safe and comfortable work environment.
5. The employer relied on common sense that the claimant was aware of the expectation.
6. On February 21, 2018, the claimant learned that he was being pulled off of a particular client. The claimant demanded to meet with the Director of Services.
7. At 12:27 p.m., the claimant texted, "Please call me immediately. You have been lied to."
8. At 12:29 p.m., the claimant texted, "There is information you need to have. You're not aware of the truth."
9. At 1:14 p.m., the claimant texted, "I need to speak to you... please call me."
10. At 2:58 p.m., the claimant texted, "I've been slandered and I can't consciously allow this to happen to me."
11. At 2:59 p.m., the claimant texted, "I'll wait to hear from you... if I don't I'll need to pursue this with [the owner]."
12. On February 22, 2018, the Director of Services met with the claimant and informed the claimant that he will be pulled off of a particular client due to a complaint that the [Company A] Hospice Care Nurse had regarding her interaction with the claimant and will be reassigned.
13. The employer determined that it was best to reassign the claimant to preserve a cooperative relationship with the other provider. The employer routinely reassigns employees based upon the request of the client, the employee and/or the third party care provider.

14. The claimant protested and demanded to speak with the Chief Operating Officer (COO).
15. At 2:01 p.m., the claimant texted, "I appreciate you meeting with me today. I'm sorry that you don't care about me or what is right. I'll handle it with [the owner] and [COO]."
16. On February 23, 2018, at 1:36 p.m., the claimant texted, "Tell [the owner] that I need to speak to her."
17. At around 2:00 p.m. [on February 23, 2018], the claimant met with the COO and voiced his protest to being taken from the particular client. The COO expressed that it was something that they had to do.
18. No conversation took place regarding hours/pay or reassignment. The COO was unable to address the topic of reassignment with the claimant because the claimant did not allow for such a topic focusing only on his he was wronged by the [Company A] Hospice Care and then the employer.
19. The claimant believed that the employer was permanently taking away a substantial number of hours, though it was never conveyed by the employer. The claimant acknowledges that no discussion about reassignment/additional hours took place and he only assumed that no reassignment/additional hours will be made available to him.
20. The employer had other work available at the time.
21. The claimant became upset and walked out of the meeting and the office.
22. The claimant was scheduled to work on February 23, 2018 from 4:00 p.m. to 8:00 p.m. and on February 25, 2018, from 9:00 a.m. to 1:00 p.m. and 2:00 p.m. to 9:15 p.m. for a total of 15.25 hours.
23. On his way out, the Office Administrator asked if he was going to his next shifts, the next being at 4:00 p.m., or if they needed to cancel them. The claimant did not answer.
24. At 2:10 p.m., the claimant emailed, "At no time, did I resign or "quit." WHAT THEY DID TO ME * IS ILLEGAL AND I'M NOT TOLERATING IT*. I told you how it's gonna be." The claimant sent such an email in order to preserve a record for unemployment purposes, specifically in regards to not quitting.
25. At 2:16 p.m., the claimant emailed, "I am observing my legal rights. I am not tolerating someone committing Defamation of Character against me. Since you clowns obviously don't care about me or what is right... I will pursue this

legally. If [the owner] has any questions, she can feel free to call me. That's all I have to say about this until it's legally addressed."

26. At 2:36 p.m., the claimant sent an email to the employer stating, "In regards to my upcoming shifts, I'm not able to attend them due to a personal matter. I do still look forward to my present and future employment with [the employer]. Again... If [the owner] has any questions, she can feel free to reach me either by phone or email. Have a wonderful weekend." The claimant sent such an email in order to preserve a record for unemployment purposes, specifically in regards "looking forward to [his] present and future employment" with the employer.
27. At 3:30 p.m., the claimant texted, "Buckle up," and "I did everything in my power to stop what's about to legally happen. You did this... not me."
28. The claimant called the office two times that same afternoon, the exact times of which are unknown. During the first call, the claimant explained to a Scheduler that he was not going to his next shift and said that he was being insubordinate. The Scheduler stated that it was his choice and that she will try to find coverage, and if she cannot, she will let him know. During the second call approximately an hour later, the claimant informed that he is not going to his shifts on Sunday because he did not feel like he had to. The Scheduler responded that she will try to find coverage and if she cannot, she will let him know[.]
29. On February 24, 2018 at 11:11 a.m., the claimant emailed the Owner again threatening legal action, that he was meeting with the state unemployment board and legal counsel to determine the extent of action that he will pursuing against the [Company A] Hospice nurses who "committed the Slander and Collusion" against him. The claimant further stated, "Since I truly believe you are a decent person, I'm willing to make 1 final attempt at "some form of reconciliation" to avoid the costly and time-consuming fiasco that awaits us. If you contact me by close of business on Monday, I promise my best cooperation and efforts to reach a positive and productive conclusion. If I don't hear from you... then Tuesday I will move forward with addressing this legally. I didn't want any of this, but I cannot consciously allow the illegal abuse that I have endured. It's your call."
30. At 11:12 a.m., the claimant texted the after-hours line, "I just emailed a letter to [the owner] via the office email address that she really needs to receive. It contains legal things."
31. The claimant made several calls, the exact number is unknown, to the after-hours line, which is answered by an assigned office staff. The Office Administrator answered a couple of the calls over the weekend made by the claimant, who made her feel uncomfortable. The claimant threatened legal action and used vulgarity, the specific wording is unknown. The Office

