The claimant's use of her personal cell phone to disclose personal information belonging to a client and a former employee violated the employer's policies and expectations. Held the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and she is ineligible for benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: [0081 5946 50]

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. Benefits were denied on the ground that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, effective February 19, 2023,[1] which was denied in a determination issued by the agency on December 16, 2023. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on January 20, 2024. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On July 11, 2024, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's state of mind at the time she used her personal cell phone to divulge personal information belonging to a former employee and a current client of the employer. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant should be disqualified from receiving benefits because she intentionally used her cell phone to disclose the personal information of a client and a former employee, and did not experience a momentary lapse in judgment at the time, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearings, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

[1] UI Online, the DUA's record-keeping database, indicates the claimant subsequently filed claim no. 2024-01, effective February 25, 2024.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked full-time as a commercial lines account manager for the employer, an insurance agency, from June 6, 2023, until November 28, 2023, when she separated.

2. The claimant's immediate supervisor was the supervisor (supervisor) for most of her employment. The supervisor went back to being an account manager and the senior vice president of business development (senior vice president) was made the claimant's supervisor towards the end of the claimant's employment.

3. The claimant maintained a property and casualty broker license at all relevant times.

4. The claimant has thirty-five years of experience in the insurance industry.

5. The employer maintains a written policy involving client privacy, including the "Written Information Security Program" guidelines, which they last updated on January 11, 2023.

6. The Written Information Security Program guidelines state, "[a]ll employee are responsible for maintaining privacy and integrity of personal information."

7. The Written Information Security Program guidelines state, "[a]ny employee who discloses personal information or fails to comply with these policies will face immediate disciplinary action including the possibility of termination."

8. The Written Information Security Program guidelines state, "[a]ny terminated employees' computer access passwords will be disabled before the employee is terminated. Physical access to any documents or resources containing personal information will also be immediately discontinued."

9. The Written Information Security Program guidelines state, "[w]e do not transmit unencrypted personal information across public networks under any circumstance."

10. The claimant signed an acknowledgement of receipt of the Written Information Security Program guidelines on June 6, 2023.

11. The employer also maintained a Personal Cell Phone/Mobile Device Use Policy, which states, "[y]ou may have the opportunity to use your personal device for work purposes. Before using a personal device for work-related purposes, you must obtain written authorization from management… You will

be subject to disciplinary action up to and including termination of employment for violations of this policy."

12. The employer had an expectation that employees would protect client privacy and personal information, including not using personal cell phones for work purposes, without authorization from management.

13. The purpose of this expectation is to comply with insurance regulations and to protect clients from unauthorized access to their personal information.

14. The discipline for violation of this expectation is up to, and including, termination.

15. The claimant was aware of this expectation from receipt of the employer's policies at the time of hire and as a matter of common sense.

16. In early November 2023, the employer discharged employee A (employee A) and ended her access to all employer files.

17. The claimant knew employee A and had exchanged cell phone numbers with her when the claimant and employee A worked together, as they lived in the same town.

18. The claimant knew that the employer discharged employee A, but did not know the reason why employee A was discharged.

19. On November 28, 2023, the claimant answered a call from a client, client A (client A) at the employer's workplace.

20. Client A had questions about an insurance policy she had with the employer.

21. The claimant tried to locate client A's policy in the employer's system.

22. The claimant was unable to find the insurance policy in the employer's system through the search function. The customer brought up employee A during the phone conversation.

23. The claimant told customer A that she would call her back when she could find out more information, and ended the call with customer A.

24. The claimant sought help from the employer's management team about how to locate customer A's policy.

25. The claimant told the senior vice president that she had received a call from customer A, but was unable to find the customer's policy in the system.

26. The senior vice president instructed the claimant to look through employee A's emails.

27. The claimant spoke to the employer's chief operating officer (COO) briefly about client A.

28. The claimant searched employee's A emails to try to find information about client A's policy.

29. The claimant was unable to find the policy information in employee A's emails.

30. The claimant did not follow up with the senior vice president or the COO once she was unable to find anything in employee A's emails.

