

The claimant lacked the requisite state of mind for deliberate misconduct in wilful disregard of the employer's interest, because he was reacting to a series of genuinely perceived provocations from his coworkers and had been unable to obtain the medication necessary to control his emotions resulting from that stress.

**Board of Review
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Issue ID: 0018 6855 28

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Dena Lusakhpuryan, 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 separated from his position with the employer on April 22, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 7, 2016. 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 27, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant resigned because he was about to be discharged for deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). 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 take additional evidence regarding the circumstances surrounding the claimant's impending discharge. Both parties attended the initial and the continued remand hearings. 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 conclusion that the claimant quit because he was about to be discharged for disqualifying reasons is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant's outbursts during the final incidents were provoked by his co-workers and that his ability to control his response to the coworkers' behavior was not being adequately controlled by his medication.

Findings of Fact

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

1. On June 16, 2012, the claimant started working for the employer, a military branch, as a fulltime sign painter.
2. The claimant was scheduled to work Monday through Friday from 6:30AM until 3PM.
3. The claimant was paid \$24.79 per hour.
4. The claimant was a union member.
5. The employer expects workers to act in a professional manner while at work.
6. The claimant was aware of this expectation.
7. The Structural Supervisor never verbally or in writing warned the claimant in the past regarding being unprofessional at work.
8. The Paint Lead and the Carpenter Lead would often interrupt the claimant while he was in his work area.
9. The claimant had complained to the Structural Supervisor in the past that the Paint Lead and the Carpenter Lead were interrupting the claimant in his work area.
10. The claimant's job as a painter required the claimant to pay attention to details.
11. The claimant has a difficult time concentrating. The claimant was taking the following medication to assist him with concentrating: fluoxetine.
12. Prior to February 2, 2016, the claimant had a meeting with the Carpenter Lead. This meeting did not occur four days prior to February 2, 2016. This meeting occurred on December 31, 2015. The Carpenter Lead and the Paint Lead attended this meeting. The claimant initiated this meeting. During this meeting, the Carpenter Lead had commented to the claimant that the Carpenter Lead thought the claimant's job was too easy. During this meeting, the Carpenter Lead had also yelled at the claimant. The Carpenter Lead commented to the claimant that if the Carpenter Lead was the claimant's boss that the Carpenter Lead would have the claimant working out every day. The claimant then responded that the Carpenter Lead was not the claimant's boss. The Carpenter Lead then swung his arms and told the claimant to leave the Carpenter Lead's office.

In addition to the meeting on December 31, 2015, the Carpenter Lead yelled at the claimant on other occasions.

In the Fall, 2015, the claimant, the Structural Supervisor, the Carpenter Lead, the Carpenter, and the Locksmith were in the office. The claimant asked why he was denied new tools. The claimant commented that he had put in a request for new tools and had received old tools. The Carpenter Lead then yelled at the claimant. The Carpenter Lead then made the following comment to the claimant: "What do you want me to do pull a new one out of my ass." In response to this comment, the claimant commented that all he wanted was new tools.

On January 8, 2016, the Carpenter Lead went into the claimant's shop inquiring into why the claimant's time sheet did not make it to the printer. In response to this inquiry, the claimant informed the Carpenter Lead that the claimant had sent the time sheet via e-mail as the Structural Supervisor had wanted. The Carpenter Lead subsequently screamed at the claimant to take the card off the computer right now. The claimant complied with the Carpenter Lead's instruction.

13. On February 2, 2016, the Structural Supervisor requested for the claimant to go with the Paint Lead to perform a task. The claimant questioned the Structural Supervisor about the reason why the claimant was being requested to go with the Paint Lead. The claimant also told the Structural Supervisor that the claimant believed there was a conspiracy being formed against the claimant.

The claimant believed that his supervisor's directive on February 2, 2016, i.e., that the claimant accompany a coworker to perform an outside task, was prompted by his coworkers complaints that the claimant's job was too easy or that he should be sent to perform outside tasks more often.

14. The Structural Supervisor informed the claimant that the Structural Supervisor was not going to send the claimant out on the requested job any longer.
15. The claimant subsequently informed the Structural Supervisor that the claimant was not feeling well and wanted to go home for the day.
16. The Structural Supervisor subsequently went to have a conversation with the Paint Lead.
17. The claimant approached the conversation that was occurring between the Structural Supervisor and the Paint Lead. The claimant called the Paint Lead an asshole. The claimant informed the Paint Lead that the claimant had no respect for the Paint Lead. The claimant also told the Paint Lead that the claimant was not yelling.

