The employer did not carry its burden to show that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2), where the employer's case consisted mostly of hearsay, the context of the claimant's alleged misconduct was not clear, his admission to the conduct did not necessarily imply that he had the state of mind necessary for disqualification, and a report completed by a state agency regarding the claimant's conduct was not entered into evidence for review during the hearing.

Board of Review
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Issue ID: 0030 3441 06

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 his position with the employer on March 21, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 12, 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 July 26, 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, 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 accepted the claimant's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 claimant was discharged for alleged inappropriate and unethical behavior on the job after the Massachusetts Department of Mental Health concluded its investigation and found that the allegations against the claimant were substantiated.

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 employee for the employer, a non-profit organization, between 06/11/2007 and 03/21/2019, when he separated.

2. The claimant's most recent job title was evening supervisor.

3. The claimant's direct supervisor was the residential manager. The claimant's upper level manager was the team leader.

4. The employer maintains a Code of Professional Ethics requiring employees to "Strive at all times to provide the most professional, clinically appropriate, effective and efficient services and supports to each person served."

5. The purpose of the Code of Professional Ethics was to ensure proper service of clients.

6. The Code of Professional Ethics does not identify what discipline, if any, will be imposed for a violation of its terms.

7. The Code of Professional Ethics was issued to the claimant upon hire.

8. The employer expected employees to provide professional, appropriate, effective, and efficient care to clients.

9. The purpose of this expectation was to ensure proper service of clients.

10. This expectation was communicated to the claimant through issuance of the Code of Professional Ethics.

11. The claimant placed his hands upon a client's back and shoulders (incident 1).

12. The claimant commented to a client about personal hygiene in the shower stating words to the effect of next time I'll need to get in with you and show you (incident 2).

13. At least one other employee witnessed incident 1 and incident 2.

14. On 01/04/2019, the human resources manager and the residential director received a report of incident 1. On 01/04/2019, the residential director received a report of incident 2, which she then reported to the human resources manager.

15. The employer suspended the claimant's employment effective 01/04/2019.

16. The employer filed a report of client mistreatment with the Department of Mental Health (DMH) regarding incident 1 and incident 2. DMH conducted an investigation which included meeting with multiple staff, the client, and the claimant. The claimant admitted to the DMH investigator engaging in incident 1 and incident 2. Following the investigation, DMH substantiated the allegations of client mistreatment.

17. On 03/21/2019, the employer terminated the claimant's employment for client mistreatment regarding incident 1 and incident 2.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's 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 reject the review examiner's legal conclusion that there is substantial and credible evidence in the record to support a disqualification under G.L. c. 151A, § 25(e)(2).

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 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 . . . .

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).[1] The review examiner concluded that the employer had carried its burden.

Here, the employer alleged that the claimant violated its Code of Professional Ethics over the course of two incidents. The employer's witness who testified during the hearing, the human resources manager, was not present for either incident. She had no direct knowledge of what happened. The witness who allegedly saw the two incidents also did not testify. *See* Finding of Fact # 13. The human resources manager testified to a report compiled by the Department of Mental Health (DMH) following an investigation by the DMH. This report is not in the record either. Thus, we are confronted with whether the employer's hearsay or, at the least, its indirect

[1] The review examiner concluded that the employer had not shown a knowing violation of a reasonable and uniformly enforced policy of the employer, which is another grounds for disqualification under G.L. c. 151A, § 25(e)(2). As will be clear from the content of our decision, the employer has not shown that the claimant knowingly violated the employer's Code of Professional Ethics. Our conclusion with regard to the deliberate misconduct analysis, specifically regarding the claimant's state of mind, applies similarly to the knowing violation standard.

evidence was substantial and credible evidence to show that the claimant deliberately violated the Code of Professional Ethics.

"Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627-628 (1984), *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981); G.L. c. 30A, § 1(6). In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value. *See* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530 (1988). Whether hearsay is corroborated by other evidence can factor into whether the hearsay will be accepted as substantial evidence. *See* Covell v. Dep't of Social Services, 439 Mass. 766, 785–786 (2003).

Initially, we note that the two incidents, as stated in Findings of Fact ## 11 and 12, are not obviously contrary to the Code of Professional Ethics or the employer's associated expectations. The employer expected that its employees "provide professional, appropriate, effective, and efficient care to clients." Finding of Fact # 8. In the first incident, the claimant touched a client's back and shoulders. Without more context, it is not clear that the touching was unprofessional or inappropriate. We note that the claimant was employed as an evening supervisor in a residential program. It would not seem out of the ordinary for someone in the claimant's position to, at times, have contact with clients, such as when the claimant is helping with the routines of daily life. We also note that the termination document provided by the employer during the hearing states that the claimant placed his hands on a client and "continued to do so after this client had asked you to stop." Exhibit # 2, p. 1. The review examiner did not find that continued contact occurred. She found that the claimant placed his hands on a client's back and shoulders, an action which, on its own, is not necessarily indicative of misconduct or inappropriate touching. Finding of Fact # 11.

The second incident also is not obviously contrary to the employer's expectations. From what we can gather from Finding of Fact # 12, a client was in the shower and the claimant was discussing personal hygiene with the client. He indicated that he could show the client what to do while in the shower. Again, no context is given as to what was going on for the claimant to have said this. The claimant was working in a type of caregiver role, and such a statement could be in keeping with that role. Of course, if said in a different context, or with a certain type of voice inflection, the comment could be taken a different way. However, such specifics are not noted in the findings of fact.[2]

Even if we were to conclude that the conduct did constitute misconduct, that is, it violated the employer's expectations or Code of Professional Ethics, there are insufficient findings of fact for us to conclude that the claimant's misconduct was done deliberately or in wilful disregard of the employer's interest. "Deliberate misconduct in 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, 436 (1978) (citations omitted). Here, the context of the comments is unclear, especially in light

[2] The human resources manager, the employer's only witness, testified that she did not know "verbatim" the claimant's comments. She testified that the comments were reported by a staff member (who heard the comments) to another staff member [A], who then reported the comments to the human resources manager.

of the setting. No prior warnings or problems with the claimant's conduct were noted in the findings of fact, suggesting that the claimant would not have been aware that his actions were violations of the employer's expectations.[3] Although the claimant later apparently admitted that the two incidents occurred, *see* Finding of Fact # 16, the fact that the conduct occurred does not mean that the claimant had the state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2).

The DMH report appears to have played an important part in the employer's decision to terminate the claimant's employment. The claimant was suspended on January 4, 2019, and he was discharged more than two months later, only after the report was issued by the DMH. Findings of Fact ## 15–17. It is important to note that the employer did not conduct an investigation in this matter. The DMH conducted the investigation and created its report. The DMH concluded that the "allegations of client mistreatment" were "substantiated." Finding of Fact # 16. The report is not in the record. No one who interviewed the witnesses testified during the hearing. Although the human resources manager testified that the claimant admitted to the DMH investigators that the two incidents occurred, we note again that the context of that admission is unclear. No other findings were made as to what was said in the interviews conducted by the DMH. In addition, the standard that the DMH used to conclude that the allegations were "substantiated" is unclear. To conclude that allegations were "substantiated," the DMH may require a lesser quantum of evidence than we require to show that a claimant is disqualified under G.L. c. 151A, § 25(e)(2), which is substantial and credible evidence.

In short, the report's conclusions, along with Finding of Fact # 16, are not enough to conclude that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. It may have been the case that the employer felt it necessary to discharge the claimant after the issuance of the DMH report. However, that does not mean that the claimant is ineligible to receive unemployment benefits.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the employer failed to carry its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

[3] One warning in the record related to the claimant's scheduling habits. *See* Exhibit 3.

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 - September 27, 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