Claimant, who, despite counseling and warnings, continued to engage in disparaging behavior toward supervisors and coworkers, and continued to refuse to train new employees, was ineligible for benefits due to deliberate misconduct in wilful disregard of the employer's interest.

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Issue ID: 0032 6871 39

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 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 November 13, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 21, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on April 7, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined 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). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to present testimony and other evidence. Only the employer attended the remand hearing. 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 original decision, which concluded that the claimant was eligible for benefits because she had not engaged in misconduct as alleged, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant had refused to follow supervisors' instructions and was disparaging, argumentative, and confrontational with managers and coworkers.

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 as an Administrative Assistant for the employer, a medical practice. The claimant began work for the employer in May 2015. She worked Monday through Friday from 7:30 a.m. to 4 p.m. She earned $21 per hour. She was assigned to work at the front desk.

2. In July, 2019, the employer implemented new policies including new employee conduct policies. The policies include a Code of Conduct which states in part: "We affirm the following ideals and behaviors: I will follow the rule of treating others as I would like to be treated. I will treat all staff with respect by…responding to calls and requests for assistance or consultation in a timely manner. I am a member of a patient care team and will: listen with patience, consider the perspectives of others, collaborate with team members to provide safe and quality care for our patients."

3. The policy also prohibits: "Verbal outbursts…intimidating behavior or words directed at another person…mocking, insulting or humiliating another person, especially in the presence of others…(and) refusing to answer questions or return calls for assistance".

4. The claimant was aware of the policies. The policies were read to employees at staff meetings in late July, 2019. The claimant was present at the staff meetings.

5. The employer maintains a disciplinary system that includes a verbal warning, a written warning and discharge.

6. The employer will always discharge an employee for continued policy violation or misconduct after a written warning.

7. In August, 2019, two front desk workers complained the claimant was disruptive. They asked to be reassigned to other areas.

8. Also in August, 2019, the employer hired a new Billing Manager. The new Billing Manger had front desk duties and asked the claimant to help train new employees. The claimant refused to train new employees.

9. On August 22, 2019, the claimant's direct supervisor, the Front Desk Manager, verbally counseled her about her conduct and attitude with others. The claimant told her she did not feel she had any problems getting along with others. The Front Desk Manager counseled her to work as part of a team and teach new employees. The claimant told her that training new employees was not part of her job. The Front Desk Manager told her it was part of her job.

10. In September, 2019, the employer promoted the Front Desk Manager to the position of Practice Manager and Bookkeeper. The employer promoted the Billing Manager to the position of Front Desk Manager.

11. The Practice Manager observed the claimant speaking with other employees in Spanish. These employees reported to her that the claimant was disparaging her and the new Front Desk Manager.

12. Other employees continued to complain about difficulties working with the claimant. The claimant also continued to fail to follow instructions from her supervisors.

13. The claimant found other prospective employment and on October 24, 2019, she gave the employer her two weeks' notice. The offer from the other employer was rescinded and on October 28, 2019, she asked the employer if she could continue working there.

14. The Front Desk Manager and the Practice manager told her that she could continue to work for the employer on the condition that she worked as a team player and did not have conflicts with other employees. The claimant agreed.

15. On October 31, 2019, the employer issued the claimant a written warning for a lack of cooperation in training new employees, not following office protocol, and patient complaints.

16. The employer authorized another Administrative Assistant to help train new employees.

17. On Monday, November 11, 2019, the other Administrative Assistant was training a new employee. The claimant became argumentative and confrontational. The Administrative Assistant became upset and went to find the managers. She was crying and complained to the managers about the claimant.

18. The Practice Manager met with the Front Desk Manager and the employer's physicians. They agreed to discharge the claimant.

