

Home health aide engaged in deliberate misconduct in wilful disregard of the employer's interest when she violated the employer's order not to have any contact with a client and not to accept gifts from clients.

**Board of Review
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Issue ID: 0028 7425 88

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 January 4, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 21, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant and employer, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on July 11, 2019.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide additional evidence pertaining to the claimant's separation from employment. Only the employer 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 decision, which concluded that the claimant is not 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 following remand the review examiner has found that the claimant: 1) violated a no-contact directive from the employer regarding a client and accepted gifts from this client in the form of free food, and 2) expended the funds of another client without obtaining the required authorization.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, made following the Board remand, are set forth below in their entirety:

1. The claimant worked full time as a personal care worker for the instant employer, a home care agency, from 11/30/15 until 01/04/19.
2. The employer maintains several policies listed below:
3. GIFTS, GRATUITIES, AND PAYMENTS

Do not accept gifts or tips or solicit loans or ask patients to cash checks. This may result in the termination of your employment. If the patient or family insists that you do any of the above, call the office for assistance.

PATIENT ABUSE

All employees of [Employer] are responsible for reporting any incident or suspected incident involving any type of neglect, abuse (verbal, physical, sexual, emotional, financial or involuntary seclusion) or misappropriate use of a patient's property.

EMPLOYEE DISCIPLINE

Theft of any amount no matter how small from the Company, other employee, or customers, or other dishonesty.

DONT'S

Please don't change your schedule with your client. Your schedule can be changed by contacting the office.

Don't give lend money or take money from your client.

Don't exchange telephone numbers with your client.

CONFIDENTIALITY

Agency personnel have access to information of a highly personal and intimate nature regarding the patients entrusted to them. Professionally, ethically, and legally, it is the responsibility of all agency staff members and volunteers to maintain strict confidentiality regarding patients, the patient's diagnosis, treatment, condition or any personal information learned about them during the course of their treatment period.

4. The employer maintains these policies to ensure the safety of the clients that are in their care.

5. The claimant acknowledged the handbook and policies on 11/30/15.
6. All employees are subject to the policy.
7. Disciplinary action for being in violation of the policies is at the discretion of the employer based on the nature and severity of the incident.
8. The employer expects employees to maintain confidentiality of all client information to remain in compliance with the HIPAA laws.
9. The employer expects employees not to abuse their clients, verbally, physically, sexually, emotionally, or financially.
10. The employer expects employees to only use a client's credit card for authorized and necessary purchases.
11. The purposed of all of the expectations are to ensure the safety of the clients that are in their care.
12. The claimant acknowledged the policies at the time of hire.
13. On 02/20/18, the claimant began accepting receipt of a pizza delivery from one of her client's (Client B).
14. The claimant accepted receipt of pizza deliveries from Client B on 02/20/18, 02/21/18, 02/27/18, 02/28/18, 03/06/18, 04/03/18, 04/04/18, 04/10/18, 04/11/18, and 04/25/18.
15. On an unknown date, the claimant took her client (client A) shopping at Victoria's Secret and charged over \$300 on the client's credit card.
16. On 03/28/18, the claimant was told by the employer that she cannot put charges on Client A's credit card without permission from the client's lawyer.
17. On unknown date, the claimant gave Client B her phone number because if she was out running errands for him it would be easy for him to get a hold of her if he needed anything.
18. On 04/19/18, the claimant was issued a written warning and removed from Client B's care. The employer believed that the claimant was manipulating Client B and having him cover for her when she was in the wrong.
19. This was the result of an incident where Client B told a staff member that the claimant called out for her shift but then contacted the employer and changed his story to say that the claimant was there but he sent her home because she wasn't feeling well.