31. The claimant did not speak to anyone else at the employer about locating client A's policy or if she should contact employee A directly about the policy.

32. The claimant was never instructed by anyone at the employer to contact employee A about client A.

33. The claimant decided to text employee A about client A's policy because she wanted to help client A.

34. The claimant felt stressed and flustered that she could not locate client A's policy.

35. The claimant texted employee A on her personal cell phone stating, "Hey Lady Hi [emoji] I'm hoping you can help – I had a call from [client A] this morning regarding a commercial policy for [omitted] (?). I can't find anything in [employer system]. Everything keeps coming back to her personal account. Can you remember what you might have entered this as? She was moving her p…"

36. The claimant used client A's first and last name in the text message to employee A.

37. The claimant used client A's trust name in the text message to employee A.

38. Client A called back and the claimant suggested that client A call employee A herself.

39. Client A read a phone number for employee A that the claimant knew was incorrect, based on the claimant having employee A's cell phone number.

40. The claimant then gave client A employee A's personal cell phone number that the claimant had stored in her personal cell phone.

41. Client A contacted employee A by text message and phone call. Employee A did not respond to client A's text message.

42. Employee A was very upset that she had been contacted by the claimant about employer-related work and client A.

43. Employee A called the human resources employee (human resources employee) and explained what had happened. Employee A was very upset with the employer and the claimant.

44. The human resources employee interviewed employee A extensively.

45. Employee A, who was still upset, emailed the employer's owner, stating, "With all this said I have been gone a month and yesterday I received a text from [claimant] asking me if I remember a [client A] (She reached out to me as your current client [omitted] over 22 year client referred her and I sent it over to [omitted] in Personal Lines in the [omitted] office who wrote her home, auto and Umbrella) I did not answer [Claimant]'s text . Then I got another text from the Client, [client A] asking if I remember her and that she knows I am no longer with [employer] and that she is dealing with [claimant] in the [omitted] office and if I remember her condo in her personal name (with a trust) that she rents out. (I texted [claimant] back and I asked if she gave my cell to the Client and she stated YES I then texted WHY but she never responded, I did not respond and I called [human resources employee]. I explained all and she apologized and I sent her the text to her cell phone yesterday. She stated she will take care of it. Then a couple of hours later my cell phone rings I answer it and it's the Client yes [client A] called my cell. She thanked me for answering it (if I knew it was her I would not have answered) I explained I no longer work there. I have no access to your accounts but I will reach out to the [omitted] Office and speak to the Office Manager [omitted] and have her call here back…"

46. On November 28, 2023, the human resources employee discharged the claimant for contacting employee A with customer A's personal information, using her personal cell phone for disclosing client information, and for giving employee A's information to client A.

Credibility Assessment:

Regarding the claimant's mental state, although the claimant testified that she did not believe she was doing anything wrong and believed she was helping the employer by disclosing the client information using her personal cell phone to a discharged employee, this belief is not found to be reasonable. The claimant used a personal cell phone without permission, gave a client name and a trust name to an employee who the claimant knew no longer worked for the employer due to being discharged. Based on the employer's policies, the claimant knew that a separated employee should not be given client information. Furthermore, the claimant never followed up with upper management regarding finding the policy, instead she

> turned to a former employee. Regarding the claimant's assertion that she believed that client A and employee A were friends, this would not be logical given that client A did not have employee A's correct phone number. The exchange and process of disclosure of information did not happen in a momentary lapse. Rather, this occurred after a phone call with the client, a discussion with management, and a search through a former employee's emails. Given the length of time that occurred prior to the disclosure of the information, the claimant had time to think through the issue, collect herself, and seek further help from management. The claimant chose not to follow up with the employer's two members of management staff that were available to her on the day of the exchanges with client A, but instead chose to take the matter into her own hands and took a series of actions against employer interests. Given this, it cannot be concluded that the claimant engaged in a momentary lapse and judgment and the disclosure and use of the personal cell phone is found to be intentional.

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.[2] We also believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. For the reasons discussed below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was discharged from her 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).