19. On Wednesday November 13, 2019, the managers discharged the claimant.

Credibility assessment:

The initial hearing, held on April 3, 2020, was attended by the claimant only. She testified that she did not ever think she did anything wrong. She testified she did not have conflicts with her coworkers on the days leading up to her separation. The Practice Manager was present at the remand hearing held on May 15, 2020. The claimant did not attend the remand hearing. The Practice Manager testified she observed the claimant mistreat other employees and refuse to follow instructions. She testified to receiving credible complaints from other employees about the claimant. Her testimony is supported by written statements from other employees and by the employer's disciplinary documents. The Practice Manager's testimony,

supported by the additional evidence, is more credible than the claimant's testimony.

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. However, as discussed more fully below, we do not believe that the consolidated findings support the review examiner's original decision to award 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 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, 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 employer discharged the claimant following an incident on November 11, 2019, in which the review examiner found that she had been argumentative and confrontational with a coworker. *See* Consolidated Findings ## 17–19. Such behavior is generally prohibited under the employer's Code of Conduct, which requires employees to treat all staff with respect, to listen with patience, consider the perspectives of others, collaborate with team members, and prohibits: "Verbal outbursts…intimidating behavior or words directed at another person…mocking, insulting or humiliating another person, . . ." *See* Consolidated Findings ## 2 and 3. We see nothing unreasonable about these employer policies.

Consolidated Finding # 4 provides that the claimant was aware of this policy, as she participated in staff meetings where the policies were read to all staff a few months earlier. Moreover, the record shows that she had been verbally counseled on August 22, 2019, about her conduct, attitude toward others, working as a member of a team, and, specifically, refusing to train staff. *See* Consolidated Finding # 9. Nonetheless, the behavior continued. Coworkers complained of difficulties working with the claimant, and, on October 31, 2019, the employer gave the claimant a written warning about her lack of cooperation in refusing to train new employees and follow

office protocol. *See* Consolidated Findings ## 12 and 15. On November 11, 2019, she again was argumentative and confrontational with coworkers. *See* Consolidated Finding # 17.

To meet its burden under the knowing violation prong of G.L. c. 151A, § 25(e)(2), the employer must show that its policy was uniformly enforced. The review examiner found that the employer will always discharge an employee for continued policy violations or misconduct following a written warning. *See* Consolidated Finding # 6. This is based upon the Practice Manager's testimony that she has discharged several employees by following this same progressive disciplinary procedure.[1] However, the policy was relatively new, and we do not know whether the employees she was referring to were terminated under an old or this new policy. *See* Consolidated Finding # 2. The record also fails to reveal whether these other discharged employees engaged in similar behavior as the claimant's, or whether the employer makes exceptions under certain circumstances. Without such evidence, we hesitate to conclude that the policy was uniformly enforced.

Nonetheless, we are satisfied that the employer has met its burden to prove that the claimant engaged in deliberate misconduct 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).

As stated, the employer communicated its policy expectations to the claimant in July and again at the end of October that she was to work as a team member, get along with, and avoid conflict with others *See* Consolidated Findings ## 2, 3, and 14. It repeated these in the context of a verbal counseling and written warning in August, and October, when the claimant was also told that she was expected to train new employees. *See* Consolidated Findings ## 9 and 15. From these findings, it is evident that the claimant knew what the employer expected of her.

As for the claimant's intent, we turn to the facts and circumstances of the case. *See* Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984) (intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case). Over a matter of five months, the claimant was repeatedly warned about her disparaging remarks to her supervisors and coworkers, failure to cooperate as a team player, and her refusal to train new employees. There is no evidence that the claimant was unable to control her behavior, that she was incapable of training new staff, or that there were any mitigating circumstances to cause her to behave this way. Instead, she maintained that she did not think she did anything wrong. The review examiner did not find her testimony to be credible. 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

[1] While not explicitly incorporated into the review examiner's findings, this testimony 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).

of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). We believe his assessment is reasonable.

Given this record of repeated misconduct, counseling and discipline over a short period of time, and the absence of any mitigating factors, we can reasonably infer that the claimant acted deliberately and in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has met its burden to prove that it discharged the claimant 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 reversed. The claimant is denied benefits for the week beginning November 10, 2020, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS Charlene A. Stawicki, Esq.
DATE OF DECISION - June 25, 2020 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
(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 July 1, 2020[2]. 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

[2] *See* Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.

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