The claimant, a safety officer at a university, was discharged for using his employee ID to enter a residence hall and obtain a statement from a witness pertaining to a complaint his department received about his behavior responding to a fire alarm. The review examiner reasonably found the claimant's argument that he entered the residence hall for work-related reasons not credible.

Board of Review
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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 affirm.

The claimant was discharged from his position with the employer on July 19, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 15, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on October 26, 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 remanded the case to the review examiner to conduct further inquiry into the employer's specific reasons for discharge and the claimant's awareness of the employer's expectations. Both parties attended the remand hearing.[1] Thereafter, the review examiner issued his 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 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 claimant entered a residence hall during work time solely to confront a witness about an investigation into his own misconduct.

[1] We note that the employer arrived too late to participate in the continued remand hearing on February 14, 2020. In light of our decision, we see no reason to remand this case again to obtain further employer evidence.

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 for the employer, a state university, from October 8, 1989, to July 19, 2019, as a Fire and Safety Officer.

2. The employer had a Principles of Employee Conduct, which stated, "University employees are entrusted with public resources and are expected to understand their responsibilities with respect to conflicts of interest and to behave in ways consistent both with law and University policy; University employees are expected to be competent and to strive to advance competence both in themselves and in others; The conduct of University employees is expected to be characterized by integrity and dignity, and they should expect and encourage such conduct in others; University employees are expected to be honest and conduct themselves in way that accord respect to themselves and others; University employees are expected to accept full responsibility for their actions and to strive to serve others and accord fair and just treatment to all; University employees are expected to conduct themselves in ways that foster forthright expression of opinion and tolerance for the view of others; and, University employees are expected to be aware of and understand those institutional objectives and policies relevant to their job responsibilities, be capable of appropriately interpreting them within and beyond the institution, and contribute constructively to their ongoing evaluation and reformulation."

3. The purpose of the Principles of Employee Conduct is to provide adequate support to the University community.

4. The employer periodically sent out emails to all staff directing them to review the material regarding the Principles of Employee Conduct, Policy on Fraudulent Fiscal Activities, State Conflict of Interest Law, State Whistleblower Legislation, the Drug Free Workplace Act, and Information Technology policies.

5. The employer had a published job description for the claimant, which spoke of job-related situations that would require entry into various buildings on campus.

6. The employer expected the claimant to use appropriate judgment and to enter residence halls only for work-related purposes.

7. Badge access is granted to those employees who require it for their job.

8. The claimant's collective bargaining agreement states that employees shall take their break at the work site and be on call at all times, that a meal break

shall be scheduled as close to the middle of the shift as possible, and that a rest period of a maximum of fifteen minutes shall be given to employees in each one-half tour of duty.

9. On December 1, 2017, the claimant received a suspension without pay for three days for violations of the Principles of Employee Conduct and the CBA's provision covering insubordination. In relevant part, the claimant was directed not to speak with anyone about an investigation into his alleged conduct and the claimant spoke with a co-worker about it.

10. In October of 2018, the employer provided a book selection for employees titled, What If I Say The Wrong Thing?, which was endorsed by the Office of Equity and Inclusion and for the purpose of improving communications across differences and [sic] create positive relationships. In the book, "Habit #19: Love Is Having To Say You're Sorry – Learn to Apologize," which encourages recognizes [sic] the impact of something though not intended [sic] and apologizing for it.

11. On December 4, 2018, at approximately 11:30 p.m., the claimant responded to a fire alarm in one of the residence halls. The claimant interacted with a student and a Resident Advisor (RA).

12. On December 5, 2018, at 1:24 a.m., the RA submitted an incident report, which, in relation to the claimant, stated in part, "Later, at approximately 11:40 p.m., RA [name] got a knock on her door. When she answered, it was [the claimant], a health and safety officer. He asked RA [name] to come with him so RA [name] grabbed her keys and went with him to room [number]. The officer pointed to a resident walking down the hallway and said that he just left the room. RA [name] knew that this resident lived in room [different number]. The resident of room [number], [student's name] was standing at the doorway. His roommate was not present at the time. The officer told RA [name] to smell the doorway, which smelled like marijuana. The officer explained that the resident had the smoke detector covered with a plastic bag and that he saw the smoke detector fall to the ground when he was talking to the resident [student's name]. RA [name] did see a plastic bag on the ground below the detector. The officer asked for [student's] name and ID number but [the student] claimed not to have his ID but that he could give the officer his number. Then [the student] gave the officer his information. The officer also explained that marijuana is not allowed on campus and smoking anything in the building is not allowed. The officer had mentioned in the conversation calling the RD [Residential Director] on call. RA [name] then called the RD on call to see what the next step was and to inform them of the situation. The RD on call took the information of the resident of the room and said to write an incident report. When the phone call ended, the health and safety officer asked if the RD was coming and RA [name] replied no, and that RA [name] would document the situation. RA [name] took a picture of the officer's badge for his name and information. The officer then said he would go

