The employer fired the claimant, a relief counselor, because she acted unprofessionally during a conversation with her manager. Review examiner's credibility assessment that the claimant did not act deliberately was unreasonable in relation to the weight of the evidence. Board held the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and is denied benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0075 1303 93

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 January 25, 2022. She filed a claim for unemployment benefits with the DUA, effective January 23, 2022, which was denied in a determination issued on March 25, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner reversed the agency's initial determination and awarded benefits in a decision rendered on June 30, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate 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 testify. Both parties 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 decision, which concluded that the claimant had been terminated merely because she told the employer she would no longer do favors for it after she learned she was removed from a program schedule and would not be working overtime, is supported by substantial and credible evidence and is free from error of law.

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 as a full-time residential counselor from 2013 to 2016 and as a relief counselor from 2016 until her separation on January 25, 2022.

2. The claimant underwent an orientation and training upon hire, during which she received the employer's written Workplace Conduct Policy (Policy) and Code of Ethics and Professional Conduct (Code).

3. The employer determines if there has been a violation of the Policy and Code based upon a number of factors, such as severity and frequency and the associated discipline.

4. The employer expected employees to conduct themselves in a professional and positive manner and to treat everyone with courtesy and respect.

5. The purpose of the expectation was to promote cooperation and collaboration among the staff so services could be provided in the most effective and efficient way possible.

6. The employer communicated the expectation to the claimant through the Policy and Code issued at the time of hire, as well as during disciplinary meetings on May 27, 2021, and January 10, 2022.

7. Between March 26, 2021, and May 12, 2021, the claimant said a nurse "sucked;" referenced "the best day of [her] life" being when another employee resigned; left voicemail that she was not going to be working as a nurse; and stated she was "fucking pissed" and was "tired or writing statements" for the employer. On May 27, 2021, the claimant received a 3-day suspension for inappropriate and abrupt behavior with management and peers between March 26, 2021, and May 12, 2021.

8. On January 10, 2022, the claimant had a meeting with her manager to review the employer's expectations in response to unspecified inappropriate comments about staff and consumers not consistent with the Policy and Code.

9. On January 11, 2022, while in a residential facility, the claimant and a coworker engaged in a heated discussion, which required the manager to intervene and tell them to take the discussion to a private location. The claimant was not immediately disciplined for this incident.

10. On January 19, 2022, after having worked two overnight shifts, the Director of Operations spoke with the claimant by phone and informed the claimant that she had been taken off of the schedule for the following week due to internal COVID-19 scheduling guidelines in an attempt to reduce the number of in-person contacts among staff. During the call, the claimant became upset and began crying. The claimant told the Director of Operations that she would not

do the employer any further favors by working overtime and said, “now you screw me” and “payback is a bitch.”

11. At the time of her comments on January 19, 2022, the claimant did not think she was acting unprofessionally because she was being honest and saying what she was thinking.

12. At the time of her comments on January 19, 2022, the claimant did not think she would be disciplined because she was tired, upset, and reacting in the moment to having her overtime taken away.

13. The manager interpreted “payback is a bitch” as a threat.

14. The claimant did not believe her conduct on January 19, 2022, was threatening. The claimant did not intend to threaten anyone when she said, “now you screw me” and “payback is a bitch.”

15. On January 25, 2022, the employer discharged the claimant because of her unprofessional behavior and negative attitude during the phone call on January 19, 2022.

Credibility assessment:

The claimant did not deny the various incidents but disputed the nature and intent of them. Despite the claimant’s disciplinary history with the employer, the claimant offered specific, detailed, direct testimony about her own state of mind during her January 19, 2022, comments to the Director of Operations. The claimant candidly admitted to making the comments to the Director of Operations when she had just completed an overnight shift and was upset following the news that her overtime was taken away. The claimant’s testimony was corroborated by the Director of Operations who described the claimant as upset and crying during the January 19, 2022, call and admittedly told the claimant of the scheduling change. Under these circumstances, the claimant’s testimony that she did not think she was acting unprofessionally because she was being honest and saying what she was thinking; did not think she would be disciplined in part because she was reacting in the moment; did not believe her conduct on January 19, 2022, was threatening; and did not intend to threaten anyone when she said, “now you screw me” and “payback is a bitch” is reasonable, plausible, and believable.

