

Even though the claimant found working with two employees to be frustrating, when she sent a text with profanity criticizing them to friend who was both her subordinate and a peer of the employees, held she acted deliberately in a way that violated the employer's prohibition against unprofessional behavior. Her frustration did not constitute mitigating circumstances. Held she is ineligible for benefits due to deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0081 2679 87

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 October 9, 2023. She filed a claim for unemployment benefits with the DUA, effective October 1, 2023, which was denied in a determination issued on October 26, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 17, 2024. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 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, is supported by substantial and credible evidence and is free from error of law, where the claimant intended to send a text message to a subordinate criticizing two other subordinates and accidentally sent the text message to multiple subordinates.

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 assistant director of residential services for the employer, a company that runs multiple residential programs, from 6/15/17 through 10/5/23.
2. The employer has a policy entitled [sic] EMPLOYEE CONDUCT AND WORK POLICIES [that] outlines a number of things that can result in discipline, including “unprofessional behavior in the workplace or in the community while acting as a representative of [the employer].”
3. Discipline for violations of the employer’s policies is discretionary depending on the severity of the incident, up to and including termination.
4. The employer has an expectation that employees will act professionally in the workplace and not engage in conduct that would create a hostile work environment.
5. The employer has these policies and expectations to maintain a safe and comfortable workplace.
6. The claimant was aware of these policies and expectations from having received the handbook at hire, periodic reviews of policies, and because she was a manager.
7. On 10/5/23, while in a staff meeting with a group of house managers, the claimant became frustrated by two staff members asking questions that they should already have known the answers to, “acting confused” and acting in a way that she perceived as negative. These same two staff members frequently complained and made “excuses” for why they could not do certain things, or why things were hard for them. The claimant had addressed these particular staff members in the past about their negativity and need to seek solutions, rather than make excuses.
8. In frustration, the claimant sent a text message that read: “Fucking [Coworker A] and [Coworker B]. [eye roll emojis] Negative and a million excuses”.
9. The claimant meant to send the text message to her friend of 30 years, who also works for the employer, to vent. Instead, she mistakenly sent the text to the entire group of house managers.
10. One of the people ([Coworker B]) that the text was about saw it and immediately became very upset and told the claimant that the text was inappropriate.
11. When the claimant realized what had happened, she called a second meeting with the house managers in a different conference room (C). While the other house managers assembled in the other conference room, the claimant tried to talk to [Coworker B] in the presence of another manager. She apologized for

the inappropriate text and explained that she was feeling frustrated. She went on to say that she felt that [Coworker B] was negative. [Coworker B] “escalated and began raising her voice” and yelling that the text was inappropriate. She took her things and left the room.

12. The claimant went to conference room C, where the house managers were assembled and were already speaking with each other.
13. [Coworker A] felt “ganged up on” by the other house managers at the 2nd meeting as several took some time to address her about feeling that she was not “a team player.” [Coworker A] became upset and started yelling and stated she was going to HR.
14. The claimant raised the issue of the text message and apologized. She explained that she was frustrated but acknowledged that her actions were inappropriate. The claimant wanted all of her house managers to hear her apologize and hear her acknowledge that she should not have sent the text.
15. The claimant was suspended while the employer investigated, which mainly consisted of gathering statements from staff.
16. On 10/9/23, the claimant was discharged for unprofessional behavior with regard to the text message.

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 of fact 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant is eligible for benefits.

Because the claimant was discharged 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 review examiner found that the employer has a policy prohibiting unprofessional conduct in the workplace and discipline for violations of the policy is discretionary, depending on the severity of the incident. Findings of Fact ## 2–3. Because discipline for violations of the policy is dependent on the employer’s judgment of the severity of an incident, and this would inevitably result in various degrees of discipline on a case-by-case basis, we cannot conclude that the claimant violated a reasonable and *uniformly enforced* rule or policy of the employer. 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.

As a threshold matter, the employer must demonstrate that the claimant engaged in the misconduct or policy violation for which she was discharged. In this case, the employer discharged the claimant for sending an unprofessional text message to her subordinates during a staff meeting. Findings of Fact ## 7–9, and 16. Specifically, the claimant sent a text message to all of the house managers, criticizing two of the house managers and using profanity. Findings of Fact ## 8–9. Inasmuch as the employer expected employees to refrain from unprofessional behavior in the workplace, and the claimant sent a text to other employees using profanity on October 5, 2023, we agree that the claimant engaged in misconduct. Findings of Fact ## 2, 4, and 8–9. We further believe that the misconduct was deliberate, because, although the claimant accidentally sent the comments to multiple house managers in a group text message, she testified that she intended to send the text to one specific house manager, who was also a friend. Finding of Fact # 9.

However, the Supreme Judicial Court (SJC) has stated, “Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer’s interest. 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). 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).

The claimant here was aware of the employer’s expectation that she refrain from unprofessional conduct in the workplace, as she had received the handbook with the employer’s policies and expectations and periodically reviewed the policies. Findings of Fact ## 2 and 6. We further believe that the employer’s expectation was reasonable, as it was in place to ensure a safe and comfortable workplace for all employees. Finding of Fact # 5.

Nonetheless, the review examiner concluded that the claimant had a momentary lapse in judgment due to frustration and, therefore, did not have the necessary state of mind to engage in deliberate misconduct in *wilful disregard* of the employer’s interest. “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 Section 25(e)(2) for denying benefits.” Garfield, 377 Mass. at 97. We disagree with the review examiner’s view of the facts.

Even if sending the text to all of the house managers was a mistake, sending the text to the one house manager that she was friends with was done in wilful disregard of the employer's interest. This house manager was still a coworker and subordinate, as well as a peer of the two house managers who were being criticized. Thus, her targeted recipient fell squarely within the population of workplace individuals which the policy was designed to protect.

We next consider whether the claimant's frustration with the two house managers mentioned in the text message was a mitigating circumstance. 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).

The review examiner found that the claimant sent the text message because she was frustrated that the two house managers that she criticized in the text message were asking questions to which they should know the answer, and she felt that they were negative and made excuses regarding their work. Findings of Fact ## 7-8. While it is understandable that the claimant was frustrated with the two house managers' behavior, there is nothing in the record to show that the claimant was so provoked by the two house managers' behavior during the October 5th staff meeting that she could not refrain from composing or sending the text.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning October 1, 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