

Although the evidence suggests the claimant likely suffered from mental health issues at the time of her separation, there is no indication in the record that her mental health contributed to the misconduct that led to her separation, and no other mitigation was established.

**Board of Review
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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 her position with the employer on October 7, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 16, 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 December 27, 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 obtain additional evidence pertaining to the claimant's state of mind. 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 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, after remand, the review examiner found that the claimant intentionally sent a profane and threatening text message to her coworkers and a state employee, while in full control of her emotions.

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 case manager for the employer's social services organization from 7/6/17 until 10/4/19. The claimant's work involved providing support for young adults in order to prevent them from re-offending or engaging in substance abuse. The claimant worked from 9:00 am until 5:00 pm on Monday through Friday and was paid an annual salary of approximately \$40,000.
2. The employer maintains an employee handbook that contains Code of Conduct and disciplinary policies. The Code of Conduct reads in relevant part: "This Code of Conduct provides guidance to all (Employer) employees and assists them in performing their duties within appropriate ethical and legal standards. Compliance with this Code of Conduct is expected and (Employer) will take appropriate disciplinary action for non-compliance. The Code of Conduct governs our relationships with our clients, outside clinicians, third party payers, subcontractors, independent contractors, vendors, consultants, volunteers and employees within (Employer) ..."
3. The Code of Conduct contains a section related to employee conduct. This section of the policy reads in relevant part: "While it is not possible to list all the forms of behavior that are considered unacceptable in the workplace, the following are examples of conduct and performance which are unacceptable and will result in disciplinary action, up to and including termination of employment at the discretion of management..." Included in the list of prohibited behaviors are: "Fighting, threatening violence or other disorderly conduct...Use of profanity; Use of vile or abuse language ..."
4. The employer's disciplinary action policy contains a list of varied types of disciplinary action, such as oral warning, written warning, and suspension. The policy contains a section related to termination, which reads: "This action will generally be taken when previous warnings and/or suspensions are not effective in resolving a problem and/or as the result of a serious offense or misconduct..."
5. The employer's management staff determines whether someone who violates the Code of Conduct will be discharged or issue[d] some other form of discipline.
6. On 8/27/18, the claimant received a copy of the employee handbook. The claimant was aware of the Code of Conduct. The claimant was aware that she could be subject to discipline if she violated the Code of Conduct.
7. On 10/3/19, the claimant went to the employer's Haverhill location for work purposes. The claimant placed her purse, workbag, and sweater on a chair where the employer's Administrative Assistant works. Sometime later, the claimant passed by the area and observed that her personal belongings were on the floor and the Administrative Assistant was seated in the chair. The claimant did not ask the Administrative Assistant if she placed the items on

the floor; the claimant assumed the Administrative Assistant placed the items on the floor.

8. The claimant did not inform her supervisor, who was present at the workplace, that she found her personal items on the floor. The claimant previously told the supervisor that she did not want to deal with the Administrative Assistant because of the way she reacts to feedback.
9. The claimant did not confront the Administrative Assistant about the belongings ending up on the floor because she was angry and because she usually does not speak to the Administrative Assistant. The claimant returned to the area where she had been working and spoke with a second co-worker about it.
10. Approximately five minutes after observing her personal items on the floor, the claimant sent a text message to two coworkers and a state caseworker. The message read: "Did this bitch put my stuff on the floor to sit next to [A]...so fucking pist...I was like oh great thanks for putting my stuff on the floor that's perfect and grabbed my stuff and went to (Coordinator's) desk...im fucking livid...I wanted to smack the shit out of her fat face...fucking grab that bitch by her neck and place her against the wall...she just sat there like a dumb bitch said nothing...fucking scumbag...(state caseworker) your kid should spit on her face." Shortly after the claimant sent the message, a manager from the state agency notified the claimant's supervisor of the message. The employer's Operations Director directed the supervisor to place the claimant on administrative leave.
11. The claimant would not have sent out a text message, had she thought that any other employee was responsible for placing her personal items on the floor.
12. The claimant continued working after sending out the text message because she felt capable of working the rest of the day. The claimant's supervisor previously informed the claimant that she could leave work anytime she felt emotional. The claimant did not request to leave work on 10/3/19.
13. On 10/7/19, the claimant, her supervisor, and the employer's Human Resources Director (HR Director) met to discuss the message. The claimant told the supervisor and HR Director that she sent the message because she was upset with the coworker for removing the claimant's belongings from the chair.
14. The employer's Executive Director decided to terminate the claimant's employment because the comments in her text message were inappropriate for the workplace and suggested workplace violence. The employer considered the claimant's behavior a violation of the Code of Conduct.

15. The claimant suffered a miscarriage in May 2019. The claimant saw her physician on June 3, 2019 for a postpartum checkup and informed the physician that she felt anxious and had been crying a lot. The physician told the claimant that she may have postpartum depression. The claimant did not see her physician or any other health care provider during the period of June 4, 2019 and the date of her termination. The employer referred the claimant to a therapist following the text message incident. The claimant saw the therapist approximately six times during a one to two-month period, beginning at the end of October. The claimant stopped seeing the therapist because s/he does not accept the claimant's health insurance.
16. On 3/6/20, the claimant saw a physician regarding preconception. The physician diagnosed the claimant as having depression. The physician provided the claimant literature regarding support groups and prescribed an antidepressant medication.
17. In the time period between the day of her miscarriage in May 2019 and the day she sent the text, October 3, 2019, the claimant had not experienced any other outburst or emotional crisis at work as a result of her emotional state.

