

The review examiner credited the claimant's direct testimony over the employer's hearsay evidence and found that the claimant did not show pornographic images on his cell phone to youth residents in his care. Thus, the claimant did not engage in the misconduct for which he was fired. His discharge is not disqualifying under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0056 3315 96

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 his position with the employer on March 15, 2020. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 8, 2020. 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 May 29, 2021. 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 allow the claimant to testify and afford both parties an opportunity to present additional evidence. 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 by showing pornographic material to residential youths in his care, is supported by substantial and credible evidence and is free from error of law, where following remand, the review examiner found that he did not show any residents pornographic images at any time.

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 a part-time Youth Care Advocate for the employer, a youth residential social services agency, from October 2019 to 03/15/2020, when he separated.
2. The claimant's immediate supervisor was the Shift Administrator.
3. The employer maintains a "Child and Youth Care" policy (the policy), which in part, prohibits employees from "having sexually oriented material, including printed or online pornography, on the organizations property." The policy also prohibits employees from "using electronic communication devices except during approved breaks and emergency situations."
4. The purpose of the policy is to provide a code of conduct for the staff and to protect the safety of the youth[s] they serve.
5. A violation of the policy results in disciplinary action up to and including termination.
6. The Executive Director, the Director, and Human Resources use their discretion to determine the disciplinary action for each violation.
7. The claimant received a copy of the employer's policies at the time of hire and when he signed an acknowledgement of receipt of the policy on 10/21/2019.
8. The claimant was not aware of the policy that prohibited personal use of cell phones while working.
9. The employer expected the claimant to not show youth[s] pornographic material on his cell phone and to refrain from using his personal cell phone while working.
10. The purpose of the expectation is to provide a code of conduct for the staff and to ensure the safety of the youth they serve.
11. A violation of the expectation results in disciplinary action up to and including termination.
12. The Executive Director, the Director, and Human Resources use their discretion to determine the disciplinary action for each violation.
13. The claimant became aware of the employer's expectation to not show youth[s] pornographic material on his cell phone when he received a copy of the policy at the time of hire, when he signed an acknowledgement of receipt of the policy on 10/21/2019.
14. The claimant was not aware of the expectation to refrain from using his personal cell phone while working.

15. The claimant's personal cell phone contained pornographic images of himself and his girlfriend, which were located in the deleted files folder in his cell phone, from five (5) to six (6) years ago and were not readily accessible for viewing.
16. On one (1) occasion, the claimant showed two resident's [sic] (Resident A and Resident D) a picture of his girlfriend on his personal cell phone. His girlfriend was fully clothed in the picture and was not inappropriately dressed.
17. The claimant showed one (1) resident the picture because he knew their family and asked the resident if they knew his girlfriend. The claimant showed the other resident the picture at that time because they were present while the claimant showed the first resident.
18. The claimant did not intend, and would not have wanted, to show an inappropriate picture to any residents at his place of employment.
19. The claimant and other employees often allowed residents to listen to music from his or the employees' personal cell phones as a reward for good behavior.
20. On two (2) occasions, the claimant allowed residents to use his cell phone to search for the music they wanted to listen to.
21. On one (1) occasion, the claimant was driving Resident A to pick up her paycheck at her work. The claimant allowed her to listen to music from his personal cell phone while they were driving.
22. The claimant opened the YouTube application on his phone, searched for an artist the resident requested, then handed Resident A his cell phone to select the song she wanted to hear because he was driving. Resident A had possession of the claimant's cell phone for enough time to select the song and was not able to look through his cell phone in the time that she was in possession of the phone.
23. On or about 01/15/2020, a resident in the program alleged the claimant showed her a picture of a naked female on his cell phone.
24. The youth reported the claimant's actions to the employer.
25. The Director did not witness the claimant show pictures from his personal cell phone to any residents.
26. On 01/15/2020, the employer filed a 51A, a report of neglect of a child, with the Commonwealth of Massachusetts.

27. On 01/17/2020, the claimant was suspended from his employment pending the outcome of an investigation into the alleged neglect of the youth[s] by the claimant.
28. On 01/23/2020, the Department of Early Education and Care began an investigation into whether the claimant showed a picture of a naked women to three (3) youths.
29. The investigation included the review of multiple documents, including EC Licensing Database, DCF 51A Intake Report, DCF 51B Investigation Report, (4) Incident Reports, (2) Corrective Action Forms, (3) Resident Files, (2) Personnel Files, (1) Staff Members Mobile Phone, and the Resident Funds Policy. The investigation also included multiple interviews of staff members and residents of the employer's program.
30. During the investigation, the claimant denied that he showed any residents any pornographic images on his personal cell phone.
31. During the investigation, the claimant voluntarily allowed investigators to look through his personal cell phone. The investigators viewed several pornographic images and videos.
32. During the investigation, Resident D reported to investigators that the claimant did not show him any inappropriate photos, images, or videos on his cell phone. Resident D reported that the claimant showed "him a photo of his girlfriend who was appropriately clothed at the time."
33. The investigation concluded that the claimant exposed three youth[s] to pornographic material on his cell phone, which constituted sexual abuse and neglect of the youth.
34. On 03/15/2020, the claimant was discharged from employment because it was concluded by the investigation that he showed pornographic material to three (3) youth[s] within the program.