18. The claimant then approached the Carpenter Lead in a different area. The claimant also called the Carpenter Lead an asshole.
19. The Carpenter Lead and the claimant subsequently argued.
20. After the claimant and the Carpenter Lead stopped arguing, the claimant informed the Structural Supervisor that he no longer wanted to go home sick for the day. The Structural Supervisor allowed the claimant to remain at work for the day.
21. On February 4, 2016, the Structural Supervisor was in his office area. The claimant and the Carpenter Lead were outside of the Structural Supervisor's office area. The Structural Supervisor could hear the conversation between the claimant and Carpenter Lead.
22. The claimant initiated the conversation with the Carpenter Lead. The claimant asked the Carpenter Lead if the Carpenter Lead was a veteran. In response to this inquiry, the Carpenter Lead told the claimant not to speak with the Carpenter Lead. The claimant subsequently called the Carpenter Lead an asshole.
23. The claimant and the Carpenter Lead started to argue.
24. The Structural Supervisor subsequently stopped the argument occurring between the claimant and the Carpenter Lead.
25. The claimant acted unprofessionally towards the Carpenter Lead and the Paint Lead on February 2, 2016 and to the Carpenter Lead on February 4, 2016.
26. The claimant believes he acted unprofessionally on February 2, 2016 and February 4, 2016 as his medication for concentrating, fluoxetine, was not the appropriate dosage. The claimant subsequently had his dosage of fluoxetine adjusted. The adjustment of the dosage for the medication has been beneficial for the claimant.

The claimant was first prescribed fluoxetine in 2012. The claimant was prescribed fluoxetine at the time because of his inability to focus at work. The claimant was prescribed this medicine in order to help the claimant deal with stress at work.

On February 18, 2015 the claimant requested his medical professionals to increase the dosage of fluoxetine.

On November 10, 2015, the claimant requested for his medical professionals to increase in the dosage of fluoxetine.

The claimant was originally scheduled for a doctor's appointment on November 10, 2015. The doctor had to postpone this appointment. This appointment was postponed until February 10, 2016.

The claimant requested an increased dosage of fluoxetine due to increased stress at work.

On February 10, 2016, the claimant went to an appointment with a provider who could increase his prescribed dose of fluoxetine. The provider in fact asked the claimant why he felt he needed an increased dosage. In response to this inquiry, the claimant informed the provider [it was] due to the stress at work becoming overwhelming. The provider did prescribe an increase dosage at that time. The provider increased the claimant's fluoxetine from 40 mg to 50 mg.

27. The claimant acted unprofessionally towards the Paint Lead and Carpenter Lead on February 2, 2016 and towards the Carpenter Lead on February 4, 2016 as in the past the Paint Lead and the Carpenter Lead had interrupted the claimant at work.
28. On February 2, 2016 and February 4, 2016, the Paint Lead and the Carpenter Lead had not been interrupting the claimant at work.
29. The claimant was subsequently sent to work in a different department. The claimant was assigned to the Emergency Response Team Department. The claimant was not assigned duties by the employer for this assignment. The claimant was instructed by the employer to just show up. The claimant took it upon himself to perform remodeling tasks on commercial buildings with the approval of his manager in the Emergency Response Team Department.

The claimant worked in this assignment for 2 ½ months before he was separated from his employment.

The claimant did not experience any work-related difficulties during that time with coworkers or supervisors. The old co-workers sometimes showed up at his new assignment. The claimant felt the co-workers wanted to intimidate the claimant. The claimant's manager in the Emergency Response Department informed the claimant that co-workers in the claimant's former department were instructed to make an announcement if they had to appear at the claimant's new assignment. The Structural Supervisor instructed the co-workers from the claimant's former Department to notify the manager at the Emergency Response Department in the event they had to go to the claimant's new assigned Department.

30. The claimant's coworkers have stated to the Structural Supervisor that the claimant's job was too easy or that the claimant should be sent out of his shop more often to work.

In 2015, the Structural Supervisor informed the claimant several times that another worker had complained that the Structural Supervisor was coddling the claimant by not sending the claimant out to other jobs. The Structural Supervisor did not disclose the name of the coworker to the claimant that had complained that the Structural Supervisor was coddling the claimant.