Credibility Assessment:

The claimant's suggestion that her emotional state from a miscarriage suffered in May contributed to her decision to send a threatening text message in October was not credible. First, the claimant testified that she would not have sent the message, had any other employee been responsible for placing her personal items on the floor. Likewise, the claimant did not confront the individual who she believed responsible for placing her personal items on the floor. These two factors support a conclusion that the claimant was capable of exercising self-control at the time she observed her personal items on the floor. The claimant left the area after collecting her belongings, returned to her work area and spoke with a coworker, and allowed at least five minutes to lapse before writing the text message. The claimant's message was not a spontaneous response; it was calculated and intentional. Prior to sending the message, the claimant did not seek any intervention with her supervisor. The supervisor was present in the workplace and exhibited support for the claimant, as evidenced by the fact that he told the claimant she could leave work anytime she may feel emotional. The claimant's failure to leave work detracts from her contention that she sent the text message because she was feeling emotional. Further detracting from the claimant's credibility on this point is the fact that she never engaged in any such behavior in the workplace. The claimant's emotions never interfered with her ability to maintain her temper. Likewise, she testified to having felt capable of continuing work on the day in question. Had the claimant been in such an emotional state that she was unable to control her behavior, it is unlikely that she would have been capable of continuing to perform her duties.

Ruling of the Board

In accordance with our statutory obligation, we review 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 except as follows. We set aside the portion of the Credibility Assessment which states that the claimant sent the text message after speaking to a coworker, as the claimant testified during the remand hearing that she spoke to her coworker after sending the text message.¹ In adopting the remaining consolidated findings, we deem 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.

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

In her original decision, the review examiner concluded that the claimant was not discharged for violating a reasonable and uniformly enforced rule or policy of the employer, after finding that the employer's management had discretion in determining what discipline to impose for a violation of the Code of Conduct policy. Thus, the issue before us is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests on October 3, 2019, when she sent a text message with threatening and profane language to two coworkers and a state employee.

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about [her] own unemployment through intentional disregard of standards of behavior which [her] employer has a right to expect." Garfield v. Director of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Director 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, 377 Mass. at 97.

We remanded this case to the review examiner to obtain a state of mind finding, as the claimant testified at the original hearing that she sent the text message out of frustration, during a time in

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

which she was still feeling emotional over a miscarriage she had suffered five months earlier. After remand, the review examiner made a credibility determination that, at the time the claimant witnessed her belongings on the floor, she was capable of exercising self-control, as she did not confront the person she believed had placed her items on the floor. The review examiner also found that the claimant did not send the profane and threatening text until five minutes later and concluded that the claimant's actions were calculated and intentional, rather than a spontaneous response. In arriving at this determination, the review examiner relied on the claimant's testimony, including her assertions that she felt capable of continuing to work that day, and that she had never had any similar outbursts at work prior to that day. The review examiner noted that had the claimant been in such an emotional state that she was unable to control her conduct, it was unlikely that she would have been capable of continuing to perform her duties that day. The review examiner's credibility assessment is within the scope of her role as a fact finder, and because we find it is reasonable in relation to the evidence presented, we will not disturb it on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

The review examiner found that the claimant was aware of the employer's Code of Conduct, which prohibited employees from engaging in the use of profanity and abusive language, and from threatening violence. In light of the review examiner's determination that the claimant intentionally sent her coworkers and a state employee a text containing threatening and profane language, the remaining question is whether the claimant acted in wilful disregard of the employer's interest. In order to answer the latter, we must determine whether mitigating circumstances existed to excuse the claimant's failure to comply with the expectations set out in the employer's Code of Conduct.

The claimant argued that the emotional turmoil that she was still experiencing due to a miscarriage that she suffered earlier in the year contributed to her decision to send the text, which described in profane language the violent acts she wanted to commit against the employee that she believed had put her personal belongings on the floor on October 3rd. During the remand hearing, the claimant provided medical documentation regarding her mental health. Based on that documentation and the claimant's testimony, the review examiner found that, in June, 2019, the claimant's physician suspected the claimant was suffering from postpartum depression, and, in March, 2020, the claimant was diagnosed with depression and prescribed an antidepressant. While the evidence in the record establishes that the claimant does suffer from mental health issues, and these issues were likely present at the time of her termination, the claimant did not establish that these circumstances contributed to her behavior on October 3rd.

The fact that the claimant was in sufficient control of her emotions that she was able to continue working the remainder of her shift, and that she avoided confronting her coworker in the moment, precludes the conclusion that the claimant's conduct was mitigated by a loss of control caused by her mental health issues. Furthermore, we do not believe that the placement of the claimant's items on the office floor, without more, was sufficient to mitigate the claimant's response of sending a text that included very graphic, threatening and profane language. In fact, it does not even appear that the placement of the claimant's belongings on the floor was the motivation for sending the text. Rather, the evidence suggests that the claimant's actions were spurred solely by her dislike for the coworker she believed had moved her items. Absent mitigating circumstances to excuse the claimant's misconduct, we must conclude that the

claimant acted in wilful disregard of the employer's interest. *See Lawless v. Department of Unemployment Assistance*, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning September 29, 2019, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 10, 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
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until May 4, 2020². If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

SVL/rh

² See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-1-20.