The employer established that the claimant engaged in deliberate misconduct in wilful disregard of its interest when he used an employer-issued cell phone to send personal text messages to an adult who had aged out of the employer's program, and he engaged in other behaviors involving this individual which crossed appropriate professional boundaries. Held he was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0069 9989 44

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 employment 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 May 10, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 29, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 29, 2022. 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, he was disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's actions in connection with a former participant in the employer's youth program exceeded professional boundaries and constituted deliberate misconduct in wilful disregard of several employer policies, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time as the director of a youth program from 1/18/94 until 5/10/21. The claimant was paid an annual salary of $102,942. Prior to 2019, the claimant was a union represented employee. The employer does not provide performance reviews for union represented employees. During the

period of 2019 through 2021, the claimant was not a member of the union and was not provided any performance reviews.

2. The employer issued the claimant a cell phone for use in his position. The claimant used the cell phone for personal business as well as work. The claimant stored personal photographs and contact information on the employer's cell phone. The claimant used the cell phone to send and receive text messages. During the term of his employment, the employer issued the claimant a laptop computer for use at work. It is unknown when the laptop computer was issued. The telephone and laptop were retrieved by the employer at the time of the claimant's termination.

3. The claimant's job description contains a section that defines the purpose of the director position. This section reads: "Under general direction of the Town Manager, recommend and develop strategies and plans for the provision of recreational, educational and cultural programs for youngsters between the ages of 11-19 that are consistent with quality financial objectives; oversee the administration of all such programs and the implementation of related special projects and new ventures; oversee management and coordination of youth based recreational, educational and cultural programs." During the term of his employment, the claimant supervised five full-time employees, as well as various seasonal, part-time, and volunteer staff. Included among the employees supervised by the claimant were social workers. The claimant was aware that his role was that of a director and not a counselor. The social workers' role within the youth program was to run programs for the participants. If a participant disclosed any serious issues such as suicide, the social worker involved the participant's family and would make referrals to other resources, such as therapists and psychologists.

4. The employer maintains an employee handbook containing a workplace policy that establishes the guidelines and standards for the use of the employer's internet and email services. The policy reads in relevant part: "The (Employer) provides e-mail and/or Internet access to employees who are connected to the municipal network server located at the Town Offices and, additionally, to various employees in other Town buildings. The purpose of providing these services to employees is to improve communication between departments and to provide the means to communicate and obtain information via the Internet. These services shall be used to improve the efficiency and effectiveness of municipal operations. Personal and other unauthorized use of the Town's E-mail and Internet is strictly prohibited. Please note the following standards when using email/Internet access: • E-mail/Internet access is provided by the (Employer) and, therefore, all messages and records are the property of the (Employer). • Electronic records, including e-mail and Internet access, must comply with all public records regulations*; and, as with all public records, a copy of such record could be requested. • All communication should be stated in a professional manner; under no circumstances may employees create, send or retrieve sexually or otherwise offensive, derogatory or harassing messages

to employees or others by e-mail or the Internet…" • Violations of such standards may result in disciplinary action up to and including discharge."

5. The employee handbook contains a policy that addresses sexual harassment. This policy reads in part: "This memorandum establishes the policy of the (Employer) regarding sexual harassment in the workplace by managers, supervisors, employees, and/or members of the public who use Town facilities, vendors and contractors. This memorandum also describes examples of conduct that may constitute unlawful sexual harassment and sets forth a complaint procedure to be followed by persons who believe that they are victims of unlawful sexual harassment…We view allegations and concerns about sexual harassment very seriously and we will respond promptly and decisively to instances where complaints of sexual harassment are brought to our attention by use of the established procedures which are set out and explained in this written policy. Where it has been demonstrated to our satisfaction that such harassment has occurred, we will promptly act to deal with and eliminate any harassment and/or other unlawful conduct. We will impose such corrective action as is necessary up to and including termination. Please note that while this policy sets forth our goals of promoting a workplace that is free of sexual harassment, it should not be construed as preventing, limiting, or delaying the (Employer) from taking disciplinary action against any individual up to and including termination, in circumstances where the (Employer) deems disciplinary action appropriate regardless of whether such conduct satisfies the definition of sexual harassment."