Administrator felt like the claimant was going to do something rash beyond the threats of legal action.

32. The Office Administrator suggested that the employer contact the police.
33. On February 26, 2018, the employer discharged the claimant via termination letter with its account of the chain of events that caused the employer's decision. The employer explained, "We have made the decision to let you go because while you are a good caregiver, your behavior is erratic and aggressive. You are unaware of boundaries and lack self-control around anger. We work with vulnerable people in unsupervised environments and cannot offer you as a stable caregiver." The employer requested that the claimant only contact the employer in writing or through his attorney or through the DUA.
34. In response, the claimant sent a series of emails to the employer that were less-than-professional and profane.

Credibility Assessment:

The claimant's behavior towards DUA staff and at the hearing only served to bolster the employer's position and reason for discharging the claimant from employment. The claimant was loud, aggressive, obstinate, and primarily had a singular focus about "his legal rights," which lends credence to the employer's assertion that he was unable to discuss anything related to reassignment in the February 23, 2018 meeting.

Notwithstanding that, the claimant gave inconsistent testimony. The claimant stated that his emails, texts and calls were for the purpose of preserving his employment, but that is unreasonable due to the tone and content of such communications. For example, when specifically asked how calling the employer "clowns" is a job-preserving act, the claimant downplayed the name-calling and chalked it up as casual conversation between guys, when in fact nothing was casual about any of the communications.

The claimant asserted that his hours dropped from thirty per week to five per week, which is inconsistent with some of the written communication authored by the claimant indicating that the particular client gave him ten to fifteen hours per week. The claimant also stated that his hours dropped to ten per week. Such statements alone are inconsistent, but the claimant had over fifteen hours of work available to him that weekend alone, which he ultimately declined to work, and which suggests that the claimant exaggerated greatly not only about his hours, but about everything.

The claimant's alleged reason for being absent from the fifteen hours of work that week was to seek legal advice. When asked what legal advice he was able to seek late Friday afternoon and over the weekend, during which time it would be highly

unusual to get legal advice, the claimant gave a feeble answer. Therefore, his purported reason is not found as fact.

Generally, much of the claimant's testimony was not found reasonable or credible and thus, many of the specific questions posed by the Board cannot be answered due to a lack of factual basis.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

The review examiner denied benefits after analyzing the claimant's separation 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 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or deliberate misconduct in wilful disregard of the employer's interest. The review examiner initially concluded the employer met its burden. We remanded the case to take additional evidence, including better copies of some of the documents submitted at the initial hearing that were illegible. After remand, we also conclude that the employer has met its burden.

The findings establish that, on February 21, 2018, the claimant learned he had been removed from his assignment with one client. The review examiner found that the employer routinely reassigns caregivers at the request of clients, the caregivers themselves, and employees of third-party facilities such as the one who complained about the claimant. The employer decided to reassign the claimant to preserve a cooperative relationship with the facility and its staff. At the time the employer removed the claimant from that facility, it had other work available to which it could reassign him.

Following notification of his reassignment, the claimant demanded to meet with the employer's director of services (DOS). The claimant also sent five text messages to the employer between 12:27 p.m. and 2:59, making accusations that he had "been lied to," he "wasn't aware of the

truth,” and that the claimant had “been slandered and . . . can’t consciously allow this to happen to me.” *See Consolidated Findings ## 7 through 11 and Remand Exhibit # 7, p. 2.*

The DOS met with the claimant on February 22 and informed him that he was being removed from that client because of a complaint from a nurse at the facility where the client resided, after an interaction she had with the claimant. The claimant was unhappy and demanded to speak with the chief operating officer (COO). The COO met with the claimant on February 23, 2018. The review examiner found that at this meeting the COO was unable to address reassignment with the claimant on February 23 because the claimant did not allow him to raise the subject. *See Consolidated Findings # 17 and # 18 and Credibility Assessment, paragraph # 1.*

The claimant was scheduled to work later on February 23 from 4:00 to 8:00 p.m., and on February 25, 2018, from 9:00 a.m. to 1:00 p.m., and 2:00 p.m. until 9:15 p.m. As the claimant was leaving his meeting with the COO, the employer’s office administrator asked the claimant if he was going to his shifts or if the employer needed to cancel them; the claimant did not answer her. The claimant called the office twice after leaving the COO’s office, telling the employer’s scheduler he was not going to his next shift and he was being “insubordinate.” She replied that it was his choice, she would try to find coverage, and she would let him know if she could not find coverage. The claimant called again about an hour later and told the scheduler he would not go to his Sunday shifts either, because he did not feel like he had to. She replied again that she would try to find coverage and would let him know if she was unable to arrange coverage.

