

The only proof of the claimant's misconduct was text messages obtained from another employee's unemployment hearing. Because the employer had no other source for these texts, they were information secured pursuant to G.L. c. 151A. As such, they were confidential and their admission as exhibits at the claimant's unemployment hearing violated G.L. c. 151A, § 46(a). Lacking other proof of misconduct, the employer failed to meet its burden under G.L. c. 151A, § 25(e)(2), and the claimant may not be denied benefits.

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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 reverse.

The claimant was discharged from her position with the employer on May 28, 2024. She filed a claim for unemployment benefits with the DUA, effective May 19, 2024, which was denied in a determination issued on July 16, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 30, 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, she 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant 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 a text message exchange with a subordinate showing comments critical of a supervisor constituted deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where the text messages were obtained from another employee's unemployment hearing.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant worked part time as quality assurance specialist for the employer, a human services agency, from May 19, 2015, until May 28, 2024, when she separated.
2. The claimant's immediate supervisor was the chief executive officer (CEO).
3. The employer maintains a "Code of Conduct" policy (the policy), prohibiting amongst other things, "actions or conduct which undermines the authority of any manager to carry out the agency policies or responsibility."
4. The purpose of the policy is to create a healthy working environment with an open and trusting relationship between managers and their direct reports.
5. The claimant was made aware of the policy when she was given the employee handbook in 2016. The claimant signed an acknowledgement of receipt of the handbook on August 31, 2016.
6. A violation of the policy may result in "disciplinary actions up and including termination immediately and without warning."
7. The employee expected the claimant not to engage in personal text messaging with an employee that is undermining to the employee's manager.
8. The purpose of the expectation is also to create a healthy working environment with an open and trusting relationship between managers and their direct reports.
9. The claimant was made aware of the expectation when she was given the employee handbook, containing the expectation, in August 2016.
10. A violation of the expectation may result in termination.
11. The claimant worked full time as the program director for many years.
12. In her role as the program director, the claimant had to discipline employees based on the policies of the employer. To do that, the claimant was aware of the employer's policies.
13. The claimant had to discipline employee A regarding her behavior towards employee B and the claimant on at least two (2) occasions.
14. The claimant discussed reducing her schedule to three (3) days per week with the CEO prior to her medical leave.
15. The claimant was friendly with another employee, employee A, prior to employee A being hired by the employer.

16. The claimant and employee A regularly sent text messages to each other. The text messages included discussions regarding the workplace and other employees. The claimant and employee A would vent to each other in these text messages regarding the workplace and other employees.
17. Employee A reported directly to employee B, her supervisor. Employee B reported directly to the claimant.
18. Between May 2023, and November 2023, the claimant and employee A exchanged text messages regarding employee B, employee A's supervisor.
19. The claimant's text messages to employee A regarding employee B, her supervisor included referring to employee B by stating, "puffed up so get ready;" "I'm sorry to say she is not very smart and is all over the place;" "She acts so dumb all of the time;" and "She is a little flaky. I told her off before I came over. You will see. She is so scary. They run all over her."
20. In January 2024, the claimant began a medical leave of absence until March 5, 2024.
21. Upon the claimant's return to work, the claimant's job title was changed to quality assurance specialist and her hours were reduced to three (3) days per week.
22. The employer conducted an investigation regarding employee B, of which the claimant was involved. The claimant did not inform the employer that she engaged in personal text messages with employee A during the investigation.
23. Employee A separated from employment and applied to [sic] unemployment benefits with the Department of Unemployment Assistance (DUA).
24. Employee A requested a hearing with the DUA regarding her separation. The claimant testified at the hearing on May 22, 2024.
25. During the hearing, the employer became aware of the claimant's text messaging with employee A during May 2023 and November 2023.
26. On May 22, 2024, the claimant was suspended from her employment based on the text messages she exchanged with employee A regarding employee B.
27. On May 28, 2024, the claimant was discharged from employment because she exchanged text messages with employee A regarding employee B, that included statements that undermined employee B.

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 are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We decline to consider Findings of Fact ## 18 and 19, for reasons discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject 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).

To meet its burden under G.L. c. 151A, § 25(e)(2), the employer must prove that the claimant engaged in the misconduct for which she was fired. In this case, the employer discharged the claimant for text messages with a subordinate, employee A, which the employer alleged undermined employee A's supervisor. *See* Findings of Fact ## 17 and 27. During the hearing, the employer's witness testified that these text messages were the only reason for the claimant's termination, and, further, that it only discovered the text messages when they were uploaded by employee A as an exhibit at her unemployment hearing. *See* Findings of Fact ## 23–25.¹

The employer presented these same text messages as evidence during the claimant's unemployment hearing, and the review examiner admitted them as Exhibits 20 and 21. In fact, these text messages and the testimony of a witness reading these texts were the only evidence of the claimant's misconduct. We may not consider this evidence, because the text messages were improperly admitted as evidence in the claimant's unemployment hearing.

