The claimant's statement, that had she known she was going to be fired she would have just engaged in the alleged misconduct, was not a threat, but merely an expression of frustration on the claimant's part. She is eligible for unemployment benefits.

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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 March 19, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 2, 2019. 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 June 19, 2019. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest by making a threatening statement, is supported by substantial and credible evidence and is free from error of law, where the alleged threat consisted of the claimant stating that if she had known she was going to get fired, she would have just engaged in the misconduct that was attributed to her.

Findings of Fact

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

1. The claimant worked as a full-time certified nursing assistant (CNA) for the employer from October 1989 until March 14, 2019.

2. The employer has both an independent living program and assisted living program. The claimant primary [sic] worked as a "responsible person" with the independent living program residents.

3. The employer maintains an employee handbook. The claimant received the employee handbook at the time of hire.

4. The handbook contains the employer's "employee conduct" policy. It states in relevant part, "Employee who fail to satisfy these requirements will be subject to disciplinary action that may range from counseling notices to warning notices to suspension to termination. In each case of misconduct or unsatisfactory performance, the appropriate disciplinary action will be determined at the Home's discretion, on the basis of the particular facts." "The following conducts are some of the reasons to justify disciplinary action, including immediate discharge." The list includes, "Striking or threatening a Resident, employee, or any other person on the Home's property or off its property if related to work."

5. The employer expects that employees will refrain from making threatening comments.

6. The employer also maintains a "Preventing, Identification, Investigation and Reporting of Abuse" policy (the "abuse policy"). The abuse policy states in relevant part, "If the alleged or suspected abuse implicates a staff member/volunteer/companion, the Supervisor shall immediately: a) take action to assess and protect the Resident; b) suspend the staff member until the investigation is complete." It also defined verbal abuse as, "the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance regardless of their age, ability to comprehend, or disability."

7. The claimant received an updated copy of the abuse policy annually.

8. During an investigation, the employer keeps documented notes and statements.

9. On or around March 13, 2019, a resident's family member made a complaint about the claimant's conduct to the shift supervisor. The shift supervisor reported it to the human resources (HR) department. The resident's family member also made the claimant aware she was filing a complaint.

10. On March 14, 2019, the employer began an investigation into the complaint.

11. The director of nurses and the HR director interviewed the claimant. The claimant indicated she did not feel she was rude and indicated the resident's family member was very accusatory.

12. Later on March 14, 2019, the director of nurses and HR director met with the resident and the family member who made the complaint. During the meeting, the resident indicated she felt she had been verbally abused by the claimant. Specifically, the resident alleged the claimant had yelled at her and stated if she was not more able to care for herself she would be sent to a new unit.

13. As a result of the verbal abuse allegation, the HR director and assistant director of nurses notified the claimant she was being suspended pending investigation.

14. The claimant stated, "If I knew I was going to get fired, I would have just done it."

15. The employer perceived the claimant's statement as a threat. The employer feared the claimant would engage in retaliation against the resident if allowed to return to work.

16. After suspending the claimant, the assistant director of nurses and the HR director documented the events of the suspension meeting with the claimant.

17. Thereafter, the employer continued its investigation into the allegation of verbal abuse.

18. The employer interviewed other residents. No other allegations came about.

19. On or around March 18, 2019, the employer concluded its investigation finding the allegation of verbal abuse unfounded. However, the employer decided to discharge the claimant as a result of violating the employee conduct policy during the suspension meeting, in making a threatening statement.

20. On March 19, 2019, the director of nurses and HR director notified the claimant of her discharge. The employer informed the claimant her discharge was the result of her threatening statement made during the suspension meeting.

21. The claimant admitted to making the statement but indicated she would not have acted on it.

22. On March 20, 2019, the claimant filed a claim for unemployment benefits.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the findings of fact support an award of benefits to the claimant.

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 . . . .

Under this section of the law, the employer has the burden to show that the claimant is not entitled to benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996).

After the hearing, the review examiner concluded that the employer had not carried its burden to prove a knowing violation of a *uniformly* enforced policy, because by reserving the right to exercise discretion, it could not show that it disciplined employees uniformly for policy violations. We agree with her analysis.

In order to determine whether an employee's actions constitute deliberate misconduct in wilful disregard of the employer's interest, 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). The review examiner concluded that the employer had carried its burden to show deliberate misconduct, as it established that the claimant had made a threatening statement and no mitigating circumstances were set forth to excuse the claimant's conduct. We disagree with this conclusion.

The review examiner found that the employer had an expectation that employees refrain from making threatening statements at work. The review examiner also found that the claimant made a statement to the employer, which the employer perceived as a threat, during an investigation into an allegation that the claimant was verbally abusive to a resident. Specifically, after being informed that she would be suspended from work on March 14, 2019, the claimant stated to the employer that, if she had known she was going to be fired, she would have just engaged in the alleged misconduct. Although the employer ultimately concluded that the abuse allegation against the claimant was unfounded, it decided to discharge the claimant for making a threatening statement during the employer's investigation. The employer explained that it feared the claimant would retaliate against the resident if she was allowed to return to work.

While the claimant probably could have acted more professionally in response to the employer's investigation into the allegations against her, there is no indication in the record that she intended to harm the employer or its residents at any time. On the contrary, we can reasonably infer from the findings before us that, at the time the claimant made the allegedly threatening statement, she was merely expressing her frustration at being accused of serious misconduct, which she denied engaging in, and which the employer ultimately determined was unfounded.

We also do not agree that the claimant's statement rose to the level of a threat of future harm to the employer or its residents. Thus, based on the totality of the evidence before us, we believe the employer did not carry its burden to show that the claimant engaged in prohibited misconduct.

We, therefore, conclude as a matter of law that the claimant did not engage in a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), by her actions on March 14, 2019.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending March 16, 2019, and for subsequent weeks if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION – October 15, 2019

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.
SVL/rh