The claimant quit in lieu of imminent discharge for accessing employee compensation data without permission from the employer. Held he was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), because the discharge would have been for deliberate misconduct in wilful disregard of the employer's interest. The claimant's belief that there was a racial pay disparity did not create mitigating circumstances for his behavior.

Board of Review
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Issue ID: 0082 6788 99

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 separated from his position with the employer on April 22, 2024. He filed a claim for unemployment benefits with the DUA, effective April 21, 2024, which was approved in a determination issued on May 18, 2024. The employer 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 denied benefits in a decision rendered on June 28, 2024. 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, 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 obtain additional evidence pertaining to the claimant's state of mind. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest when he accessed employee compensation information in the employer's system, 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 full-time director of applications with the employer, a human services provider, from February, 2011, through April 22, 2024, when he separated from his employment.

2. The claimant's direct supervisor was the chief information officer (CIO).

3. The employer maintained a "Code of conduct" policy (policy A) that included, in part, "employees will respect and safeguard the personal property of all clients, visitors, and coworkers as well as the property or (employer) in accordance with all applicable policies and procedures…All (employer) communication systems such as electronic mail, electronic medical records, cell phones, internet access, or voice mail are the property of (employer) and are to be used only for business purposes."

4. The purpose of the [sic] policy A is to "guide and assist employees, volunteers, interns and consultants in carrying out the job duties associated with their position with appropriate ethical and legal standards."

5. The disciplinary consequences for violation of policy A included, "may be subject to appropriate dictionary [sic] action, including termination, depending on the nature, severity and frequency of the violation."

6. Policy A was communicated to the claimant on February 28, 2011, when he originally signed an acknowledgment of receipt of the employee handbook and the subsequent updating and revising of the handbook.

7. The employer maintained an "Employee conduct and work rules" policy (policy B) that included in part, "Unauthorized disclosure of confidential information."

8. The purpose of the [sic] policy B is to "ensure orderly operation and provide the best work environment, the (employer) expected employees to follow rules of conduct that will protect the interests and safety of all clients, employees, and the organization."

9. The disciplinary consequences for violation of policy B included, "may result in progressive discipline or immediate termination of employment."

10. Policy B was communicated to the claimant on February 28, 2011, when he originally signed an acknowledgment of recipe [sic] of the employee handbook and the subsequent updating and revising of the handbook.

11. The employer maintained an expectation that employees would not access confidential and sensitive information that was not within the scope of the employee's employment.

12. The purpose of this expectation is to ensure sensitive and confidential information was not accessed.

13. The employer communicated the expectation to the claimant through its employee handbook and Health Insurance Portability and Accountability (HIPAA) training.

14. The claimant understood the expectation.

15. As director of applications, the claimant had wide access to the employer's database and system for the purpose of assisting with system integration for new employees.

16. In September, 2018, the claimant was explicitly asked by management to create a report that would take employee payroll and compare it to the employer['s] budget to confirm if the employer was overspending.

17. On September 17, 2018, the claimant sent an email to multiple employees, including the President and CIO, after being explicitly requested to create an IT report, indicating, "IT has an updated version of the Budget to Actual Salary Report. It is still in test, and we are continuing to work through some issues with wonky data, but overall it is ready to review and validate. Please let us know if you find any inaccuracies on this report. This report contains salary info, and is not openly accessible to all staff and managers. Please let me know who should have access going forward."

18. In approximately 2020, the claimant became inquisitive regarding performance bonuses when said performance bonuses were issued to members of his IT Department.

19. On March 2, 2021, the claimant sent an email to the CIO that included two (2) attachments showing bonuses given to administration and salary history of employees following a conversation with the CIO whereby the CIO was looking for an easier way to access data.

20. On March 29, 2022, the claimant sent an email to the CIO showing the salaries of five (5) senior staff employees, upon the CIO asking for said salary information.

21. On March 21, 2024, at 9:14 p.m., the claimant sent an email to the President, indicating in part, "I am writing to advocate for the establishment of a formal policy and procedure for conducting salary reviews within our organization."

22. The President did [not] immediately not [sic] respond to the claimant's email.

23. The President did not give the claimant permission to review employee salary information following the March 21, 2024, email.