6. The employer's policy also contains a section that reads: "Sexual harassment does not refer to behavior or occasional compliments of a socially acceptable nature. It refers to behavior that is not welcome, that is personally offensive and that fails to respect the rights of others… Examples of sexual harassment include, but are not limited to: • repeated, unwanted sexual flirtations, advances or propositions; • continued or repeated verbal abuse or innuendo of a sexual nature; • uninvited physical contact such as touching, hugging, patting, brushing or pinching; • verbal comments of a sexual nature about an individual's body or sexual terms used to describe an individual; • display of sexually suggestive objects, pictures, posters or cartoons; • continued or repeated jokes, language, epithets or remarks of a sexual nature in front of people who find them offensive; • comments or inquiries about a person's body or sexual activity, deficiencies or prowess…"

7. The employee handbook contains a section related to public relations. This section reads: "All employees who have contact with the public must remember that the impression our citizens have of the Town and local government employees is based on their initial encounter with you. Therefore, it is most important that employees deal with the public in a pleasant and courteous way, and make every effort to assist customers, whether on the phone or in person. Furthermore, it is expected that employees will maintain a professional manner at all times."

8. During the term of his employment, the claimant received a copy of the employee handbook. The claimant was aware of the employer's policies contained in the handbook.

9. In April 2021, the employer hired a third party to conduct an investigation into allegations that the claimant engaged in a sexually inappropriate behavior with a woman years earlier, during the time when she was a program participant and employee. The woman last participated in the program in 2013, when she was 18 years-old. During the investigation, the investigator reviewed text messages between the claimant and the woman and interviewed both. The investigator found that the woman's allegation that the claimant engaged in sexually inappropriate behavior was not credible.

10. During her investigation, the investigator found that the claimant hugged program participants and told them that he loved them.

11. During her investigation, the investigator found that after the woman was an adult and left the youth program, the claimant continued to be involved with her. After the woman relocated and returned to the town for a visit, the claimant met her at the workplace at approximately 9:00 p.m. and visited with the woman until approximately midnight, when he drove her home in his personal vehicle. The investigator found electronic exchanges on the employer's cell phone between the claimant and the woman. In his messages to the woman, the claimant wrote that he loved her and that she was beautiful.

12. In a text message sent to the woman, the claimant wrote: "I'm sorry that you are upset ; I'm sorry that you have endured much and tried to help others even in your own turmoil. Your pain believe it or not can be the foundation of change; a new direction, hope and balance. But we have to stop and beware of all around us and then accept we can't control much but can get off the road of insanity and become sane again. We can't do it along and we can't do it with those who say they love us and we can't do it high."

13. In response to a text message from the woman stating that she hated her life, the claimant responded: "I know you do. But you are a beautiful person who is lost no fault of your own. You need to get away from all that hurts or harms you."

14. In response to a text message from the woman that reads: "I hate that I did porn like that no one will ever take seriously", the claimant wrote: "- that's a lot. The reality is some of this can change and some you can't. So accepting some of the pain is a reality but changing the things you can is a must. You have been living in trauma for years now. The trauma stays in place and festers inside your mind and heart. Makes you hate yourself and your life. The trauma is like a compass it can lead you to a different existence if you only learn to use the compass. If you expect to find peace in your heart and joy in your life then you

must learn to use your compass. If you set your compass towards "liking my life" then you have to struggle up the mountain and each step focus on your responsibility to change your life. If you want any kind of life you must face yourself which is the mountain and strip away anything that gets in your way of self acceptance. So what if you did porn? It's just a reaction to your pain. What would you feel? What would your life be like? If you are trying to save your parents it will never happen? We can't save anyone and if we think we can we are going to live in great pain. If you want love then you must give love. Love is not money and it has nothing to do with sex but everything to do with honesty. You also cannot find yourself among people manipulating you and calling it love. Consumerism, materialism and social media life I pray for change for you but you must be the catalyst to the desire to change; and take specific actions* Your struggle and pain are actually your foundation to living a good life. It gives you wisdom and the ability to see what is truly important in this world. What will motivate you to abandon this life from a different one?" In a subsequent unsolicited message, the claimant wrote: "what's going on? What's up in your world and can you feel the ground? Love you always…"

