

Where the review examiner made sufficient findings of fact to show that the claimant had inappropriate contact and conversations with a client of the employer's food pantry, the decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is free from error of law.

**Board of Review
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Issue ID: 0029 3207 68

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 1, 2019. He filed a claim for unemployment benefits with the DUA, and the claim is effective January 27, 2019. On March 1, 2019, the DUA sent the claimant a Notice of Disqualification, informing him that he was not eligible to receive unemployment benefits. 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 May 25, 2019.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 accept the claimant's application for review. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision to deny benefits 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 found and concluded that the claimant had inappropriate communications with a client of the employer's business.

Findings of Fact

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

1. The claimant worked for the employer, a food pantry, from November 4, 2016 to February 1, 2019 as a Pantry Coordinator.

2. The employer had a policy, which prohibited harassment.
3. The purpose of the policy was to ensure a hostility-free workplace for employees and clients.
4. The claimant received training on the harassment policy on November 16, 2016.
5. The employer applied the policy to all employees.
6. The employer had an expectation that its employees maintain professional boundaries.
7. The claimant was involved with the employer as a volunteer prior to becoming a permanent employee. The employer documented instances of the claimant crossing boundaries with clients throughout his pre-employment and employment periods.
8. Throughout the claimant's employment, the claimant did things that exceeded the scope of his duties such as giving a client money for formula, picking up a sewing machine from a client who wished to donate it, or waiting with a client while the client waited for a ride, all of which the employer addressed with the claimant.
9. The claimant often gave client's [sic] children candy, which the employer talked to the claimant about on several occasions from January to 2017 to March of 2017.
10. In March of 2017, the claimant received a positive evaluation noting that the claimant makes clients feel welcome, but criticizing the claimant giving sweets to clients.
11. In the fall of 2017, the claimant had some medical issues that adversely affected his emotions.
12. On November 28, 2017, the claimant accompanied a female client outside because her ex-boyfriend was there, about which the client complained the next day. The employer [sic].
13. In the first half of 2018, the claimant began messaging a nineteen-year-old client and offering items, such as a toddler bed that his grandson does not use anymore and a toy.
14. In June of 2018, the claimant began having a negative interaction with another employee, which become hostile.

15. In September and October of 2018, the claimant sought treatment for anxiety and depression stemming from a stroke suffered six months prior and a felony conviction that cost him his job with a municipal police department. The claimant was previously diagnosed with [sic].
16. In October of 2018, the client called the employer's facility to ask if any diapers were in. The claimant took the call. The claimant stated yes and told the client to stop by. The client went to the facility with her ex-boyfriend as it was closing. The claimant was talking on his cell phone and he came to door and handed the client some diapers and wipes. No more than ten minutes later, the claimant called the client's cell phone. The client did not recognize the number so she had her ex-boyfriend answer it. The ex-boyfriend answered and then handed the phone to the client. The client recognized the claimant's voice. The claimant told the client that the facility was closed on Columbus Day, to which she replied that she knew. The call ended. No more than ten minutes later, the client received a text from the claimant stating that he hoped it was not an issue calling her. The client felt that the interaction was weird, so she blocked his number.
17. The client did not provide her cell phone number to the claimant.
18. When the client visited the employer's facility, the claimant made comments about how the client looked.
19. By December of 2018, the claimant believed his medical issues to be resolved by treatment.
20. In December of 2018, the nineteen-year-old client received Facebook messages from the claimant. The messages had the claimant's name and a picture of the claimant and his grandson. On December 14, 2018, the claimant "waved" at the client via Facebook and on December 18, 2018, the client "waved" back.

December 18, 2018

Claimant: That was a pleasant surprise.

Client: ☺

Claimant: How are you?

Client: I'm good, been busy.

Claimant: Same here. I was very surprised you waved. Unless it was an oops. Hopefully it was not.

Claimant: [missing message]

Client: Yes I'm trying!

Claimant: Anything "Santa" can buy him??? I know it must be tough this time of year but your [sic] a great mom. Or for mom of course.

Client: Aw thank you! I have the toy funds I've been trying to get most of his presents from them.

Claimant: May I join?

Client: That would be awesome, thank you very much [claimant's name]

Claimant: What can I get him???

Client: He loves the wooden train tracks and trains. He doesn't have those yet.

Claimant: Wooden trains with tracks done. And since I have had a crush on you since we first met (hope you didn't notice lol) what would you like or shall it be a surprise. [sic] Also while being completely honest I would love the chance to know more about you? [sic] If you are interested? If not no worries or hard feelings.

