0030 1739 56 (Nov. 25, 2019) - The claimant was fired for a Facebook post critical of the employer school district's Superintendent. Held the claimant was eligible for benefits under G.L. c. 151A, § 25(e)(2), because the employer failed to prove that it had previously communicated expectations about such social media activity or that the claimant's actions constituted misconduct.

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: 0030 1739 56

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. Benefits were denied on the ground that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on April 10, 2019. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on May 15, 2019. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On September 16, 2019, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence about the employer's expectation underlying its reason for discharge and any mitigating circumstances. Both parties attended the remand hearing with counsel. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded 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), when he posted comments about the employer's Superintendent on Facebook, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked for the employer, a regional school district, from February of 2015 to March 21, 2019 as a Custodial Supervisor.

2. The employer had a social media policy, which stated:

   "The Superintendent and the School Principals will annually remind staff members and orient new staff members concerning the importance of maintaining proper decorum in the on-line, digital world as well as in person. Employees must conduct themselves in ways that do not distract from or disrupt the educational process. The orientation and reminders will give special emphasis to:

   1. Improper fraternization with students using social media or other electronic means.

      a. Teachers may not friend or follow current students on social media.
      b. All electronic contacts with students should be through the district's computer and telephone system, except emergency situations.
      c. Team, class, or student organization pages, accounts, or groups will be created only in conjunction with the coach or faculty advisor. All groups must include the appropriate administrator as a member. Access to the page will remain with the coach or faculty advisor.
      d. All contact and messages by coaches and faculty advisors with team members shall be sent to all team members, except for messages concerning medical or academic privacy matters, in which case the messages will be copied to the appropriate administrator.
      e. Teachers will not give out their private cell phone or home phone numbers without approval from the district.
      f. Inappropriate contact via phone or electronic devise [sic] is prohibited.

   2. Inappropriateness of posting items with sexual content.

   3. Inappropriateness of posting items exhibiting or advocating use of drugs and alcohol.

   4. Examples of inappropriate behavior from other districts, as behavior to avoid.

   5. Monitoring and penalties for improper use of district computers and technology.

   6. The possibility of penalties, including dismissal from employment, for failure to exercise good judgment in on-line conduct.

The Superintendent or designees will periodically conduct internet searches to see if teachers have posted inappropriate materials on-line. When inappropriate use of computers and websites is discovered, the School Principals and Superintendent will promptly bring the inappropriate use to the attention of the staff member and may consider and apply disciplinary action up to and including termination."

3. The employer did not apply a progressive system of discipline to that, which gave rise to the claimant's discharge from employment.

4. The employer maintained an expectation that employees conduct themselves in ways which do not distract or disrupt the education process and employees not engage in conduct unbecoming resulting from insubordinate, libelous and slanderous comments made through public social media account [sic] directed at the Superintendent and a School Committee member.

5. The employer also had concerns over confidential medical information being divulged online.

6. The employer's policy was made available to the claimant online in November of 2018 and email notifications were sent out to all employees regarding its availability.

7. The claimant felt that he was a victim of harassment/bullying by the Superintendent, which caused him to suffer from anxiety. The claimant received treatment for anxiety.

8. The claimant was on a medical leave of absence from February 12, 2019 to February 25, 2019 due to situational anxiety.

9. Shortly after his return to work, the claimant received some negative feedback regarding his job performance contained in a letter issued by the Principal.

10. The claimant suspected that the Superintendent was behind the letter criticizing his job performance.

11. On March 2, 2019, the claimant submitted a post on Facebook, which stated:

"Attention [name] school district families
When are you all gonna finally start asking questions???
Why are so many faculty members leaving in the last year??
Getting Fired?
On stress related leaves?
Unhappy?
Fearful?
On medication due to stress?

