Employer failed to prove that the claimant housekeeper engaged in the misconduct of using vulgar language or lying during an investigation. Although the claimant did not finish cleaning two of her assigned rooms, it was due to mitigating circumstances. She could not finish making all of the beds because the clean linens arrived late and she ran out of time. Claimant is eligible under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0031 6005 36

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 July 11, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 6, 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 October 31, 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, she 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 remanded the case to the review examiner to obtain further evidence about the separation from the claimant. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

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, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings show that the claimant did not swear at her supervisor or lie during an investigation, as alleged, and that mitigating circumstances prevented her from completing her assigned work.

Findings of Fact

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

1. The claimant worked full-time as a housekeeper for the employer, a hotel chain, from October 2016 through July 11, 2019. The claimant had worked at the hotel under the previous owner as well.

2. The employer has rules and policies governing employee behavior, including that the use of obscene, abusive, or threatening language or gestures, and unprofessional conduct, are forbidden and can lead to discipline up to and including termination.

3. The employer has an expectation that employees will follow all managers' directives and complete their work in a professional manner without cursing and participate honestly in investigations.

4. The claimant was aware of the employer's policies and expectation as she had received the policies at hire (in English and Spanish) and acknowledged receipt on October 29, 2016.

5. The claimant had also received a 2nd written warning on March 20, 2019 for: breaking company rules, carelessness, refusal to obey orders, and poor work due to neglect. This warning was the result of the claimant's alleged failure to properly clean rooms on March 6 and March 20, 2019, and alleged failure to follow a supervisor's instructions.

6. The claimant was a union leader in her workplace and often spoke up for her co-workers or encouraged and assisted them in speaking up for themselves.

7. The claimant and two of her co-workers were on the union team negotiating a new contract. The union had noticed an increase in discipline towards these three employees and believed it was a result of their involvement in the union contract negotiations.

8. On July 7, 2019, the claimant arrived at work on time, was assigned her rooms for the day and began her work.

9. The linens were late arriving at the hotel causing the claimant to be unable to change all of the beds in her rooms. She stripped the beds, cleaned the bathrooms and replaced towels in those rooms.

10. The linens arrived in the afternoon after 2 p.m. The claimant went room by room replacing linens.

11. Due to the late arrival of linens, the claimant did not have time to make up the beds in two of her rooms. She marked this on her daily assignment sheet and informed her supervisor.

12. The supervisor did not request that the claimant stay and finish the last two rooms.

13. The claimant was scheduled to leave at 5:25 p.m., and clocked out at 5:35 p.m.

14. On July 8, 2019, the claimant's supervisor reported to the housekeeping manager that the claimant had sworn at the room inspector telling her, "You're fucked. I'm leaving early and you'll have to clean my rooms." or words to that effect.

15. On July 8, 2019, the claimant was suspended pending an investigation.

16. The housekeeping manager spoke with the claimant about her failure to clean the rooms on July 7, 2019, as part of the investigation. The claimant stated that she had been unable to finish the rooms because the linens were late causing her to be unable to change the beds. The claimant stated that she had cleaned the bathrooms in each room and replaced the towels.

17. The claimant was also asked about swearing at the room inspector on duty on July 7, 2019. The claimant denied doing so.

18. The employer reviewed surveillance recordings of the hotel and saw the claimant with her cart and the clean linens at 5:19 p.m. and determined that the claimant had lied about not having appropriate linens.

19. Determining that the claimant had purposely failed to clean two rooms assigned to her, used vulgar language, and lied to her manager during the investigation about why she had not cleaned the rooms, the employer decided to terminate the claimant.

20. On July 12, 2019, the claimant and her union representative were brought into a meeting with the employer. The claimant was terminated in that meeting for violations of the employer's policies and expectations.

21. The union, who believed the claimant and her co-workers who were working on the contract were being subjected to discipline based on their involvement, also believed the claimant's termination was invalid and encouraged her to grieve. The claimant did not believe that she would be treated fairly if she were returned to her job and declined to grieve the termination.

22. The claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) on July 7, 2019, with an effective date of July 15, 2019.

23. On August 6, 2019, the DUA issued a Notice of Approval to the claimant. The employer appealed the determination.

Credibility Assessment:

The employer's lead general manager and housekeeping manager attended the initial hearing. The claimant did not attend. On January 2, 2020, a remand hearing was held in the [City A] office. The employer's new general manager and the housekeeping manager appeared for the employer. The claimant also appeared and brought her union representative as a witness. A Spanish interpreter assisted both the claimant and the housekeeping manager.

The claimant was the only witness with first-hand knowledge to appear at either hearing. The general manager appeared at the remand hearing but had only been with the employer for 7 weeks and had no new testimony to offer. The lead general manager (who testified at the first hearing but did not appear at the remand) and the housekeeping manager (who appeared at both hearings) provided hearsay testimony.

