

Board held that when the claimant sent one client's HIPPA-protected information to another client, it was not a mistake, but a deliberate choice not to follow the employer's procedures. Since she did not show that anything prevented her from safeguarding the employer's clients' protected information, she did not present mitigating factors. She is ineligible for benefits under G.L. c. 151A, § 25(e)(2), due to deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0081 1177 59

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 September 15, 2023. She had filed a claim for unemployment benefits with the DUA, effective September 3, 2023, and was approved in a determination issued on October 12, 2023. 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 November 16, 2023. 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 knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 give the claimant an opportunity to testify and provide other evidence. The claimant did not appear at the remand hearing. We subsequently remanded a second time, and both parties attended the 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 and knowingly violated a reasonable and uniformly enforced rule or policy of the employer when she shared one client's HIPAA-protected information with another client, 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 full-time as a clinician for the employer, an outpatient mental health provider, from March 20, 2023, until September 15, 2023.
2. The employer has an unwritten policy prohibiting the dissemination of clients' sensitive and protected personal information (the policy).
3. The claimant became aware of the employer's policy during the employer's onboarding process on March 30, 2023.
4. The purpose of the employer's policy is to ensure compliance with the federal Health Insurance Portability and Accountability Act (HIPAA), which governs and prohibits the dissemination of a patient's personal information without prior authorization.
5. Discipline for violations of the policy is termination.
6. The employer has not terminated other employees for HIPAA violations because the employer is not aware of other violations. The employer would terminate any other employee who violated the policy.
7. The employer has an expectation that its employees will not disclose sensitive or protected personal information of its clients to others.
8. The employer communicated its expectation to the claimant when she was hired, and through regular group supervisions and one-on-one supervisions with the Owner.
9. The claimant's immediate supervisor was the company Owner (the Owner).
10. The claimant has a master's degree in her field.
11. HIPPA [sic] regulations and its protections are common knowledge in the mental health field. HIPAA guidance is instilled in all medical professionals throughout their studies for their chosen profession.
12. The claimant was aware that termination would result if a HIPAA violation occurred because she was told in the group and one-on-one supervisions.
13. The claimant was aware that the employer could face consequences for its employees' failure to adhere to HIPAA regulations.
14. The employer always reviews HIPAA regulations and prohibitions during group supervisions and in one-on-one supervisions.

15. Employees are reminded constantly throughout their daily work applications of the seriousness of HIPAA violations.
16. The claimant graduated from a graduate school program in January, 2023.
17. The claimant was on a three-month probationary period from March 20, 2023, until June 20, 2023.
18. The claimant's probationary period was extended prior to its expiration until August 15, 2023, for conduct and performance related issues.
19. The claimant received previous warnings for various infractions, including insubordination, client complaints, cancelling client appointments, double booking, deletion of client notes, and failure to maintain a 35-hour workweek. The warnings were given on April 4, 2023, August 16, 2023, September 12, 2023, and September 13, 2023.
20. The employer has a template intake package it sends to all of its prospective clients. The template package is devoid of information belonging to other clients.
21. The employer has a procedure for employees to follow prior to sending intake packages to ensure they remain in compliance with HIPAA regulations and do not commit HIPAA violations.
22. On August 21, 2023, the claimant sent an intake package to Client A that contained the personal information of Client B, that included credit card information, Client B's full name, credit card number, CCV, expiration date, and zip code information.
23. The claimant did not send the employer's template intake package to Client A.
24. The claimant did not follow the employer's procedure to ensure HIPAA compliance prior to sending the intake package to Client A.
25. The claimant did not check the intake package that she sent to Client A thoroughly to ensure there was no information remaining in the packet that belonged to another client.
26. After receiving Client B's information, Client A contacted the claimant by e-mail to inform the claimant of the error and advised the claimant that they would not be using the employer's services due to the egregiousness of the error, which caused Client A not to trust the employer.
27. The claimant did not report the error to her supervisor, nor did she report [that] her error had caused the loss of a potential client.