24. The claimant did not have permission to review employee salary information following the March 21, 2024, email.

25. Between approximately March 20, 2024, and approximately April 11, 2024, the claimant accessed the employer's database to view employee compensation information, which included employees across the organization.

26. The claimant did not notify any of the employees that he accessed their confidential compensation data.

27. Between approximately March 20, 2024, and approximately April 11, 2024, [the] claimant did not request permission to view employee compensation information.

28. Between approximately March 20, 2024, and approximately April 11, 2024, [the] claimant did not have permission to view employee compensation information.

29. It was not within the claimant's scope of employment to search for employee compensation information in the employer's system without permission.

30. The claimant did not receive immediate personal gain by searching for employee compensation data.

31. On approximately April 10, 2024, the claimant was called into a meeting with the president and vice-president of human resources (vice-president), following the claimant requesting to have a conversation regarding the CIO.

32. Prior to the meeting, the claimant provided the president with documentation regarding his hypothesis of a disparity in pay based upon race.

33. Prior to the meeting, the president went to speak with the CIO, whereby the CIO indicated the claimant did not have permission or authority to search for the confidential employee data including compensation data in the employer's electronic system.

34. During the meeting, the president informed the claimant that she was concerned that the claimant accessed employee data without authority or privilege to do so, and she had concerns about being able to trust him moving forward.

35. The vice-president informed the claimant that if the claimant was interested in doing a deep dive into the employer system, he should have asked for permission.

36. During the meeting, the claimant did not inform the president or vice-president that he had permission or requested permission to access the confidential

employee data, including compensation data in the employer's electronic system.

37. The president informed the claimant that she did not see a path forward regarding the claimant's continued employment.

38. The vice-president informed the claimant that he could resign, which would eliminate having a termination on his record, and that the employer could be amendable [sic] to providing a severance package.

39. The claimant asked for time to determine what option he would select.

40. Following April 10, 2024, the claimant was placed on suspension and not allowed to work.

41. The claimant was paid through the week ending April 14, 2024.

42. On April 17, 2024, at 2:38 p.m., the claimant sent an email to the president and vice-president stating, "As I consider your decision for me and (employer) to part ways, I have been wrestling with what to do next, and how to best decide whether to quit or be terminated. Can you give me more information about what these options look like? This is important for me to understand before making a decision."

43. The vice-president responded on April 18, 2024, at 6:10 p.m., stating, "I can call you tomorrow and talk it through with you and answer any questions you have. That make sense?"

44. On April 19, 2024, at 4:07 p.m., the claimant sent an email to the vice-president stating, "I am inclined to resign, and I'd like the severance offer sent over so I can review it. Assuming I sign the agreement, I will then resign. Can you provide a letter/email confirming when my healthcare coverage will end. I need to provide that to [Name A]'s company to start me up on their plan."

45. On April 19, 2024, at 5:00 p.m., the vice-president responded, "You should send me what you would like for severance to start the process."

46. On April 20, 2024, at 12:54 p.m., the claimant sent an email to the vice-president stating, "I want as much as possible. I do not know your limitations."

47. On April 21, 2024, at 8:46 a.m., the vice-president responded, "I can offer you 4 weeks of severance. I look forward to hearing from you tomorrow."

48. On April 21, 2024, at 3:12 p.m., the claimant sent an email to the vice-president stating, "Please send me the agreement."

49. On April 21, 2024, at 3:47 p.m., the vice-president responded, "There is no agreement. If you decide to resign (employer) will pay you 4 additional four weeks of pay. What else are you looking for?"

50. On April 22, 2024, at 12:05 p.m., the claimant sent an email to the vice-president stating, "Just so I can be completely clear, are you telling me that if I resign, you'll pay me 4 weeks' pay, but if I don't resign that I'm going to be fired?"

51. On April 22, 2024, at 3:36 p.m., the vice-president responded, "Do you want to speak by phone? Basically, you are correct. I didn't respond to that email because you sent the second email asking if the 4-week severance could be [paid in] a lump sum which I confirmed could be."

52. On April 22, 2024, at 3:59 p.m., the claimant sent an email to the vice-president and cc'd a personal attorney stating, "I hereby resign my position at (employer), effective immediately."

53. On April 22, 2024, the claimant accepted the employer's offer to resign instead of being discharged from his employment.