While hearsay evidence is permissible in an administrative hearing, it must be weighed according to its reliability. The indicia of reliability on which hearsay evidence must be weighed includes: consistency of the hearsay; amount of corroboration; motive, or lack thereof, for the person offering the hearsay to have fabricated it; and, whether the original statement was given under oath or was subject to cross-examination. Given that the employer's hearsay evidence was: not corroborated; was not independently reliable; the employee with first-hand knowledge (the room inspector) did not provide a statement nor appear at the hearing allowing the claimant to cross-examine them; was rebutted by the claimant's direct and credible testimony; and that the union representative presented testimony that he, in fact, did not deem the termination valid and believed the claimant was targeted due to her involvement with the union, the hearsay evidence of the employer cannot be considered "substantial" as required by the Law because it does [sic] contain sufficient indicia of reliability.

Given that the claimant was the only person with first-hand knowledge and the hearsay evidence presented did not have the indicia of reliability, this Review Examiner credits the claimant's testimony that she did not refuse to, or internally [sic] fail to, clean all rooms assigned to her, nor did she swear at anyone on July 7, 2019.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe

that the review examiner's credibility assessment is reasonable in relation to the evidence presented.[1] In light of the new findings after remand, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

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 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).

Consolidated Finding # 19 states that the employer discharged the claimant for purposely failing to clean two rooms as assigned, for using vulgar language, and for lying about her reason for not cleaning the rooms during an investigation. The review examiner's original decision noted that the employer's policies allow for a range of discipline for violations. Since there is no evidence to show that the employer uniformly disciplined employees for similar infractions, we agree that it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, we consider whether the employer has met its burden to show deliberate misconduct in wilful disregard of the employer's interest. As a threshold matter, the employer must prove that the claimant engaged in misconduct.

As for using vulgar language, the employer's housekeeping manager testified that the claimant's supervisor reported that the claimant swore at the room inspector on July 8, 2019. *See* Consolidated Finding # 14. The claimant denied doing so. *See* Consolidated Finding # 17. The review examiner's finding is embedded in the final sentence of her credibility assessment, which states that the claimant did not swear at anyone. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a

[1] We believe the last sentence in each of the final two paragraphs of the credibility assessment have a typographical error. The context of the sentences indicates that the review examiner meant to say that the hearsay evidence does "not" contain sufficient indicia of reliability and that the claimant did not "intentionally" (rather than "internally") fail to clean all rooms.

reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.) The review examiner rejected the employer's allegation because it rested upon unreliable hearsay, whereas the claimant testified from first-hand knowledge. We agree with her assessment that the employer failed to present substantial evidence that the claimant swore. It is reasonable in relation to the evidence presented.

The parties agreed that the claimant did not finish cleaning all of her assigned rooms on July 7, 2019. *See* Consolidated Finding # 11. The question is whether she acted deliberately and 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). In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

It is evident the claimant knew the employer expected her to clean all of the rooms on a list issued to her early on July 7, 2019. *See* Consolidated Finding # 8 and Exhibit 9. Since no one suggested that the assignment was unusual, we deem the employer's expectation to have been reasonable. In two of her assigned rooms that day, the claimant did not perform the task of placing new linens on the beds. *See* Consolidated Finding # 11. It was deliberate in the sense that it was not an oversight. However, we believe it was due to mitigating circumstances.

Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). The claimant could not make the beds without clean linens. She ran out of time because clean linens were not delivered until after 2:00 p.m. *See* Consolidated Findings ## 10 and 11. That they arrived so late into her shift was beyond her control. In the meantime, she performed other cleaning tasks, including stripping the beds and cleaning the bathrooms while waiting for the linens, and, when her shift ended, she notified her supervisor that the beds in two rooms were not made. *See* Consolidated Findings ## 9 and 11. This action demonstrates that the claimant was not acting in wilful disregard of the employer's interest. Rather, it shows a diligent effort to perform as many of her assigned tasks as possible under the circumstances and a concern to ensure the employer knew to have someone finish making the beds.

Finally, we consider the last ground for termination — lying during the investigation. During the investigation, the claimant told her manager that she was unable to finish the rooms because the linens were late. Consolidated Finding # 16. As noted, the review examiner found that the linens arrived after 2:00 p.m., and that this late arrival caused the claimant to be unable to change the linens in all of her rooms before her shift ended at 5:25 p.m. *See* Consolidated Findings ## 9–11, and 13. Nothing about the employer's surveillance image of the claimant transporting a cart with clean linens at 5:19 p.m. contradicts what the claimant told the manager. *See* Consolidated Finding # 18. Further, such [evidence] is consistent with getting the linens late and running into the end of the shift without using them all. Simply put, the employer has not shown that the claimant lied, as alleged.

We, therefore, conclude as a matter of law that the employer has failed to meet its burden to show that the claimant 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).

The review examiner's decision is reversed. The claimant entitled to receive benefits for the week beginning July 7, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - February 7, 2020

Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

AB/rh