The unemployment statute includes a strict confidentiality provision. Specifically, G.L. c. 151A, § 46, provides, in relevant part as follows:

¹ While not explicitly incorporated into the review examiner's findings, this portion of the employer's testimony 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).

(a) Except as provided in this section, *information secured pursuant to this chapter is confidential* and for the exclusive use and information of the department in the discharge of its duties. *Such information is not a public record nor admissible in any action or proceeding, except as provided in this section.* This information is absolutely privileged and shall not be made the subject matter or basis in any action of slander, libel or emotional distress.

(b) *Such information may be admissible only in the following actions or proceedings:*

- (1) in civil or criminal cases brought pursuant to this chapter where the department or the commonwealth is a necessary party;
- (2) in civil cases relating to the enforcement of child support obligations under section twenty-nine B;
- (3) in criminal prosecutions for homicide, or any offense stemming from investigations conducted pursuant to section 10 of chapter 14; and
- (4) in criminal prosecutions for violation of federal law.

(c) *The department shall disclose, upon request, such information in the following circumstances:*

- (1) *to any employer, information concerning the employer's record;*
- (2) *to any claimant or to the claimant's authorized agent, information concerning the claimant's own record;*
- (3) *to the heads of the departments of career services, transitional assistance, revenue, veterans' services, family and medical leave, office of Medicaid and industrial accidents, information necessary in the performance of their official duties;*
- (31/2) *to the heads of governmental agencies who are partners in the Workforce Innovation and Opportunity Act, information necessary for the purpose of complying with performance reporting requirements of the Workforce Innovation and Opportunity Act, Public Law 113–128;*
- (4) *to probation or parole officers working for a governmental agency, information necessary in the performance of their official duties;*
- (5) *to the Internal Revenue Service of the United States Department of the Treasury, information necessary for purposes of the administration of federal unemployment taxes.*
- (6) *to the state police, including the state police violent fugitive arrest squad, and local police departments, identifying and locating information, upon request for the sole purpose of identifying and locating individuals wanted on default or arrest warrants. Only identifying information including, but not limited to, name, date of birth, all pertinent addresses, telephone number and social security number shall be made available to the state police and local police departments pursuant to this section.*
- (7) *to the commonwealth health insurance connector authority, information under an interagency agreement for the administration and enforcement of chapter 176Q.*

(71/2) to the executive office of health and human services, information under an interagency agreement for the administration and enforcement of paragraph (4) of subsection (a) of section 69 of chapter 118E.

. . .

(e) Whoever discloses such information contrary to this section and without the authority of the commissioner or pursuant to the commissioner's rules and regulations, or as otherwise required or authorized by law, shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than six months, or both. . . .

(Emphasis added.)

To be sure, the employer lawfully came into possession of the text messages as a party to employee A's unemployment hearing. However, because it did not have them from any other source, the texts were information secured pursuant to G.L. c. 151A, *i.e.*, employee A's unemployment hearing. This rendered them confidential pursuant to G.L. c. 151A, § 46(a).

G.L. c. 151A, § 46(a), prohibits admitting such information in any action or proceeding except those set forth in § 46(b). *See Beaubrun v. Family & Cosmetic Dentistry of North Andover, LLC*, No. 11-P-2043, 2014 WL 887058 2-3, n. 3 (Mass. App. Ct. Mar. 7, 2014), *summary decision pursuant to Rule 1:28* (noting the comprehensiveness of the statutory language and, particularly, the confidentiality and admissibility exceptions in G.L. c. 151A, § 46, held the record from unemployment hearing and subsequent appeals could not be admitted in Superior Court suit alleging discrimination, contractual, and emotional distress causes of action).

An unemployment hearing is not among the allowable actions or proceedings listed under G.L. c. 151A, § 46(b). Thus, the review examiner improperly admitted these text messages as evidence and used them to prove misconduct under G.L. c. 151A, § 25(e)(2).

Inasmuch as there is no other evidence of the misconduct for which the claimant was fired, the employer has not met its burden to show deliberate misconduct in wilful disregard of the employing unit's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. We, therefore, conclude as a matter of law that the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 26, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 2024



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

AB/rh