downstairs to check and see if [student's] detector was working. He said if it wasn't working that another officer would come and a team would come to replace the detector." The RA continued the report regarding the student being upset about the interaction with the claimant.

13. The RA believed the claimant to be abrasive and had a frustrated tone when interacting with the student.

14. On December 5, 2018, at 12:43 p.m., the student, with whom the claimant interacted, sent an email complaint about the claimant's behavior with him.

15. On December 11, 2018, at 8:02 a.m., the Executive Director of Environmental Health and Safety and Emergency Management sent an email to the claimant that he and other members of management wished to meet with him on December 14, 2018, at 10:00 a.m. to discuss a complaint made regarding the fire alarm response on December 4, 2018, in a particular residence hall.

16. The claimant began his workday at 4:00 p.m.

17. At 4:51 p.m., the claimant entered the residence hall he visited on December 4, 2018 for the purposes of talking to the RA. The claimant knocked on the door of the RA and the RA opened the door and saw the claimant. The Resident Advisor initially believed it to be a follow-up to his December 4, 2018 visit. The claimant asked if he could speak with her in a public area. The two went to the lounge. The claimant handed the email regarding the complaint to the Resident Advisor and questioned her about his behavior on December 4, 2018, particularly how he interacted with the student. The RA then began to feel uncomfortable because she realized it was not an official follow-up visit and was more personal in nature. The RA answered the claimant's questions vaguely and positively due to feeling "cornered" and uncomfortable. The claimant asked the RA to write a statement on the back of the email. The claimant left the room while she wrote the statement.

18. The RA wrote on the back of the claimant's email he presented, "Hello, My name is [RA's name]. I am the RA on the 4th floor of [the residence hall name]. I responded to an incident on December 4th, where officer [claimant's name] also responded. I wrote an incident report regarding the situation. While the officer did show strong emotion during the encounter, his response did not seem unfair towards the student."

19. The claimant left the residence hall after he interviewed the RA and obtained her statement.

20. The claimant did not believe that his actions were harassing or that he created an atmosphere of intimidation.

21. The claimant did not initially intend to obtain a written statement defending him from the complaint.

22. The claimant did not make a log entry of the visit.

23. The employer did not direct the claimant to go to the residence hall and had no knowledge of his visit at the time as no business need existed. The claimant went to the residence hall on his own accord and not for the purpose of fulfilling any of the duties enumerated on his job description.

24. On December 12, 2018, the Assistant Director Campus Safety and Fire Prevention emailed the student who complained asking to meet to discuss the incident.

25. On December 14, 2018, the claimant met with the employer's management team to discuss the December 4th event. The claimant did not divulge that he visited the RA on December 11, 2018.

26. On December 17, 2019, the Assistant Director Campus Safety and Fire Prevention emailed the RA to request a meeting because the claimant indicated in his meeting with management that the RA was present for much of the interaction.

27. After meeting with the RA, the employer learned the claimant visited her on December 11, 2018, to discuss the matter being investigated.

28. On January 3, 2019, the Executive Director of Environmental Health and Safety and Emergency Management directed the claimant to appear at an investigatory hearing on January 11, 2019, at 12:00 p.m. The purpose of the hearing as explained was because of the claimant entering a resident hall on December 11, 2018, at 4:51 p.m. during work hours, but not for work purposes. The employer contended that the claimant entered a residence hall improperly, that he abused work time as the action was not work-related, that he harassed a witness in her home and created an atmosphere of intimidation, and that his action eroded the confidence and trust that the university places in them to not abuse access granted to employees for personal reasons.