15. After the woman left the employer's youth program, the claimant did not speak with the program's social worker about the woman. The social worker never met the woman.

16. Sometime in 2016, the claimant was visited by a male town resident who knows the woman. The male resident told the claimant that the woman was involved in pornography. The claimant and male resident used a computer belonging to the town or the male resident and viewed a pornographic video containing images of the woman. The claimant subsequently visited the woman's mother at the mother's home. The claimant told the mother that allegations were going through the community that the woman was involved in pornography. The mother stated that the allegations were untrue. The claimant told the mother that the allegations were true, and he provided the mother with the woman's stage name. The claimant and the mother searched the internet for videos of the woman. The two found a pornographic video with images of the woman. The woman subsequently learned of the claimant's actions and initiated a complaint with the local police before being referred to the office of the District Attorney. The District Attorney notified the employer that the woman alleged the claimant engaged in inappropriate conduct when she was a minor. There were no criminal charges brought against the claimant.

17. The employer discharged the claimant because of information revealed during the investigation into the woman's allegations. The employer concluded that the claimant crossed boundaries; gave unlicensed advice; downloaded pornography and showed it to families; sent inappropriate text messages; and hugged and expressed love to program participants.

18. The claimant filed an initial claim for unemployment insurance benefits, effective 5/30/21.

19. On 9/29/21, the DUA issued the claimant a Notice of Disqualification, finding him ineligible for benefits under Section 25(e)(2) of the law for the week beginning 5/9/21 and indefinitely thereafter.

20. On 10/16/21, the claimant appealed the Notice of Disqualification.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was terminated from his employment, 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 findings show that the employer hired the claimant to run recreational, educational, and cultural programs for youngsters between the ages of 11–19. Finding of Fact # 3. They further provide that he was fired after an investigation conducted by an outside consultant revealed activity that the employer determined had crossed professional boundaries, that he had given unlicensed advice, downloaded pornography and showed it to families, sent inappropriate text messages, and hugged and expressed love to program participants. Finding of Fact # 17. In her decision, the review examiner concluded that the claimant violated the employer's expectations in three regards. She concluded that the claimant violated the employer's sexual harassment policy with his interactions involving a 24-year-old woman (hereinafter, "X") who had been a former program participant, violated the employer's internet and email use policy by using his employer-issued cell phone for personal business, and violated the employer's public relations policy by failing to maintain a professional manner at all times. These policies are set forth in Findings of Fact ## 4–7.

Because there is no evidence demonstrating that the employer discharged other employees for engaging in similar behavior, we agree that it has not met its burden to show that the claimant knowingly violated a reasonable and *uniformly enforced* policy. However, we do believe it has shown that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must show that the claimant engaged in misconduct. We do not agree that the claimant's behavior toward X, however troubling, necessarily constituted a violation of the employer's sexual harassment policy, as it is set forth in Findings of Fact ## 5 and 6. However, we do agree that the claimant's actions violated the email and internet use policy prohibiting personal use of the employer's internet and the public relations policy, particularly the part that requires employees to maintain a professional manner at all times. *See* Findings of Fact ## 4 and 7.

There is no question that the claimant used his employer-issued cell phone to send text messages to X over the internet. *See* Findings of Fact # 11–14. We consider whether the content of these messages were personal or in furtherance of the claimant's job responsibilities as director of the employer's youth program. Similarly, we consider whether viewing a pornographic video of X, showing it to her mother, and then meeting with X alone on the employer's premises late at night were in furtherance of his role directing the employer's youth program, or were done for personal reasons. The employer and the review examiner concluded that they were personal.