20. The warning indicated that the claimant could not be in contact with Client B by any means after being removed from his care.
21. The claimant accepted receipt of pizza deliveries from Client B on 04/25/18, 05/09/18, 05/15/18, 05/16/18, 05/30/18, 06/06/18, 06/13/18, 06/20/18, 06/27/18, 07/11/18, 07/18/18, 07/25/18, 08/01/18, 08/08/18, 08/15/18, 08/22/18, 08/29/18, 09/12/18, 09/19/18, 09/26/18, 10/03/18, 10/10/18, 10/17/18, 11/07/18, 11/14/18, 11/28/18, 12/05/18, 12/12/18 and 12/19/18.
22. The claimant took Client B up on his offer to buy pizza when she was working at a different client's house (Client C).
23. The claimant would call and order the pizza for delivery and provide the address herself for Client C's house. The claimant would then call Client B and tell him that she placed her order.
24. Client B would call the pizza company and provide them with his credit card information to pay for the pizza. Client B was never given Client C's address.
25. The claimant took Client A shopping around Christmas time. The claimant did not get permission from Client A's lawyer before making any purchases on the credit card.
26. On 12/15/18, Client C reported that her necklace had been stolen. The necklace was subsequently found.
27. On 12/26/18, the new aide for Client B reported to the employer that the claimant had called him at his house.
28. The employer spoke with Client C who told them that the claimant was getting pizza delivered to her house and Client B was the one who was sending the pizza.
29. The employer called Client B and asked why he was sending the pizza to the claimant and he responded that he wanted to do it.
30. On 12/27/18, Client A's attorney called the employer and reported that the claimant had charged several transactions without her permission for the month of November and December.
31. The employer did not speak to the claimant about the transactions or the pizza prior to her discharge.
32. On 01/04/19, the claimant was notified that she was terminated for "gross misconduct."

Credibility Assessment:

At the initial hearing, the claimant testified that she didn't have any contact with Client B from 04/18/18 until on or about Thanksgiving and only after that time, began accepting a pizza delivery every now and then from Client B. The claimant also testified that she received permission from Client A's attorney before making any purchases on the credit card.

At the remand hearing, the employer presented testimony and evidence to show that the claimant had been receiving pizza deliveries from Client B regularly beginning in February of 2018 until she was discharged from the job. Therefore, the claimant's testimony regarding her lack of contact with Client B and that she only took him up on his offer every now and then cannot be deemed credible. The employer also presented an email from Client A's attorney which indicated that the claimant did not request permission before making any purchases with Client A's credit card. Although the document is considered hearsay, the document coupled with the employer's testimony from the original hearing is deemed reliable and credible. The claimant's testimony that she did get permission is no longer credible.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not subject to disqualification.

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 relevant 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

This section of law disqualifies a claimant from benefits if his or her separation was attributable to either a knowing violation of a reasonable and uniformly enforced policy or deliberate and wilful misconduct. Under G.L. c. 151A, § 25(e)(2), the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). After the first hearing, the review examiner concluded that the employer had not met its burden. Following our review of the record

from both the initial and remand hearings, as well as the consolidated findings of fact and the documentary evidence, we now conclude that the employer has shown that the claimant should be disqualified from receiving benefits.

At the outset, we note that the employer has established the existence of reasonable policies that, among other things, prohibit employees from accepting gifts and money from clients or exchanging telephone numbers with clients. The employer's policies also require employees to protect the confidentiality of clients' personal and medical information and to report any suspected incidents of neglect, abuse or misappropriate use of a patient's property. The findings also indicate that the claimant was aware of such policies. However, the employer did not establish that these policies were uniformly enforced. Thus, we conclude the employer has not met its evidentiary burden under the "knowing policy violation" prong of G.L. c. 151A, § 25(e)(2). We now consider whether the employer has established that it discharged the claimant for deliberate and wilful misconduct within the meaning of this provision.