The Director of Employee Relations offered credible testimony regarding the application and enforcement of the Policy and Code and the associated discipline for a violation.

The Vice President of Community Living and Day Services offered credible testimony about the January 25, 2022, phone call terminating the claimant’s employment.

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 as follows. As discussed below, we reject Consolidated Findings of Fact ## 11, 12 and 14, as they are based upon a credibility assessment that is unreasonable in relation to the evidence presented. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject the review examiner's legal conclusion that the claimant is eligible to receive 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 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. . . .

"[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).

Because the employer had discretionary authority with the form of discipline to impose when an employee violates the employer's rules of conducts, we cannot conclude that the claimant violated a reasonable and *uniformly enforced* rule or policy. *See* Consolidated Finding # 3. Alternatively, we consider whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

To meet its initial burden, the employer is required to show that the claimant's actions were not only misconduct but that they were deliberate. The employer maintained a workplace conduct policy and code of ethics and professional conduct and expected employees to conduct themselves in a professional and positive manner, as well as treat everyone with courtesy and respect. *See* Consolidated Findings ## 2 and 4.

It is undisputed that, on January 19, 2022, and after the claimant had completed work on two overnight shifts, the Director of Operations spoke with the claimant by phone, informing her that she had been taken off of the schedule for the following week due to internal COVID-19 scheduling guidelines in an attempt to reduce the number of in-person contacts among staff. During the call, the claimant told the Director of Operations that she would not do the employer any further favors by working overtime and said, "now you screw me" and "payback is a bitch."

See Consolidated Finding # 10. By making these comments to the Director of Operations, the claimant engaged in misconduct, as such words are self-evidently unprofessional, discourteous, and disrespectful.

In rendering Consolidated Findings ## 11, 12, and 14, the review examiner credited the claimant's "testimony that she did not think she was acting unprofessionally, because she was being honest and saying what she was thinking; did not think she would be disciplined in part because she was reacting in the moment" as "reasonable, plausible, and believable." 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based on the record before us, we cannot accept these findings, as we believe that the review examiner's credibility assessment is unreasonable in relation to the evidence presented. It relies on facts not in evidence and fails to take into account significant portions of the record which detract from the weight of the claimant's hearing statements.

In his credibility assessment, the review examiner noted that the claimant testified that she did not think she was acting unprofessionally, because she was being honest and saying what she was thinking, and she did not think she would be disciplined in part because she was "reacting in the moment." However, this statement, and the consolidated findings that derive from it, are unsupported by the record. At no time did the claimant ever assert, during the initial and remand hearings or in her completed fact-finding questionnaire, that, at the time that she made the two comments to the Director of Operations, she was being "honest and saying what she was thinking," or that she was "reacting in the moment." *See* Exhibit 9.[1] The claimant merely testified that she did not believe that she acted unprofessionally.

Similarly, although the parties stipulated that the claimant had recently completed two overnight shifts at the time of the January 19, 2022, conversation, the claimant never testified or reported in her fact-finding questionnaire that she made the comments because she was "tired," as stated in Consolidated Finding # 12.