Client: I'm not really interested right now. Thank you for helping me out though.

Claimant: Of course. Hope you tell me if you EVER are. Well I will text when gifts are ready.

December 20, 2018

[Claimant:] At work in a [sic] hour any chance of dropping off gifts.

Client: I'm not in the area at the moment. Is the [employer's facility] open on Monday?

Claimant: No closer [sic] on Monday and Tuesday. I'm off Monday, Tuesday and Thursday. I'm assuming you're uneasy of dropping off. That's ok I can just keep in my car. Just FYI I have my grandson Saturday and celebrating Xmas on Sunday.

Client: Is the [employer's facility] open next Wednesday?

Claimant: Yes.

December 30, 2018

Claimant: Hope you feel better. I'm not trying to stalk you as I know you have no interest in me. I can always just drop off on your door step on Tuesday and you will never have to see me.

Client: No it's okay I can pick up at the [employer's facility] tomorrow.

December 31, 2018

Claimant: Sorry for bugging you although I think your [sic] beautiful inside and out I can only hope you may someday feel that way. You would be treated as a goddess without a worry in the world. Happy New Year XXXXX

Client: I just wanted to let you know, I don't think it's really appropriate the way you message me considering I am a client of the [employer]. I want to feel comfortable going there. I am only 19 years old and I am pregnant. I know you are trying to be nice to me. But you are over stepping your boundaries.

21. The client began feeling afraid because she felt that the claimant knew where she lived.
22. The client stopped going to the employer's facility to use its services.
23. In January of 2019, the client discussed her discomfort with going to the employer's facility to use the available services with a third party human services agency.
24. The third party human services agency contacted the employer about the situation, provided text messages, and the employer began an investigation.
25. The employer met with the claimant and questioned him regarding the behavior. The claimant denied the allegation completely. When confronting him with the messages, the claimant suggested that it was not him further stating that he does not do things like that and that he knew it was something that he could get fired for.
26. On February 1, 2019, the employer discharged the claimant from employment.
27. On February 2, 2019, the claimant emailed the employer stating in part, "I continue to maintain I did NOT do this and since no name was mentioned of the item read I can tell you who it was. A client named [nineteen-year-old client's name], [sic] I know this because she asked for a loan right before christmas [sic] and I explained I could not as that was not allowed. Notice her name was not mentioned yesterday but. [sic] I knew who it was and when she reached out to me on facebook [sic], like any other clients she was immediately blocked., [sic] but she told me money was tight because she was only 19 and pregnant. My facebook [sic] page is currently being reviewed for any other hackers by their security team as when you put in my email it shows two accounts."

28. On February 17, 2019, Facebook removed the claimant's cell phone number from a Facebook account "because it was registered and verified by another person on Facebook."

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact, as they are supported by substantial and credible evidence in the record, except as follows. We note that Findings of Fact ## 12 and 15 contain incomplete sentences. It is not clear from either finding what exactly the review examiner was intending to find. However, portions of the findings are supported by testimony and documentation in the record. Therefore, as to Finding of Fact # 12, we accept the first sentence of the finding only, as it is supported by the employer's record of incidents and conversations it had with the claimant over the course of his employment. *See Exhibit # 8, p. 1.*

As to Finding of Fact #15, we note that the review examiner found that the claimant had suffered a stroke "six months prior" to September and October of 2018. It was undisputed during the hearing that the claimant's stroke occurred in June of 2016. This date is also reflected in the narrative of at least one medical document contained within Exhibit # 22, dated October 2, 2018, and titled, in part, "Assessment Update Session Information." In addition, the finding contains an incomplete sentence, "The claimant was previously diagnosed with." We reject that portion of the finding, as it is unclear what diagnosis the review examiner was going to refer to in that finding. Thus, we accept the first sentence of Finding of Fact # 15, with the exception of the time when the claimant had a stroke. We further note that the claimant's medical conditions are not critical to the outcome of this matter, because the claimant denied all the behavior associated with his discharge. He did not argue that he engaged in the conduct alleged, but his conduct was somehow mitigated by a medical condition. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See Lagosh v. Comm'r of Division of Unemployment Assistance*, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found).

Following our review of the entire record, and noting this issue with the review examiner's findings of fact, we conclude that the review examiner's decision to deny benefits is based on substantial evidence and is free from any error of law affecting substantive rights. The employer has shown that the claimant "brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect," and, thus, should be denied unemployment benefits under G.L. c. 151A, § 25(e)(2). *See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning January 27, 2019, 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 - July 10, 2019



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.

SF/rh