Our leader
The Superintendent…
[name of Superintendent]
She's a BULLY!!!
She leads by fear and intimidation.
Why do we allow bullying by our supposed leader when its not allowed by our students??
She's running every great employee out of the district. Why??? Cause she fears others who don't fear her.
She's targeting employees and creating false narratives trying to make them look bad and promote herself.
Look beneath the surface and see the reality.
[Name of Superintendent] undermines everyones work and has created a hostile work environment that no one can succeed in. She has continuously set people up to fail so she looks good.
Time to wake up [town name] and [town name] families and put an end to this. She is ruining our schools. Our kids and community members are the ones who are suffering because of one individual who only cares about herself and the power she has. She does not care about our kids or our communities. I have not heard one good word about her when speaking to any faculty member at any of the 3 schools.
She has survived with the help of her best friend who also serves as the co-chair on the school committee ([name of individual]) helping influence school committee members.
Only 5 or 6 yrs ago the union at [town name] had a vote of no confidence in [name of Superintendent] when she was the SPED director but now she is capable of running or district?? Really????
Talk to the faculty one on one and you will find out the truth.
She has the principals do her dirty work so she will have someone to take the fall for her.
She is smart, diabolical, and down right underhaded.
She needs to be stopped now.
Faculty members it is time to stand up and have your voices be heard. Stop living in fear.
I'm sure I will be fired after this post but I'm ready to sacrifice myself for the good of our community. We need to take our schools back.
Our School committee needs to get their heads out of the sand and wake up before our school district is run into the ground.
I finally had enough and I'm reaching out to all our community members to please step up and hold our Superintendent accountable for her actions.
Please share with other [town name] and [town name] residents.
We need to unite
And
Take back our schools.
Anyone want to private message me and I will gladly set up a time to meet and fill you in.

I'm posting this because I am a concerned citizen and truly care for all the families in our great district and the awesome faculty members who work in each school." [*sic*]

12. The claimant, who had three children in the regional school district, believed that he was doing the right thing. The claimant felt "cornered" because nothing was getting done after the claimant addressed some of his concerns with the Principal and the Chair of the School Committee.

13. On March 3, 2019, the Principal sent an email to the claimant notifying him that he was being placed on Administrative Leave for an investigation.

14. On March 4, 2019, the Principal sent a letter to the claimant stating that it was the employer's intent to terminate his employment "for conduct unbecoming resulting from insubordinate, libelous and slanderous comments made through your public social media account directed at the Superintendent and a School Committee member."

15. The employer is not alleging that the claimant refused to perform reasonable duties as directed by a superior.

16. On March 19, 2019, a hearing was held, during which the claimant stated why he posted his comments to social media.

17. On March 21, 2019, the employer discharged the claimant from employment for "insubordinate and disruptive activities on social media."

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except to note as follows. Consolidated Finding # 6 refers to an employer policy without identifying it. Since the only policy referenced in the consolidated findings is in Consolidated Finding # 2, the employer's social media policy, we assume that Consolidated Finding # 6 is referring to this social media policy as the policy that was made available to the claimant in November, 2018. We also note that, while Consolidated Finding # 12 in not inaccurate, it fails to capture the claimant's full explanation for his March 2, 2019, Facebook post, as explained more fully below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, in light of these consolidated findings, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was terminated from his employment, his 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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The review examiner found that the employer discharged the claimant for insubordinate and disruptive activities on social media. Consolidated Finding # 17. More specifically, the employer's termination letter states that his employment was terminated for social media postings against the Superintendent and social media activity in promoting an online petition against the Superintendent.[1]

We first consider whether the employer has satisfied its burden to prove a knowing violation of a reasonable and uniformly enforced rule or policy. The only policy presented into evidence was the employer's social media policy, which states that the employer *may* take disciplinary action up to and including termination for policy violations. *See* Consolidated Finding # 2. Even if we concluded that the claimant violated this policy, which is not at all clear, the policy on its face provides that the employer has discretion with imposing discipline for violations. Without further evidence demonstrating that individuals who post similar comments on social media are also terminated from employment, the employer has not shown that its social media policy is uniformly enforced, as required under this section of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer can meet its burden if it shows that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. 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). A claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The review examiner's findings indicate that the claimant was made aware of the employer's social media policy and the expectations contained therein. *See* Consolidated Finding # 6. But the findings do not reveal how the claimant violated that policy. We see nothing in the claimant's Facebook post, which is printed in full in Consolidated Finding # 11, that could be

[1] *See* Exhibit 10, the employer's termination letter. While not explicitly incorporated into the review examiner's findings, these additional details from the termination letter are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

interpreted as violating the policy's prohibition of "fraternization with students," containing "sexual content," "advocating use of drugs or alcohol," or evidence that the claimant used the employer's computers or technology to post it. *See* Consolidated Finding # 2. The employer's termination letter seems to suggest that the claimant violated the policy's prohibition against disrupting the educational process. *See* Consolidated Findings ## 2 and 17, and Exhibit 10. However, it is unclear how it did so, as nothing in the record shows that students could not be educated because of the claimant's social media activities.[2]

To be sure, the claimant called the Superintendent a bully, and a fair reading of the posting is that the claimant wanted to generate support to remove her from her position. *See* Consolidated Finding # 11. The claimant was a member of the community with children in the school district. *See* Consolidated Finding # 12. Under cross-examination, the employer's human resources specialist conceded that the employer did not expect members of the community to refrain from getting together to discuss their concerns about the Superintendent or the school committee. He also admitted that neither the claimant nor anyone else had ever been warned for social media discussions criticizing the school district or the Superintendent. Rather, his concerns were that the claimant did not go through the proper channels, such as bringing his issues to human resources.[3] If there was an expectation to follow a particular protocol for airing the claimant's grievances, the employer has not shown where that protocol appears in a written policy or that the claimant had been made aware of it during the course of his employment.

