

**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: 0031 1378 72

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 the claimant benefits following her separation from employment on May 17, 2019. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On June 26, 2019, the agency initially determined that the claimant was entitled to unemployment benefits. The employer appealed and both parties attended the hearing. In a decision rendered on September 25, 2019, the review examiner affirmed the agency determination, concluding 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). The employer appealed to the Board, and the Board now accepts the employer's application for review.

Findings of Fact

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

1. The claimant worked as a Substitute Teacher, for the employer, a School District, from August 22, 2014 until June 7, 2016, when she was separated from her employment.
2. The claimant worked a varied number of hours for the employer.
3. The employer has a written policy (Mobile Computing and Communication Device Policy) that prohibits employees, which are given organization-provided laptop computers, from using the employer's laptops for non-work related purposes. The employer maintains discretion on the level of discipline one would receive for violating the policy.
4. The claimant was promoted to Clinical Care Manager in August 2018.
5. When the claimant was promoted, she was given a work laptop.

6. On August 20, 2018, the claimant was given a copy of the Mobile Computing and Communication Device Policy and signed an acknowledgment of such receipt.
7. Shortly after receiving the laptop, the claimant was invited by other managers (her co-workers) to join an on-going “g-chat” conversation on the employer “g-chat” account.
8. The claimant “joined” the conversation.
9. The claimant observed that the “g-chat” was mainly a private forum for the managers to discuss day-to-day work issues and “vent” about work-related frustrations. The claimant observed other managers use “profane” language throughout the “g-chat” on a regular occurrence.
10. The claimant and her co-workers experienced a lot of stress in their positions and felt it [sic] venting about different work-related issues or people was an appropriate way to handle some of that stress.
11. From August 2018 until May 2019, on several occasions, the claimant swore and used hateful words pertaining to work, other employees, and/or her supervisor. The claimant never expressed these thoughts or words directly to the person, which they were about.
12. The claimant observed the other managers in the “g-chat” speak similarly throughout her tenure as a manager.
13. During her tenure, the claimant witnessed her supervisor raise her voice and swear at work on multiple occasions.
14. Throughout the nine months that the claimant had participated in the work “g-chat”, she never observed any of the other managers receive any type of discipline for the language and content of what was said in the chat.
15. In May 2019, one of the managers that was active on the “g-chat” resigned (manager X). Manager X was supposed to properly move and organize files on her work laptop before returning it to the employer. Manager X failed to properly move and organize her files on the work laptop. Because of this, the employer needed to search manager X’s laptop and found the on-going and extensive work “g-chat” between the managers.
16. The employer read the some of the content of the “g-chat”, concluded that it was inappropriate, and had been used for non-work related matters. The employer read some of what the claimant had written, including profane and unprofessional language.

17. The employer met with the claimant on May 16, 2019 to speak with her about the content of the work “g-chats”. The claimant was suspended.
18. On May 17, 2019, the employer terminated the claimant for allegedly violating the employer’s Mobile Computing and Communication Device Policy.
19. The claimant did not think at the time she was participating in the work “g-chat” that she was doing anything wrong or violating any employer policies.
20. The claimant filed for unemployment benefits and received an effective date of May 19, 2019.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the employer’s appeal, we conclude that the review examiner’s findings of fact, except for Findings of Fact ## 1 and 2, are supported by substantial and credible evidence in the record. We reject these two findings, because they have no relation to the evidence presented during the hearing before the review examiner. It was undisputed that the claimant began working for the employer’s behavioral health services company on April 30, 2012, and that she worked full-time hours. *See* Exhibits ## 3, p. 1, and 4, p. 1.

The problems with Findings of Fact ## 1 and 2 do not affect the outcome of the decision. Especially where the review examiner has believed, found, and concluded that the claimant did not have the state of mind necessary to disqualify her from receiving unemployment benefits, pursuant to G.L. c. 151A, § 25(e)(2), the decision to award benefits is free from any error of law affecting substantive rights. *See Hawkins v. Dir. of Division of Employment Security*, 392 Mass. 305, 307 (1984) (review examiner has responsibility to determine credibility and weight of testimony).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning May 12, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – October 24, 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.

SF/rh