[2] Throughout the consolidated findings, the review examiner utilized the words "client" and "customer" interchangeably. However, the findings indicate that the review examiner intended to refer to the same individual who was first introduced as "client A" in Consolidated Finding # 19.

The employer discharged the claimant for contacting employee A with client A's personal information, using her personal cell phone for disclosing client information, and for giving employee A's information to client A. Consolidated Finding # 46. More specifically, as the employer explained during the initial hearing, her conduct fell within two policies that can be grounds for termination. The first is its Written Information Security Program guidelines, which states, in pertinent part, that "[w]e do not transmit unencrypted personal information across public networks under any circumstance," and "[a]ny employee who discloses personal information or fails to comply with these policies will face immediate disciplinary action including the possibility of termination." *See* Consolidated Findings ## 5–9. The second is its Personal Cell Phone/Mobile Device Use Policy, which requires employees to obtain written authorization from management before using a personal device for work-related purposes. *See* Consolidated Finding # 11.

There is no dispute that, on November 28, 2023, the claimant: decided to text a former employee about a client's policy on her personal cell phone and included identifying information belonging to the client in that text message; suggested to the client that she contact the former employee directly; and provided the client with the former employee's personal cell phone number so that the client could do so. Consolidated Findings ## 33, 35–37, and 40.

Although the employer witness testified that the disciplinary consequence for employees who violate these policies is always termination, the review examiner nonetheless found that the employer maintains discretion over the type of disciplinary action it imposes. *See* Consolidated Findings ## 7 and 11; Exhibits 13–14.[3] Given these findings, the employer has not sustained its burden to show that the claimant knowingly violated a reasonable and *uniformly enforced* policy. Alternatively, the employer may show that the claimant engaged in deliberate misconduct in wilful disregard of its interest.

To meet this initial burden, the employer is required to show that the claimant's actions were not only misconduct, but that they were deliberate. The employer has written information security program guideline requirements and expects employees to maintain the privacy and integrity of its personal information, and refrain from transmitting unencrypted personal information across public networks under any circumstance. Consolidated Findings ## 5, 9, and 12. The employer also maintains a personal cell phone/mobile device use policy and expected employees not to use personal cell phones for work purposes without authorization from management. Consolidated Findings ## 11–12.

There is no meaningful dispute that the claimant violated the employer's policies and expectations in two instances – first, by using her personal cell phone to conduct business on behalf of the employer without prior authorization, and second, by divulging personal information belonging to a former employee and a client. Consolidated Findings ## 33, 35–37, and 40. Although the claimant's attorney questioned whether the employer's policies appropriately define "personal information," it is undisputed that the claimant divulged information that the employer considered to be personal and confidential for both the client and the former employee. During the hearing,

[3] Exhibit 13 is the Personal Cell Phone/Mobile Device Use Policy, while Exhibit 14 is the Written Information Security Program guidelines. These exhibits as well as the other exhibits cited and described below are all part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

the claimant acknowledged that the information she sent was personal in nature. Therefore, there is no question that the employer established that the claimant engaged in misconduct.

In her appeal to the Board, the claimant contended that the employer's witness testified and agreed with the claimant that her disclosure of the information was a "reaction without thinking" to address a work issue. Remand Exhibit 2. However, the claimant mischaracterizes the employer's testimony. The hearing audio transcript confirms that the employer's witness merely recounted what the claimant had stated to her during the investigation that took place prior to her termination. At no time did the employer's witness agree with the notion that the claimant's disclosure of information was a "reaction without thinking." Specifically, the employer witness testified that "she [claimant] did say she was not sure if this [client] was a friend of hers [former employee], and didn't think twice about it, because she did. . . . I asked her what would make her think it was okay . . . she just said she did it, just did it."[4]

In her credibility assessment, the review examiner rejected the claimant's contention that she had a momentary lapse in judgment and considered several factors, including the claimant's knowledge of the employer's expectations, the claimant's access to two upper-level management staff on the day in question, and the ensuing sequence of events. 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). Based on the record before us, the review examiner's credibility assessment is reasonable in relation to the evidence presented.