29. On January 11, 2019, the claimant attended the hearing with union representation, after which the employer was to decide the claimant's discipline, if any.

30. The employer held the decision in abeyance pending the claimant's impending leave.

31. The claimant began a paid leave of absence from February 10, 2019 to July 18, 2019.

32. On July 19, 2019, the employer discharged the claimant from employment for his conduct on December 11, 2019, specifically that he entered a residence hall "illegally," that he abused work time, that he harassed a witness in her home, and that his action eroded the confidence and trust of the employer.

33. The employer erred in using the word "illegally" and acknowledges that the word "inappropriately" should have been used.

34. The employer believed that the claimant's actions constituted harassment because the claimant entered someone's "home" to question a student for personal reasons, which made that student feel uncomfortable.

The employer was absent from the continued hearing despite the date and time being arranged at the initial remand session and therefore, questions #5, 6, 7 and 8 were not addressed fully.

[Credibility Assessment:]

The claimant was not credible in regard to his visit. The claimant's visit was prompted by the employer's email that put him on notice of the complaint and not due to self-reflection in the previous five days triggered by a book recommended by the Office of Equity and Inclusion two months prior. The claimant testified that he asked for the written statement by the RA, the purpose of which is almost self-evident. Yet when asked why he asked for it at all and what he was planning to do with it, the claimant stated it was "just to have" with no apparent purpose. One does not "just have" a written statement favorable to him or her while facing a complaint lodged against him or her for no reason at all. It strains credibility. Furthermore, if the purpose of his visit was to truly apply the book, which spoke about apologizing for causing offense, it would make more sense to approach the student that was offended, and not a witness to the alleged offensive conduct about which the student complained, to apologize as the book suggests. Ultimately, the claimant did not go to the residence hall to apologize to the offended student.

In regard to his understanding of not speaking to a potential witness to an investigation after receiving a suspension for doing just that, the claimant stated that he had no understanding of that rule. This is not credible. First, even if he did not fully understand and such conduct might only be questionable in his mind as it reasonably should have at minimum [sic], the reasonable course of action would be to avoid anything of the sort. Second, the claimant did not divulge to the employer that he had a written statement from a witness that "exonerated" him when he was questioned. This information was withheld by the claimant for a purpose that was not in line with putting an allegation to rest from the start.

In regard to the claimant's belief that the December 14, 2018 meeting was not part of [sic] investigation, the claimant was not credible. The claimant obtained a written statement exonerating him as it related to the complaint and the purpose of

> the meeting. Obtaining such a statement was not "just to have," as he suggested, but to mount a defense against an allegation of his conduct. If the claimant did not believe that the meeting was about an investigation into his conduct with a student, it would be unreasonable to obtain a written statement from a potential witness that counters the complaint.

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 and deems them to be supported by substantial and credible evidence. We further believe the review examiner correctly disqualified the claimant from receiving benefits.

The claimant was terminated from his employment, and accordingly, 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 consolidated findings show that the employer discharged the claimant because he entered a residence hall on December 11, 2018, without any work-related reason to be there, used work time for personal business, approached and intimidated a witness in her home, and, in accessing the residence hall for these reasons, he eroded confidence and trust in the University's departments. *See* Consolidated Findings ## 28 and 32.

We first consider whether the employer has met its burden to show a knowing violation of a reasonable and uniformly enforced policy under G.L. c. 151A, § 25(e)(2). The employer alleged that the claimant's actions on December 11, 2018 violated its "Principles of Employee Conduct." *See* Consolidated Findings of Fact # 2. However, as the review examiner observed in his decision, these Principles are general in nature. They express vague expectations without stating that discipline will be imposed for any specific conduct. Thus, the employer has not shown that its discharge was connected to a knowing violation of this policy.

Our inquiry will, therefore, focus on whether the claimant's actions on December 11, 2018, constituted deliberate misconduct in wilful disregard of the employer's interest. In order to deny benefits under this prong of G.L. c. 151A, § 25(e)(2), it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The parties did not dispute that the claimant deliberately entered the residence hall at 4:51 p.m. on December 11, 2018, to speak with the RA in connection with the claimant's response to a fire alarm at that resident hall on December 4, 2018. *See* Consolidated Findings ## 11 and 17. At issue is whether he was aware that the employer expected him not to do so and whether he was acting in wilful disregard of the employer's interest.