Additional inconsistencies in the record further detract from the credibility of the claimant's testimony. For example, at the hearing, the claimant testified that she became upset when she worked overnight shifts, and the employer took away the overtime she had been expecting to receive. However, in her fact-finding questionnaire response, the claimant indicated that she was terminated because she advocates for residents and recalled a completely different incident that was not related to overtime. *See* Exhibit 9. Also, the claimant testified that she had received previous warnings relating to the same allegation of inappropriate/unprofessional conduct. Yet, in her fact-finding questionnaire, she indicated that she never had any prior warnings. *See* Exhibit 9. Perhaps most significantly, the review examiner appears to have ignored or disregarded the fact

[1] Exhibit 9 is the claimant's completed fact-finding questionnaire.

that, during the initial hearing, the claimant denied knowing the reasons for her termination. In what appears to be a contradictory statement, the claimant subsequently testified, "The thing that they said, that payback is a- is not true, I didn't say that."[2] However, on cross-examination during the remand hearing, the claimant admitted telling the Director of Operations that "payback is a bitch." *See* Consolidated Finding # 10.

There is also insufficient information in the record to support a conclusion that the claimant acted spontaneously. The employer's witnesses testified that the conversation continued for some time after the claimant stated, "now you screw me," and that, after discussing other matters, the claimant stated that "payback's a bitch" before ending the call. The claimant did not refute this testimony. The claimant's ability to discuss other matters in between these two statements undercuts any contention that her comment "payback's a bitch" was merely a momentary reaction, accidental, or unintentional. In the absence of any credible evidence that the claimant acted unintentionally or accidentally when making the statements to the Director of Operations, we can reasonably infer that her actions were deliberate.[3]

However, our inquiry does not end here. The employer must also show that the claimant's actions were done in wilful disregard of the employer's interest. To determine whether an employee's actions were in wilful disregard of the employer's interest, 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). 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) (citation omitted). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Id. at 95.

In this case, the review examiner found that the employer expected the claimant to refrain from unprofessional behavior and treat others with courtesy and respect. *See* Consolidated Finding # 4. The purpose of the expectation was to promote cooperation and collaboration among staff so that services can be provided effectively and efficiently. *See* Consolidated Finding # 5. As such, we believe that the employer's expectation was reasonable.

The review examiner also found that the claimant was aware of the employer's expectation because she underwent orientation and training upon hire and had received the written policies. *See* Consolidated Finding #2. Further, the employer had communicated its expectation to the claimant during two disciplinary meetings on May 27, 2021, and January 10, 2022. *See* Consolidated Findings ## 6 and 8. After a series of incidents relating to the claimant's inappropriate behavior with management and peers between March, 2021, and May, 2021, the claimant received a three-day suspension. Consolidated Finding # 7.

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[2] 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).

[3] We also note that the review examiner appeared to focus on whether the claimant's remarks were threatening, including whether she believed they were threatening. However, we believe that this analysis was too narrow and did not go far enough, as there is undisputed evidence in the record showing that the employer terminated the claimant for unprofessional conduct, not making specific threatening statements.

We next consider whether the record supports the presence of mitigating circumstances which prevented the claimant from complying with the employer's expectation. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

Consolidated Finding # 10 states that the claimant was upset about being removed from the employer's schedule and not working overtime. This finding suggests that the claimant's reaction could have been prompted by stress relating to financial considerations. Although there are no findings on the matter, there is unrefuted evidence that, while the Director of Operations did call the claimant to notify her that she would not be on the schedule for the following week and would therefore not be receiving overtime through one particular program, the Director of Operations did offer the claimant the same number of hours in other programs in which she had already worked to compensate for the inability to work in that particular program. *See* Remand Exhibit 8.[4] Given that the employer offered the claimant the same number of hours in another one of its programs, it cannot be said that stress relating to financial considerations or the threat of financial harm or loss effectively mitigated the claimant's behavior. Moreover, the claimant did not show that she experienced any detrimental physical or psychological symptoms associated with working two overnight shifts on January 19, 2022. Thus, we see nothing in the record to suggest that the claimant was under extreme stress or provocation at the time of the incident.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant engaged in 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 from the week beginning January 23, 2022, 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 - March 28, 2024

Paul T. Fitzgerald, Esq.
Chairman

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[4] Remand Exhibit 8 is a letter, dated January 19, 2022, from the Director of Operations to Human Resources.

Member

Member Michael J. Albano 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