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). A person's knowledge or 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. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984). We are also mindful that the Supreme Judicial Court has stated, "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." Garfield, 377 Mass. at 97.

There is no suggestion that any of the actions listed in the findings were accidental. In that sense, it is apparent that the claimant's conduct was deliberate. The question is whether his text messages, his actions in connection with the pornographic video, and meeting with X late at night went beyond the professional role he was hired to do, or, as the employer asserts, crossed professional boundaries such that they were personal, inappropriate, and done in wilful disregard to the employer's interests. *See* Finding of Fact # 17.

Although the claimant maintained that these messages were part of his job to help a very troubled young woman, we think that the entire record demonstrates that they were not. The text messages in this case were exchanged with a woman who was 24-years old, well beyond the 11–19-year-old population that the claimant was hired to serve.

During the hearing, the claimant asserted that it was not unusual for former program participants to reach out to him for support if they were struggling, and that he would not turn them away.[1] Were we to view the messages in isolation, this would be a closer case. By themselves, his words "you are a beautiful person," "I love you more now than ever," "love you always," "always miss you," could be dismissed as friendly words of encouragement and support or, at most, an exercise of poor judgment.[2] However, it is difficult to view them in isolation, because in this case, prior to sending these messages, the claimant had viewed this woman acting in a pornographic video, and subsequently met with her alone for two hours at night (on the employer's premises) and drove her home in his car. Together, these facts demonstrate that the claimant was no longer acting in a professional manner. They present substantial evidence that the claimant's behavior crossed the line, and we can reasonably infer that he had developed a personal or romantic interest in X.

It is also difficult to fathom why the claimant took it upon himself to view the pornographic video with a male resident, share it with this woman's mother, or how that furthered the employer's interest to provide "recreation, educational, and cultural programs for youngsters between the ages of 11–19." *See* Finding of Fact # 3. Nothing in the record suggests that there were mitigating circumstances that required him to act this way. As the review examiner observed, a social worker was available in the program to address crisis situations. *See* Finding of Fact # 3. The review examiner reasonably concluded that viewing the video with both the male resident and X's mother was unprofessional and contrary to how the employer expected its employees to interact with the public.

In his appeal, the claimant asks the Board to reverse because the grounds for the review examiner's decision go beyond those stated in the underlying DUA determination, (*i.e.* "You were discharged for taking the employer's property for your own use without authorization."). *See* Exhibit 4. There is nothing improper about the review examiner considering the additional facts presented during a full evidentiary hearing and reaching alternate grounds for disqualification under the same section of law, here G.L. c. 151A, § 25(e)(2). *See* Board of Review Decision 0002 4465 51 (June 7, 2016), *citing* Jean v. Dir. of Division of Employment Security, 394 Mass. 225 (1985).

The claimant also asserts due process grounds for reversal, specifically that he was denied the opportunity to use the investigative report to cross-examine a witness, and he was denied the opportunity to cross-examine the investigator, because the employer did not present her as a witness. We see no due process violations. The employer's hearing witness was its Director of Human Resources. She was not involved in the investigation and the questions posed to her by the claimant's attorney went beyond the scope of her knowledge. It was appropriate for the review examiner to end that line of questioning. Moreover, if the claimant's attorney felt that it was necessary to question the investigator directly, he could have asked for a further continuance and subpoenaed the witness directly. *See* 801 CMR 1.02(10)(i).

[1] This portion of the claimant's testimony, while not explicitly incorporated into the review examiner's findings, 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).

[2] *See* Exhibit 10, pp. 15, 28, 41, and 49. These pages show the original text messages (redacted) and are also part of the unchallenged evidence in the record.

We, therefore, conclude as a matter of law that the employer has met its burden to show 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 affirmed. The claimant is denied benefits for the week beginning May 9, 2021, 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 - July 18, 2022

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 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