The Carpenter Lead was the individual that had complained to the Structural Supervisor about the claimant not having to leave the work area. In response to the Carpenter Lead's complaint, the Structural Supervisor informed the Carpenter Lead that it does not end well if the claimant is sent out on jobs. The Structural Supervisor had received a complaint from a customer in the past from a customer regarding the claimant's mannerisms.

31. In the last year of the claimant's employment, the claimant's duties required him to work outside his shop 1 or 2 times.
32. In the past, the claimant's coworker [stated], in the presence of the claimant's supervisor that he (the coworker) sometimes interrupted the claimant's work because he wanted to see how far he could push or annoy the claimant or that he wanted to get a reaction from the claimant.
33. About January or February 2015, the claimant was in the presence of the Carpenter Lead, the Structural Supervisor, the Locksmith, the Sheet Metal person, and the Carpenter. The claimant commented that a painter had changed a lot since returning from Afghanistan. The Carpenter Lead then commented that the claimant had also changed. The Carpenter Lead then commented that they have been going into the claimant's shop to push and annoy the claimant. The Structural Supervisor was present when the Carpenter Lead had commented that they had been going into the claimant's shop to push and annoy the claimant.
34. The claimant has never acted physically violent at work.
35. It is commonplace within the work place for employees to use coarse language or curses.
36. On March 10, 2016, the employer issued the claimant a Notice of Proposed Removal (Exhibit 10).
37. On March 15, 2016, the employer issued the claimant a memorandum titled: Amendment to Notice of Proposed Removal dated 10 Mar 16 (Remand Exhibit 6).
38. On April 18, 2016, the employer issued the claimant a Notice of Decision advising that the employer was going to remove the claimant from his job position (Exhibit 10).

39. On April 20, 2016, the claimant submitted a letter of resignation to the employer (Exhibit 9). The claimant listed his last day of work as April 25, 2016.
40. The claimant resigned from his job because he believed the employer was going to terminate him from work.
41. The employer was going to discharge the claimant from work if the claimant had not decided to resign.
42. The employer was going to discharge the claimant from work for acting unprofessionally at work on February 2, 2016 towards the Paint Lead and Carpenter Lead and on February 4, 2016 towards the Carpenter Lead.
43. The claimant's last day of work was on April 22, 2016.

Credibility Assessments

With regards to finding of fact #7, during the hearing, the Structural Supervisor contended that the claimant was warned in the past regarding acting unprofessionally at work. However, the claimant's contention to the contrary is assigned more weight where, during the hearing, the Structural Supervisor was not able to specifically identify dates that the claimant was warned for acting unprofessionally at work.

With regards to Finding of Fact # 12, during the hearing, the Structural Supervisor contended that the Carpenter Lead had not yelled at the claimant in the past. But, the claimant's contention to the contrary is assigned more weight where the claimant provided specific examples of the Carpenter Lead yelling at the claimant in the past.

With regards to Finding of Fact # 30, during the hearing the Structural Supervisor testified that none of the claimant's co-workers ever stated to the Structural Supervisor that the claimant's job was too easy or that the claimant should be sent out of his shop more often to work. However, the claimant's contention to the contrary is assigned more weight. It is more likely that co-workers informed the Structural Supervisor that the claimant's job was too easy or that the claimant should be sent out of his shop more often where the Structural Supervisor acknowledged during the hearing that the Lead Carpenter had complained to the Structural Supervisor that the claimant did not have to leave his work area and that Structural Supervisor disclosed this information to the claimant.

With regards to Findings of Fact ## 32–33, during the hearing, the Structural Supervisor testified that in the past, the claimant's coworker did not [state] in the presence of the claimant's supervisor that he (the coworker) sometimes

interrupted the claimant's work because he wanted to see how far he could push or annoy the claimant or that he wanted to get a reaction from the claimant. However, the claimant's contention to the contrary is assigned more weight because the claimant had a very specific recollection of the Carpenter Lead commenting in front of the Structural Supervisor in about January, 2015, or February, 2015, that they had been going into the claimant's shop to push and annoy the claimant.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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. As discussed more fully below, we conclude, contrary to the review examiner's initial decision, that the claimant's misconduct was mitigated by certain circumstances at work coupled with the delay he encountered in obtaining a medically necessary increase in the medication he took to cope with workplace stress.

