The employer did not show the claimant understood it expected her to document all communications with clients, that the employer expected her not to use her personal phone when communicating with clients, or that it fired other employees for similar infractions. It, therefore, did not meet its burden to show that the claimant violated a uniformly enforced policy or that she acted in wilful disregard of an employer expectation. The claimant may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0082 1997 64

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 affirm.

The claimant separated from her position with the employer on January 22, 2024. She filed a claim for unemployment benefits with the DUA, effective January 21, 2024, which was denied in a determination issued on March 7, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on April 26, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated 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 obtain additional evidence pertaining to the reason for the claimant's separation. Both parties attended the remand 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 employer failed to show that the claimant took some action to try to sabotage the employer's business, 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 as a Senior Catering Manager for the employer, a restaurant, from 6/13/21 until she separated from the employer on 1/22/24.

2. The claimant worked full-time, earning an annual salary of $85,000.00.

3. The claimant was discharged for insubordination and improper holding of company information on her cell phone. The employer has no written, uniformly enforced rule or policy accompanied by specific consequences which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the Owner in conjunction with the Director of Human Resources.

4. The employer expected the claimant to follow the directives of the employer and not to engage in unauthorized use of company information while committing a fraudulent act or breach of trust.

5. The claimant was aware of the employer's expectations. She had received the employer handbook at onboarding. She had a previous conversation with the Kitchen Area Manager about her use of the company platforms so she could have a successful event. The claimant was never told that the conversation with disciplinary in nature.

6. On Thursday, 1/18/24, the claimant was informed that the employer was eliminating her position at the location where she had been working and was going to transfer her to another location with a decrease in pay. She was told her new annual salary would be $75,000 and that this action was not a demotion but instead was because the employer could not afford to continue her position. The claimant counter offered and asked the employer if she could at least be paid $80,000 to which the employer agreed. The claimant was given the weekend to decide if she wanted to continue on with the new position in a new location and with a new salary.

7. On Saturday, 1/20/24, the claimant had notified her clients who had events coming up that she was no longer going to be at the location because she was being transferred and that her salary was being decreased but that they would be in good hands and would still be taken care of. She also informed the clients that they could still reach out to her if they needed to.

8. The clients became upset that the claimant was being transferred and reached out to the employer to express their concerns.

9. On 1/22/24, a tenant in the building had informed the employer they were going to cut their catering request 4 weeks short. When asked why, the tenant told the employer they were doing so because they did not want to do business with them due to a conversation between the claimant and the tenant.

10. The Director of Catering and Director of Human Resources looked into the communication between the claimant and the tenant through an audit of the claimant's company email platforms and found their communication was through the claimant's personal accounts and not on the company platform. There was little to no communication on the company platforms.

11. On this same day, there was a catering meeting. One hour after the meeting, the claimant was brought into the office. Her email had been shut down and she was told by the Director of Catering that she was being let go because she was trying to sabotage the company. She was told not to speak to anyone and to leave. The employer never asked the claimant why there was no communication on the company platforms and no one spoke to her about what had happened.

12. The claimant did as instructed by the employer and left the company. There was no further communication between the claimant and the employer.

13. The claimant did not attempt to sabotage the company.

14. The claimant needed to use her cell phone when communicating with the tenants because her location did not have a landline. She tried her best to recap the conversations.

15. The claimant's termination letter indicated there were no records of emails from 1/19/24 to 1/22/24. There were no emails during that time because the claimant was not scheduled for weekends. On 1/19/24, the claimant was doing inventory and general manager duties so there was no need for her to be emailing anyone since there was no catering that day.

16. The claimant performed her job to the best of her ability working in both catering and handling general manager duties. She was not aware that she needed to do phone recaps as she was never told this by the Director of Catering. She was aware that if an event included alcohol or unordinary foods, it needed to be documented.

Credibility Assessment:

Although the employer testified that the claimant's performance was inadequate and against company policy, the claimant's contention that she performed her job to the best of her ability is deemed more credible. The employer became upset with the claimant and her performance only after a tenant told the employer they were no longer going to do business with them because the employer intended to transfer and decrease the claimant's pay since they could no longer afford her position.

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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is entitled to 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).

While the employer maintains a policy prohibiting insubordination and misappropriation of company information, it retains discretion over how to discipline employees who violate that policy. Consolidated Finding # 3. As the employer did not provide evidence showing it discharged all other employees who engaged in insubordinate acts or misused company information, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged. The employer discharged the claimant because she failed to document communications between herself and the employer's clients in the employer's computer system. It determined that the claimant's failure to do so was insubordinate and contrary to the employer's expectation that the claimant not engage in unauthorized use of company information. *See* Consolidated Findings ## 4, 10, and 15. Inasmuch as the claimant did not dispute that she had not documented all communications she had with clients in the employer's system, we believe that the record confirms that the claimant engaged in the misconduct for which she was discharged. *See* Consolidated Finding # 16.

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).

Following remand, the review examiner accepted as credible the claimant's contention that she was unaware that the employer expected her to document all communications with the employer's clients and performed the job to the best of her ability. Consolidated Finding # 16. 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 employer's witness, its Director of Human Resources, testified that the Director of Catering had given the claimant verbal warnings about her need to document all communications. Hearsay evidence, such as the testimony the Director of Human Resources provided about these verbal warnings, is admissible in informal administrative proceedings and may constitute substantial evidence on its own if it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). However, as the employer could not provide any firsthand testimony or contemporaneous documentary evidence verifying this testimony, we believe that the review examiner reasonably concluded that the employer did not present sufficient indicia of reliability supporting its contentions. We have, therefore, accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Consistent with the review examiner's credibility assessment, the employer has not met its burden to show the claimant understood her failure to document all communications with clients was contrary to the employer's expectations. Consolidated Finding # 16.

The employer also contended that the claimant's use of her personal cell phone to contact clients was a breach of trust constituting unauthorized use of confidential information. *See* Consolidated Findings ## 3, 4, and 10. There was no dispute that the claimant's duties included communicating regularly with clients at her location.[1] As discussed above, the employer testified that it expected the claimant to document any phone calls that she had with clients. This expectation confirms that it permitted the claimant to communicate with clients using the telephone. Because the employer did not provide the claimant with a telephone at the location where she worked, she had to use her personal cell phone to contact clients. *See* Consolidated Findings ## 10 and 14.

Additionally, the section of the Employee Handbook that the employer alleged that the claimant violated, admitted into evidence as Exhibit 3, contains no language prohibiting employees from using their personal cell phones in the performance of their job duties. In fact, the portion of the handbook addressing "[u]se of telephones/cellular phones/headsets, faxes" explicitly discusses employees who are permitted[2] Absent some indication that the employer told the claimant not to use her personal cell phone in the performance of her job duties, and we see none, the employer

[1] The parties' uncontested testimony in this regard, 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] Exhibit 3 is also part of the unchallenged evidence introduced at the hearing and placed in the record.

has not shown that the claimant was aware that using her personal phone to communicate with clients was contrary to the employer's expectations.

We, therefore, conclude as a matter of law that that the employer has failed to demonstrate that the claimant's discharge was due 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. The claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week of January 21, 2024, and for subsequent weeks if otherwise eligible.

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.

LSW/rh