

The claimant was discharged because the employer asserted she used foul language in the workplace. Because the review examiner reasonably rejected as not credible the employer's hearsay testimony about the claimant's actions, the employer did not meet its burden to show the claimant engaged in conduct that violated an employer policy or expectation. Therefore, the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0083 1158 32

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 June 24, 2024. She filed a claim for unemployment benefits with the DUA, effective June 23, 2024, which was denied in a determination issued on July 23, 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 September 5, 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 evidence from the employer 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 the claimant engaged in the conduct for which she was discharged, 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. On January 25, 2024, the claimant began working as a full-time (30+ hours per week) front desk receptionist for the employer, a dental practice, for \$21 an hour.
2. The claimant's direct supervisors were the employer's practice manager (the supervisor), and the employer's practice owner (the owner).
3. The employer does not maintain policies addressing [the] use of foul language at the workplace.
4. The employer expects that employees will not use foul language at the workplace. This expectation is meant to promote professionalism and create a good environment for employees and customers coming in for dental appointments.
5. On May 7, 2024, the claimant received a written warning for attendance issues.
6. Typically, the claimant worked on daily schedules for the practice. Working on the schedule included confirming customer appointments, ensuring that the employer was ready for the procedures to be performed that day, etc.
7. On Wednesday June 19, 2024, the claimant overheard one of the employer's doctors (the doctor), telling a new employee to work on the schedule for Friday June 21, 2024. The doctor stated that he did not want the claimant to "touch" the schedule for Friday June 21, 2024.
8. After speaking to the doctor, the new employee informed the claimant that she would work on [sic] Friday June 21, 2024, schedule because the doctor had requested her to.
9. The claimant failed to work on the June 21, 2024, schedule because she believed that the new employee would work on it.
10. The new employee did not work on the June 21, 2024, schedule.
11. On Thursday June 20, 2024, after realizing that the June 21, 2024, schedule was not worked on, the supervisor confronted the claimant, screaming at her for not working on the schedule. The supervisor told the claimant that she was "unprofessional."
12. The claimant told the supervisor that she was under the impression that the new employee was working on the schedule, following the doctor's orders. The claimant also told the supervisor that she did not appreciate being screamed at.
13. The claimant confronted the doctor, asking him if he had told the new employee to work on the schedule for Friday June 21, 2024. The doctor laughed and stated that he did not remember telling the new employee to work on the schedule.

14. The claimant went into the owner's office to complain about what she felt was unfair treatment from the supervisor and the doctor. The owner stated he was busy.
15. The claimant called the employer's district manager to complain about what she felt was unfair treatment from the supervisor and the doctor. The district manager stated that he would speak to them.
16. The claimant did not curse at anyone or use any foul language at work on June 20, 2024.
17. On June 20, 2024, when the new employee reported to work, she spoke to the supervisor and admitted that she was the one that was supposed to work on the Friday June 21, 2024, schedule, and that it was her "fault" the schedule was not worked on. The new employee told the supervisor not to "come at" the claimant.
18. On June 20, 2024, the supervisor told the owner that she had called the claimant into a meeting to discuss the claimant's performance, and that the claimant had cursed and sworn at the supervisor during that meeting.
19. On Friday June 21, 2024, the claimant called out from work because she had a stomach bug leading to vomiting.
20. On Friday June 21, 2024, after she called out, the claimant noted that her supervisor had altered her hours for the following week. The supervisor had reduced the claimant's hours from 40 hours to 15 hours for that week.
21. The claimant called the district manager to complain about the reduction in hours, and what she felt was unfair treatment by the employer. The district manager stated that he would speak to the supervisor.
22. On Saturday June 22, 2024, the claimant reported to work as scheduled and worked her assigned shift.
23. On Monday June 24, 2024, the claimant reported to work as scheduled.
24. The claimant did not curse at the supervisor, or use foul language at the workplace on June 24, 2024.
25. One hour into her shift on June 24, 2024, the claimant was called into the owner's office.
26. The owner stated that the claimant's employment was not "working out", and that the employer was letting her go.