The Massachusetts Supreme Judicial Court has held that "deliberate and wilful disregard of the employer's interest suggests 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, 4306 (1978) (citations omitted). Thus, 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). In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonable of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

After remand, the consolidated finding establish that the employer expects employees to: 1) maintain the confidentiality of all client information, 2) not to abuse clients including financially, and 3) only use a client's credit card for authorized and necessary purchases. *See Consolidated Findings ## 8, 9, and 10.* The employer policies referenced above also codify expectations that employees not accept money or other gifts from clients or exchange telephone numbers with clients. *See Consolidated Findings # 3.* The findings establish that all of these expectations are reasonable, as their purpose is to insure both professional and ethical standards and the safety of clients in the employer's care as well as compliance with relevant laws concerning health information. *See Consolidated Findings ## 4, 8 and 11.* The findings further establish that the claimant was aware of these expectations, as she had received and acknowledged the written policies, was told about the employer's expectations, received warnings during the course of employment, and was removed from the care of one client for violating the policies. *See Consolidated Finding of Fact ## 5 and 18.* Finally, as discussed below, the findings establish that the claimant intentionally violated all these expectations with respect to two of the employer's clients identified in the findings as Client A and Client B.

With respect to Client A, the consolidated findings show that, on an unknown date, the claimant took Client A shopping and charged over \$300.00 on the Client's credit card. Following this incident, on March 28, 2018, the employer told the claimant that she could not put charges on Client A's credit card without permission from the Client's lawyer. *See Consolidated Findings ## 15 and 16.* Around December, 2018, the claimant took Client A shopping. The claimant did not

secure the permission of Client A's lawyer prior to making any purchases using the Client's credit card. *See Consolidated Finding # 25.* On December 27, 2018, Client A's attorney reported to the employer that, in November and December, 2018, the claimant had charged several transactions without permission. *See Consolidated Finding # 30.* The claimant has offered nothing to mitigate her intentional failure to either abide by the employer's reasonable directive not to use Client A's credit card without permission or meet the employer's reasonable expectation that she only use a client's credit card for authorized purchases. Thus, we conclude on the record before us that the claimant engaged in deliberate and wilful misconduct within the meaning of G.L. c. 151A, § 25(e)(2), when, in November and December, 2018, she used a client's credit card without authorization.

Regarding Client B, the findings establish that, in February 2018, the claimant began accepting the receipt of pizza deliveries from the Client. The claimant received such free pizzas on at least ten occasions between February and late April, 2018. *See Consolidated Findings ## 13 and 14.* In the early spring of 2018, the employer had reason to believe that the claimant was manipulating Client B relative to the tracking and reporting of the claimant's time. As a result, on April 19, 2018, the employer issued the claimant a written warning, which removed Client B from the claimant's care and directed the claimant to have no contact with Client B. *See Consolidated Findings ## 18, 19 and 20.* Given the employer's need to maintain professional standards and protect clients from abuse, we believe that this no contact order was reasonable. The findings, however, establish that, between April and December, 2018, the claimant repeatedly and consistently violated this directive and contacted Client B. *See Consolidated Findings ## 21, 23, and 27.* Moreover, following the issuance of the no contact warning, on at least 29 occasions, the claimant again accepted the delivery of pizza, which was paid for by Client B. *See Consolidated Findings ## 21–24.* Again, the claimant has offered nothing to mitigate her failure to either abide by the employer's no contact directive or meet its reasonable expectations regarding accepting gifts from clients.

Overall, the record before us demonstrates that the claimant was aware of the employer's reasonable directives concerning Clients A and B as well as the employer's policies and expectations concerning professional conduct, client credit card use, accepting gifts from client and financial abuse of clients. The claimant failed to abide by the employer's directive or meet its reasonable expectations. There are no mitigating factors to show that she was not acting in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the review examiner's original decision to award benefits is not supported by substantial and credible evidence or free from error of law, and that the claimant engaged in 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 reversed. The claimant is denied benefits for the week beginning December 23, 2018, and for subsequent weeks, until 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.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 28, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
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.

MJA/rh