Consolidated Finding # 4 provides that the employer maintained an expectation that its employees not engage in "conduct unbecoming resulting from insubordinate, libelous and slanderous comments made through [a] public social media account directed at the Superintendent and a School Committee member." This quoted phrase is copied from the employer's March 4, 2019, intent to terminate letter. *See* Consolidated Finding # 14 and Exhibit 8. Again, the record is wholly lacking in identifying how the claimant's social media post was insubordinate, libelous, or slanderous. There is no evidence or even an allegation that the claimant refused to perform his work duties or a directive from a supervisor. *See* Consolidated Finding # 15. Thus, the employer has not established that the claimant engaged in insubordinate behavior. Even if it were self-evident that the employer expected its employees not to make libelous or slanderous comments, nothing in the record establishes that the claimant's Facebook postings were. To constitute libel or slander, the speech must be defamatory.[4] The employer has not presented substantial evidence to show that the claimant's statements were false or that they were anything other than opinions criticizing the school district's public officials.[5]

---

[2] The employer testified to confidential personnel information and students' names being listed on social media or on the petition. The petition is not in evidence and the review examiner made no findings about this allegation of confidential information, presumably because he did not find it to be supported by substantial and credible evidence. We agree.

[3] These portions of the employer's testimony are also part of the unchallenged evidence in the record.

[4] *See* Black's Law Dictionary 927, 1392 (7th ed. 1999). Defamation is defined as, "[t]he act of harming the reputation of another by making a false statement to a third person." Id. at 427.

[5] The record has not been developed enough to confirm whether the individuals who commented to the claimant's Facebook post were coworkers. If any were, the claimant's speech may also constitute protected concerted activity under G.L. c. 150E(2). *See* In the Matter of Salem School Committee and Babcock, MUP-04-4008 (Commonwealth Employment Relations Board Apr. 14, 2009) (employer, who ordered a school teacher to shut down a website where coworkers and other members of the public posted comments critical of the employer, had improperly infringed on the teachers' right to discuss matters of mutual concern under G.L. c. 151E, § 10(a)(1)), *cited in* Board of Review

In the fact-finding questionnaire submitted to the DUA on April 5, 2019, the employer's response seems to suggest that the claimant violated the social media policy's expectation to "exercise good judgement [sic] in online conduct."[6] If this is the real reason for the claimant's discharge, it is not, by itself, grounds for disqualifying him from receiving unemployment benefits. The Supreme Judicial Court has stated, "When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield, 377 Mass. at 97.

Finally, it is worth noting that, even if we assume, *arguendo*, that the claimant's Facebook posting constituted misconduct, the record fails include substantial evidence that the claimant's actions were done in wilful disregard of the employer's interest. Contained in the claimant's Facebook post is the statement, "I'm sure I will be fired after this post but I'm ready to sacrifice myself for the good of our community. We need to take our schools back." Consolidated Finding # 11. During the hearing, the employer argued that the statement, "I'm sure I will be fired," was sufficient proof that the claimant knew his behavior was wrong and harmful to the employer. The claimant disagreed, explaining that he did not think he was doing anything wrong, that he thought he was doing the right thing to let community members understand what was happening in the school district, but, because he believed the Superintendent to be retaliatory and vindictive, he knew he could be fired. A portion of this explanation is captured in Consolidated Finding # 12, which simply states, "The claimant, who had three children in the regional school district, believed that he was doing the right thing." If the claimant's qualification for benefits rested upon whether he believed he was acting for the greater good of the school district or with the intent to harm the district, we would remand this case once again to have the review examiner expand Consolidated Finding # 12. That is not necessary, because we conclude that the employer failed to establish that it had previously communicated expectations about such social media activity related to criticizing its public officials or that the claimant's actions constituted misconduct.

We, therefore, conclude as a matter of law that the employer has failed to prove that the claimant either knowingly violated a reasonable and uniformly enforced policy or engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

Decision BR-117550 (Aug. 12, 2011). Board of Review Decision BR-117550 is an unpublished decision, available upon request.

[6] *See* Exhibit 2, page 5, where the employer's Human Resources representative quoted the following portion of the social media policy: "the possibility of penalties including dismissal from employment for failure to exercise good judgment in online conduct."

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 17, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 25, 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.

AB/rh