Credibility Assessment:

The claimant's testimony is deemed to be more credible than that of the employer. The Director provided testimony that the claimant showed three (3) residents photographs of nude females on his personal cell phone, while the claimant maintains that he did not show pornographic images to any residents. The employer provided only multilevel hearsay testimony and evidence, the Department of Early Education and Care Investigative Report ("investigative report") that was admitted into the record as exhibit 9; and did not present any witnesses who had directly witnessed the claimant showing any residents any photos and did not present any witnesses who saw the photos the claimant allegedly showed the residents. The claimant provided direct testimony that while he did show two (2) residents a

picture of his girlfriend on his personal cell phone, his girlfriend was fully clothed in the picture. This testimony is corroborated by Resident D's statement to investigators in the investigative report, where Resident D, "denied that [the claimant] showed him any inappropriate photos, images, or videos on his cell phone." Resident D further informed investigators that the claimant did show "him a photo of his girlfriend who was appropriately clothed at the time." The claimant further admitted that although he did allow two (2) residents to search for music on his personal cell phone while he was driving, the residents had the phone for such a short period of time they would not have been able to access any photographs that he had on his personal cell phone, including any pornographic photographs that he had stored in his personal cell phone in deleted files from four (4) to five (5) years ago.

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, except the portion of Finding of Fact # 1 that inaccurately refers to the claimant's work schedule as part-time, as it is undisputed that he had worked full-time. In adopting the remaining 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. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact now support the conclusion that the claimant is qualified for benefits.

Since the claimant was discharged from his employment, we analyze his eligibility for benefits under 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 the original decision, the review examiner decided the claimant's eligibility under the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2), as opposed to the knowing violation of policy prong. Although the employer presented evidence that it maintains policies that prohibit employees from having sexually oriented materials in the workplace and using cell phones for personal use while working, the employer did not present evidence that it uniformly enforced these policies. For this reason, we cannot conclude that the claimant knowingly violated a *uniformly enforced* policy. The review examiner properly analyzed this case under the deliberate misconduct prong.

We note at the outset that “the 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). Thus, it is the employer’s burden to establish that the claimant actually engaged in the alleged conduct, that such conduct violated a reasonable expectation, and that the conduct was done deliberately in wilful disregard of the employing unit’s interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In determining whether the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest, our first inquiry is whether the claimant actually engaged in the misconduct alleged by the employer. In this case, although the parties disputed the events that led up to the claimant’s discharge, they did not dispute that the employer discharged the claimant for using his cell phone to show pornographic material to residents. *See* Consolidated Finding of Fact # 33.

The employer’s evidence referred to a resident’s allegation that the claimant showed her a sexually oriented photograph of a female on his cell phone, and the ensuing investigation, which concluded the claimant had exposed three youths in the residential program to pornographic material on his cell phone. *See* Consolidated Findings of Fact ## 23, 24 and 33.

Although there is no finding specifically stating one way or another whether the claimant showed residents pornographic images, we can reasonably infer from the other findings and the credibility assessment that the review examiner concluded that he did not. The review examiner found that the claimant denied engaging in this conduct. *See* Consolidated Finding # 30. Consolidated Findings ## 16 and 17 refer to showing residents only a photograph of the claimant’s fully clothed girlfriend.

In her credibility assessment, the review examiner explained why she viewed the claimant’s testimony denying the allegations to have been more 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 of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). In this case, the review examiner relied upon a resident statement, which corroborates that the claimant did not show any inappropriate images to the residents on his cell phone. In contrast, the employer presented less reliable hearsay evidence. We believe the review examiner’s assessment is reasonable in relation to the evidence presented, and we find no reason to disturb it.

Absent any findings that the claimant engaged in the alleged wrongdoing for which he was fired, the employer has not met its burden.

We, therefore, conclude as a matter of law that that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer’s interests, or for a knowing violation of a reasonable and uniformly enforced rule or policy, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 15, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 22, 2021



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 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.

JMO/rh