Credibility Assessment:

The evidence in the record has established that the claimant accessed confidential employee compensation data without requesting permission or being granted permission from management for the purpose of proposing a new employee salary increase procedure that was not within the scope of his employment. The evidence in the record has also established that while the claimant did access employee compensation data during his employment on a limited basis, the claimant's belief that this entitled him to continue to access said employee compensation data is not reasonable or logical, as the claimant's previous access was due to management explicitly requesting him to obtain specific information each time. As such, the claimant had the requisite state of mind in this case when he knowingly and deliberately accessed confidential employee compensation data outside the scope of employment without requesting permission or being granted permission from management.

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. 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. However, while we believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented, we set aside the last sentence of the credibility assessment, inasmuch as the review examiner is making conclusions of law. At this stage of the proceedings, it is for the Board of

Review to apply the law to the fact. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979).

Because the claimant resigned from employment, his eligibility for benefits is properly analyzed pursuant to G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . .

This statutory provision expressly places the burden of proof upon the claimant.

However, it is undisputed that the claimant submitted an email resigning from his employment solely because he was about to be discharged and was given the option to resign to avoid having a termination on his record. Consolidated Findings ## 38 and 52. In this situation, a claimant will not be eligible for benefits if the discharge, had it occurred, would have been for disqualifying reasons within the meaning of G.L. c. 151A, § 25(e)(2). *See* Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984).

We consider whether this discharge would have been disqualifying under G.L. c 151A, § 25(e)(2), G.L. c 151A, § 25(e)(2), provides, in pertinent part:

> [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 review examiner found that the employer has policies that limit the use of employer communication systems to business purposes only, and which prohibit the unauthorized disclosure of confidential information. Consolidated Findings ## 3 and 7. Because Consolidated Findings ## 5 and 9 reflect that the employer applies various degrees of discipline on a case-by-case basis, depending on the nature, severity and frequency of the violation, we cannot conclude that the claimant violated a reasonable and *uniformly enforced* rule or policy of the employer. Alternatively, we consider whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the claimant must have engaged in the misconduct or policy violation for which he was going to be discharged. In this case, the employer was going to discharge the claimant for accessing employee compensation data in the employer's system without authorization. Consolidated Findings ## 25, 34–35, and 37–38. Inasmuch as the employer expected employees to obtain permission before accessing employee data in the employer's

system, and the claimant failed to obtain that permission from the employer, we agree that he engaged in misconduct. Further, Consolidated Findings ## 21, 25, and 32 reflect that the claimant's misconduct was deliberate, as he looked up the employee compensation data in the employer's system to provide the employer with evidence of what he viewed as a disparity in pay based upon race.

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 findings show that the claimant was aware of the employer's expectation that he obtain permission before accessing employee data in the employer's system, as he had reviewed the policies pertaining to accessing the employer's system and confidential information on February 28, 2011. Consolidated Findings ## 6 and 10. We further believe that the employer's expectation was reasonable, as it was in place to protect the interests and confidential information of all employees and guide employees in carrying out their duties within the appropriate ethical and legal standards. Consolidated Findings ## 4, 8, and 12.

Following remand, the review examiner issued a credibility assessment finding that, although the claimant may have believed that he had continued access to the employee compensation data because he was given access to it in the past, the claimant's belief was not reasonable or logical as the claimant's previous access was due to management explicitly requesting him to obtain specific information each time. 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). Upon review of the record, we have accepted this credibility assessment as being supported by a reasonable view of the evidence.

Finally, we consider whether the claimant presented evidence of mitigating circumstances for his 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).

In this case, the findings indicate that the claimant believed that there was a pay disparity between employees of different races, and that he sought to implement a formal policy and procedure for conducting salary reviews within the organization. Consolidated Findings ## 21 and 32. This belief, however sincerely held, was not a factor beyond his control which caused the claimant to access and share the employee compensation data without obtaining the necessary permission from the employer.

We, therefore, conclude as a matter of law that the claimant is ineligible for benefit pursuant to G.L. c. 151A, § 25(e)(1), because he resigned in anticipation of imminent discharge for reasons,

which constituted 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 April 21, 2024, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2025

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano declines to sign the majority opinion.

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