27. The owner discharged the claimant on June 24, 2024, because the owner believed that the claimant used foul language at work on June 20, 2024, and June 24, 2024.

Credibility Assessment:

The claimant attended the initial virtual hearing on September 4, 2024, while the employer did not participate. Both the claimant and the employer's practice owner were present at the remand virtual hearing on October 9, 2024.

The employer's witness alleged that on June 20, 2024, the claimant and her supervisor had a meeting in an office during which the supervisor provided feedback on the claimant's work. The witness claimed that the claimant reacted negatively to the feedback, cursing at the supervisor and using foul language. The witness further stated that the supervisor subsequently prepared a write-up documenting the incident.

The claimant, however, denied that any such meeting took place on June 20, 2024. She testified that the only interaction that day involved the supervisor confronting her about not completing the schedule. She stated that the supervisor called her "unprofessional" for failing to do so. The claimant explained that she had assumed the new employee would handle the scheduling, as instructed by the doctor. She denied cursing at the supervisor, using foul language, or receiving a write-up that day.

The employer's witness admitted that he was not present during the alleged June 20, 2024, incident. His testimony was based entirely on what the supervisor had relayed to him. The writeup presented during the hearing was unsigned by the claimant, and the witness could not confirm if, when, or how it was issued to her. The employer provided no evidence to show the write-up was shared with the claimant or that it was created on June 20, 2024, as alleged. Given these inconsistencies, the review examiner credited the claimant's firsthand testimony over the employer's hearsay account. It was concluded that the claimant did not curse at the supervisor or use foul language on June 20, 2024.

The employer's witness also alleged a similar incident on June 24, 2024, in which the claimant supposedly swore at the supervisor and used foul language in front of others. However, the witness again admitted he did not witness the alleged event and relied on the supervisor's account. The claimant denied this incident as well. Since no firsthand testimony or corroborating evidence was provided by the employer, the review examiner credited the claimant's testimony. It was concluded that the claimant did not curse at the supervisor or use foul language on June 24, 2024.

Throughout both hearings, the claimant's testimony about her separation from the employer remained consistent. The employer's witness lacked firsthand knowledge of the alleged incidents, and the employer failed to provide credible evidence to

dispute the claimant's account. As a result, the review examiner deemed the claimant's testimony credible.

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).

The employer did not present evidence that it maintained a policy or rule prohibiting employees from using foul language in the workplace. Consolidated Finding # 4. Absent such evidence, the employer has not shown it discharged the claimant for a knowing violation of a reasonable and uniformly enforced rule or 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 under this provision, the employer must first show the claimant engaged in the misconduct for which she was discharged.

In this case, the employer discharged the claimant for using foul language in the workplace on June 20, 2024, and June 24, 2024. Consolidated Finding # 27. Following remand, the review examiner rejected as not credible the employer's contention that the claimant used foul language on both days. *See* Consolidated Findings ## 16 and 24. 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 review examiner rejected the employer's contentions as not credible because the employer's witness was not present during the alleged incidents on June 20th or June 24th and had no firsthand knowledge of the claimant being issued discipline for her actions on June 20, 2024. At the remand hearing, the employer's witness was only able to provide hearsay evidence of the claimant's actions on either day. Hearsay evidence 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). Because the employer's witness had no firsthand knowledge of the claimant's alleged misconduct and could not provide contemporaneous evidence verifying that the employer had issued the claimant disciplinary action on June 20, 2024, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Given the review examiner's credibility assessment and corresponding findings, the employer has not shown that the claimant acted contrary to an employer policy or expectation on either July 20, 2024, or July 24, 2024. Consolidated Findings ## 16 and 24.

We, therefore, conclude as a matter of law 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 June 23, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 16, 2025



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