Following his meeting with the COO, the claimant also sent a series of text messages and emails to the employer. In these emails and messages, among other things, the claimant referred to the employer as ‘clowns,’ threatened legal action, and told the employer to “buckle up” for what was going to happen. The review examiner also found that the claimant made several calls that weekend to the employer’s after-hours line, threatening legal action and using vulgarity. The calls made the employee who answered them feel uncomfortable. She felt that the claimant would do something rash beyond the threat of legal action and suggested the employer call the police. *See Consolidated Findings ## 31 and 32.*

On February 26, 2018, the employer discharged the claimant via letter, citing the claimant’s behavior as “erratic and aggressive,” noting he was “unaware of boundaries and lack[s] self-control around anger,” and asking that, because of the level of anxiety he had created, he only contact the employer “in writing, through his attorney, or through the DUA.” *See Consolidated Finding # 33 and Hearings Exhibit # 14.*

After remand, we agree with the review examiner’s initial conclusion that the claimant’s conduct constituted deliberate misconduct in wilful disregard of the employer’s interest. The purpose of G.L. 151A, § 25(e)(2), “is to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect. Garfield v. Dir. of the Division of Employment Security, 377 Mass. 94, 97 (1979). The employer expected its employees not to conduct themselves in the workplace in a hostile, threatening, or aggressive manner. This expectation is inherently reasonable in any workplace, but particularly in this employer’s business: providing personal care to elderly and other clients who are unable to care for themselves. The findings and record before us establish that following a disagreement about his reassignment, the claimant directed towards the

employer a series of unprofessional, aggressive, and, in some instances, insulting emails, text and phone communications. Such misconduct was obviously intentional and contrary to the conduct that the employer had a right to expect from its employees. *See, e.g. Sharon v. Dir. of Division of Employment Security*, 390 Mass. 376, 378 (1983) (refusing to make a public apology is obviously intentional). *See also Grise v. Dir. of Division of Employment Security*, 393 Mass. 271, 275 (1984) (leaving a scheduled work shift without notification or authorization is obviously intentional).

The Massachusetts Supreme Judicial Court has held that, in the unemployment context, a specific finding on state of mind is not required where a claimant's act is obviously intentional. *Sharon*, *supra* at 378. We note, however, that while a specific state of mind finding is not necessary, the findings before us establishes that the claimant was aware he was being insubordinate and stated so to the employer's scheduler. This indicates an awareness on the claimant's part that the course of conduct he had undertaken was contrary to the employer's interest. The review examiner's findings and credibility assessment lead us to further conclude that the claimant presented no credible evidence of mitigating circumstances to justify his conduct.

In rendering his findings, the review examiner provided a detailed credibility assessment in which he rejected as not credible several of the reasons offered by the claimant to justify his conduct. In his credibility assessment, the review examiner rejects the claimant's attempts to downplay his actions as "casual conversation between guys" and efforts to defend his "legal rights." The review examiner reasonably noted that the claimant's own conduct "towards DUA staff and at the hearing only served to bolster the employer's reason" for discharging him, citing that the claimant was "loud, aggressive, obstinate, and primarily" focused on "his legal rights."¹

Where the claimant complained that he was upset that his hours had been cut, the review examiner's credibility assessment reasonably noted that notwithstanding his professed concern about losing income, the claimant called out from all three of his shifts during the weekend at issue. Where the claimant contended he needed the weekend off of work to pursue legal advice, the review examiner reasonably rejected this contention because the claimant could not explain how he could get competent legal advice from late Friday afternoon through the weekend.

The claimant claimed he sent emails, text messages, and voice mail messages to the employer to preserve his employment. The review examiner reasonably rejected this argument, noting it was unreasonable in view of the tone and content of the communications themselves. Further, when asked how calling the employer "clowns" in an email could be perceived as an act of job preservation, the review examiner was not persuaded by the claimant's attempts to downplay the name-calling as "casual conversation between guys."

The review examiner's consolidated findings and credibility assessment establish that the employer met its burden to show that the claimant was discharged for unprofessional and insubordinate conduct in the workplace, without mitigating circumstances. We, therefore,

¹ The review examiner's credibility assessment is within the scope of the fact finder's role and unless it is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending March 3, 2018, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

JPC/rh