There is nothing in the record to suggest that the claimant's behavior was accidental or inadvertent. The record shows the claimant sent multiple text messages to both the former employee and the client, which indicates that the claimant put some thought behind composing and sending the text messages. *See* Exhibit 12.[5] From a practical standpoint, the very act of typing a text message on a phone requires aforethought, and it is not feasible that the claimant sent these messages accidentally or inadvertently. The claimant's decision to continue engaging with the former employee and client on November 28, 2023, through phone and text messages, detracts from the notion that the claimant acted spontaneously and instead demonstrates that the claimant acted deliberately.

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.

[4] This portion of the employer's testimony is also part of the unchallenged evidence introduced at the hearing and placed in the record.

[5] Exhibit 12 is comprised of the text message communications between the claimant and former employee and between the claimant and client.

In this case, the review examiner found that the employer expected the claimant to maintain privacy and integrity of its personal information, refrain from transmitting unencrypted personal information across public networks and refrain from using personal cell phones for work purposes without authorization from management. *See* Consolidated Findings ## 5, 9, and 11–12. The review examiner further found that the purpose of these expectations was to comply with insurance regulations and protect clients from unauthorized access to their personal information. Consolidated Finding # 13. Accordingly, we believe the employer's expectations to be self-evidently reasonable.

The review examiner also found that the claimant was aware of the employer's expectations, because she signed an acknowledgement of receipt for the written information security program guidelines on June 6, 2023, had received the employer's policies, including the personal cell phone/mobile device use policy at the time of hire, and was aware of these expectations as a matter of common sense. Consolidated Findings ## 10 and 15. The review examiner further found that the claimant maintained a property and casualty broker license at all relevant times and has thirty-five years of experience in the insurance industry. Consolidated Findings ## 3–4. Moreover, the claimant's responses in one of her fact-finding questionnaires to the DUA suggest that she already knew at the time that she engaged in the misconduct that she could be disciplined for it, which contradicts her subsequent hearing testimony that she did not believe she had done anything wrong. *See* Exhibit 6.[6]

We next consider whether the record supports the presence of mitigating circumstances which prevented the claimant from complying with the employer's expectations. 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).

In her hearing decision, the review examiner determined that the claimant had failed to provide a valid mitigating circumstance. We agree. The claimant presented no evidence to show that there were circumstances in her personal or work life that affected her ability to abide by the employer's expectations on November 28, 2023. Though the review examiner found that claimant was "stressed and flustered" that she could not locate the client's policy, and the claimant testified that she felt "frustrated and anxious," she did not explain why or how this rendered her unable to comply with the policies, when the employer had assisted the claimant in resolving the client issue by instructing her to look through the former employee's emails, and there were also two upper-level managers available to provide the claimant with any additional assistance. *See* Consolidated Findings ## 25 – 27, and 34.

Throughout the hearings, the claimant testified that she believed she was helping to further the employer's interests through her conduct on November 28, 2023. *See* Consolidated Finding # 33. However, in her credibility assessment, the review examiner rejected that belief as unreasonable. The claimant had no meaningful explanation for her failure to follow up with senior management after she could not locate the client's policy information over email, despite her testimony that she

[6] Exhibit 6 is the claimant's completed fact-finding questionnaire, dated December 1, 2023. In that questionnaire, the claimant reported, in pertinent part, that "I was told not to contact this person [former employee] under any circumstances," and "I did not realize how strict they would be; I thought I would be written up. . . ."

believed she was handling it with the senior vice president and did not need to discuss the client issue with anyone else. It is reasonable to infer that the claimant consciously chose not to inform the employer about her communication with the client and the former employee, because she knew that they were contrary to their instructions and, therefore, their interest. Therefore, the record does not establish that the claimant was under such extreme stress or provocation at the time of the final incident that it mitigated her misconduct. The absence of mitigating factors indicates that she 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 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 affirmed. The claimant is denied benefits for the week beginning November 26, 2023,[7] 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 - December 26, 2024

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

[7] In her decision, the review examiner disqualified the claimant from November 28, 2023. We have modified the disqualification start date to reflect the appropriate week beginning date of November 26, 2023.

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