28. After receiving Client B's information, Client A made a complaint to the U.S. Department of Health and Human Services Office of Civil Rights (HHS-OCR).
29. On September 13, 2023, HHS-OCR sent the employer a letter stating Client A alleged in her complaint that the employer "... violated the Federal Standards for Privacy of Individually Identifiable Health Information and/or the Security Standards for the Protection of Electronic Protected Health Information (45 C.F.R. Parts 160 and 164, Subparts A, C, and E, the Privacy and Security Rules)."
30. The letter stated HHS-OCR had conducted an informal investigation and, "You are encouraged to review these materials closely and to share them with your staff as part of the Health Insurance Portability and Accountability Act ("HIPAA") training you provide to your workforce. You are also encouraged to assess and determine whether there may have been any noncompliance as alleged by the complainant in this matter, and, if so, to take the steps necessary to ensure such noncompliance does not occur in the future."
31. On September 14, 2023, the Owner contacted the claimant by e-mail to find out what had happened. At 5:44 p.m., the claimant responded to the Owner by e-mail, stating she had sent the wrong packet to Client A and provided the Owner with a copy of the e-mail she sent.
32. The claimant's e-mail to the Owner read, "This is the email i sent out. She called to let me know she was all set. I'm so sorry, I just noticed on this packet there is [Client B's] card information. I just checked other packets and they are all set!"
33. On September 15, 2023, the Owner called the claimant on the telephone and told her she was terminated for violating the employer's policy regarding HIPAA. The Owner told the claimant she could come in and sign a termination letter and pick up her last check.

Credibility Assessment:

During the hearing, the claimant's testimony was not credible, straightforward, or sincere. The claimant stated any HIPAA training she received was not fresh in her mind despite having graduated from a graduate program in her field in January, 2023, having worked in healthcare in the past, and the employer's credible testimony that HIPAA guidelines and reminders were regularly reviewed during groups and one-on-one supervisions. The claimant disputed that HIPAA [sic] regulations and protections are common knowledge in the mental health field. The claimant also stated the probationary period imposed by the employer was not extended, which is contrary to the testimony of the employer. Moreover, the claimant's testimony shows the claimant was aware of her error of sending Client B's information to Client A on the day the error occurred and knew the employer had lost a client due to her error, yet deliberately chose not [sic] report the error to

the employer. The claimant was then untruthful in her e-mail to the Owner on September 14, 2023, where she stated, "... I just noticed on this packet there is [Client B's] card information...", when, in fact, she learned on August 21, 2023, that the card information was present in the packet when it was sent to Client A.

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 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.

Where a claimant is discharged from employment, her eligibility 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).

In this case, the employer fired the claimant because she sent a prospective client an intake form via email containing an existing client's name and credit card information on August 21, 2023. Consolidated Findings ## 22, and 32–33. This was both a policy violation and misconduct in the sense that her actions violated the employer's HIPAA policy, which prohibits the disclosure of such protected information without authorization. Consolidated Findings ## 2 and 4. The claimant alleged during the remand hearing that she mistakenly shared the existing client's protected information with the prospective client.¹ While there is no indication in the record that the claimant intended to share the existing client's protected information with the prospective client, the evidence does show that the claimant intentionally disregarded the employer's practices, which were in place to safeguard against such mistakes. Consolidated Finding # 21.

The employer provides clinicians, such as the claimant, with a blank template intake form to send to prospective clients. Consolidated Finding # 20. This template package is devoid of information

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).

belonging to other clients. Id. The employer also has a set procedure for employees to follow prior to sending intake packages to ensure they remain in compliance with HIPAA regulations and do not commit HIPAA violations. Consolidated Finding # 21. Rather than following the set procedure, the claimant failed to maintain and isolate the blank intake form from previously completed intake forms submitted by other clients. The claimant further failed to thoroughly and properly inspect the intake form to make sure it was completely blank prior to sending it to a new prospective client. The fact that she checked the first two pages of the intake form indicates that she was concerned about something she was doing. Yet, for whatever reason, she chose not to keep going and inspect the rest of the document. In our view, her action demonstrates a deliberate choice and not a mistake. Thus, the claimant's actions on August 21, 2023, were a deliberate act.

However, in order to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, "[d]eliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). In order 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). 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) (citation omitted).

The consolidated findings show that the claimant was made aware of the employer's policy to prohibit the dissemination of clients' sensitive and protected personal information as early as her onboarding process on March 30, 2023. Consolidated Findings # 2–3. She was further reminded of the HIPAA requirements through regular group supervisions and one-on-one supervisions with the owner. Consolidated Finding # 8. The claimant also possessed a master's degree in her field where HIPAA regulations and its protections are common knowledge and instilled throughout their studies. Consolidated Findings # 10–11. We believe that the employer's expectation that its employees comply with federal HIPAA laws is reasonable. Consolidated Finding # 4.

Finally, we consider whether there were mitigating circumstances for her behavior. 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). There is nothing in the record to indicate that the claimant was prevented from taking the necessary steps to ensure the accuracy of her work and compliance with the employer's HIPAA policy. 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 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 September 10, 2023, 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 - September 27, 2024



Charlene A. Stawicki, Esq.
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 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.

SVL/rh