The review examiner found that the employer expected the claimant to enter residence halls only for work-related purposes. Consolidated Finding # 6. He further found that, on December 11, 2018, even though the employer had not asked the claimant to go to the RA's residence hall, he went there during his shift at 4:51 p.m., that he went of his own accord and not to fulfill any work duties. *See* Consolidated Findings ## 17 and 23.

Missing from the findings is that the claimant *knew* of the employer's expectation not to enter the residence hall for anything but a work-related purpose. We believe it is self-evident. A specific finding on state of mind is not required where a claimant's action makes it obvious. Sharon v. Dir. of Division of Employment Security, 390 Mass. 376, 378 (1983). Even if it were not obvious than employees were expected to use their work-issued IDs to access residence halls solely for work-related purposes, there is no question that, in another regard, the claimant knew his visit to the RA on December 11, 2018 was improper and he was acting in wilful disregard of the employer's interest.

In its discharge letter, the employer explained that one of the reasons the claimant was terminated was because he "went to [the] Residence Hall and approached the RA for the sole purpose of pressuring her into providing a positive written statement about [his] behavior" on December 4th.[2] The employer has shown that the claimant was aware that it expected him not to approach potential witnesses to an investigation, as he had recently been disciplined for the same behavior.

Specifically, a year earlier, the claimant served a three-day suspension because, after being instructed not to speak to anyone about an investigation into his alleged misconduct, the claimant spoke to a coworker about it. *See* Consolidated Finding # 9. On December 11, 2018, he knew that the employer was investigating his response to the December 4, 2018 fire alarm, when he received the email instructing him to meet with several members of management to discuss the incident. *See* Consolidated Finding of Fact # 15. He also knew the RA was a key witness, as he involved her in confronting the student who had covered the smoke alarm. *See* Consolidated Findings ## 11 and 12. Yet, as soon as he got to work on the day that he learned of the new

[2] Exhibit 7, the termination letter, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

complaint about his behavior, the claimant went to see the RA, placing her in a position that made her feel cornered and uncomfortable. *See* Consolidated Findings ## 15–17.

As for why the claimant approached the RA in the residence hall on December 11, 2018, the review examiner's findings are mostly embedded in his credibility assessment. He rejects the claimant's assertion that he went to apologize for offending the RA, in the spirit of the employer's October 2018 book selection encouraging employees to improve communication. *See* Consolidated Finding # 10. The review examiner observed that, had the claimant actually been following the book's instructions, it would have made more sense to discuss his behavior with the student who filed the complaint. The review examiner also rejected the claimant's testimony that he was unaware of the employer's expectation not to speak to potential witnesses in a pending investigation. In support, the review examiner pointed to the fact that the claimant had just been suspended for engaging in the same behavior that he was claiming he did not understand was wrong. He further explained that the claimant's decision not to divulge the written statement to the employer at the December 14th meeting suggested the claimant knew his actions on December 11th were improper. The review examiner also flatly rejected the claimant's testimony that he did not believe the December 14th meeting was part of an investigation. He observed that there was no reason for the claimant to obtain a written statement from a potential witness to counter the underlying complaint unless the claimant thought the purpose of the December 14th meeting was to investigate that complaint. Rather, the review examiner concluded that the claimant was motivated to exonerate himself from complaints about his behavior with the student and the RA on December 4, 2018.

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. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). In light of these explanations, we believe his assessment and findings are reasonable in relation to the evidence presented.

Simply put, because the claimant knew an investigation was pending and knew that the employer expected him not to contact potential witnesses, his contact with the RA on December 11, 2018, constituted deliberate misconduct in wilful disregard of the employer's interest.

It is worth noting that we do not believe that the claimant's meeting with the RA was a mere exercise of poor judgment. *See* Garfield, 377 Mass. at 97 ("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."). Given the severity of the discipline he had received for the same type of conduct and its proximity in time to the incident in question, the only reasonable inference is that the claimant acted in wilful disregard of the employer expectation not to speak to a potential witness about an investigation.

We, therefore, conclude as a matter of law that the claimant was discharged for 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 affirmed. The claimant is denied benefits for the week beginning July 21, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 13, 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.

LSW/AB/rh