It is undisputed that the claimant submitted a letter of resignation solely because he was about to be discharged from his employment. In this situation, a claimant will 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). 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

For purposes of the foregoing provision, the employer has the burden to establish that the claimant actually engaged in the alleged misconduct, that such conduct violated a reasonable policy or expectation, and that the conduct was done either knowingly or deliberately and in wilful disregard of the employing unit's interest. A "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine the employee's state of mind, we "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id. For unemployment compensation purposes, even if an employer had good cause to terminate the claimant's employment, the claimant may be eligible for benefits if the Legislature intended that benefits should be allowed under the circumstances. Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978), and cases cited therein.

In this case, the facts establish that the claimant was about to be terminated (“removed,” according to the employer’s discharge procedures), because, in two incidents that were two days apart, February 2 and February 4, 2016, he became angry and called two of his co-workers “assholes.” During the second incident, an employee bystander called the employer’s security personnel. The removal documents charged with the claimant with “conduct unbecoming a federal employee.” Consistent with the employer’s testimony, the Consolidated Findings reflect that the claimant was terminated for “unprofessional conduct.”

As to the knowing policy violation prong of G.L. c. 151A, § 25(e)(2), the employer introduced a series of work place policies prohibiting violence, including threats or intimidating behavior, but the language used in the policies is subjective on its face, and the penalties could vary from reprimand to discharge. The employer has not established that every employee who curses angrily at his coworkers has been disciplined, and, given Consolidated Finding # 35 (“It is commonplace within the work place for employees to use coarse language or curses”), there is no reason to assume that to be the case. Accordingly, the “uniformly enforced” requirement of the knowing policy violation prong has not been met.

Turning to the “deliberate misconduct” prong of the statute, the findings reflect that the employer maintains an expectation that its employees will act professionally toward one another. This expectation is obviously reasonable, and, indeed, the claimant has acknowledged that he did not act professionally on February 2 and February 4, 2016, when he became upset about he perceived as their mistreatment of him and called them “assholes.” In the incident that occurred on February 2, the claimant approached the Paint Lead and the Carpenter Lead, sequentially, and initiated an interaction with them by calling them “assholes.” In the incident on February 4, the claimant initiated a conversation with the Carpenter Lead in a non-hostile manner, but, after the Carpenter Lead told the claimant not to speak to him, the claimant again used the epithet. In each situation, the claimant clearly took steps to disparage and insult his coworkers, which is, as he understood, unprofessional. Nothing suggests that this behavior was inadvertent. Thus, the employer has met its burden to establish that the claimant engaged in the alleged misconduct and that this behavior was deliberate within the meaning of the statute.

However, that does not end the inquiry. The claimant’s conduct must also be in wilful disregard of the employer’s interest, a state of mind that can be mitigated if circumstances suggest the claimant was not substantially at fault for the occurrence. Mitigating circumstances can include real or genuinely perceived provocations as well as medical conditions that inhibit the claimant’s ability to control his behavior. *See, e.g.*, Board of Review Decision 0002 1981 72 (December 19, 2013) (claimant’s misconduct in telling a coworker to “fuck off” mitigated by insults she had just received from a group of coworkers); Board of Review Decision 0011 5216 27 (October 19, 2016) (the claimant’s misconduct in giving the finger to a coworker mitigated by prior incidents in which the coworker had insulted and intentionally annoyed him); Board of Review Decision 0016 7682 81 (December 31, 2015) (claimant’s misconduct in publicly yelling at another ticket booth operator to “go fuck yourself” was mitigated by the other operator’s taunting and threats); Board of Review Decision 0012 7902 99 (December 29, 2014) (claimant’s inappropriate discussion with students mitigated by her medical condition caused by stress); Board of Review

decision 0017 8624 63 (October 19, 2016) (the claimant's tardiness even after final warning mitigated by her medical condition).¹

Both of the mitigating circumstances discussed in the above cited Board decisions are demonstrated here. The consolidated findings reflect the considerable evidence produced at the remand hearing indicating that the claimant's sign-painting job required intense focus, that he had repeatedly requested his supervisor to limit unnecessary interruptions in his shop, that his coworkers (particularly the Lead Painter and the Lead Carpenter) frequently interrupted him in his shop, and that the Lead Carpenter had boasted to the claimant and their mutual supervisor that he sometimes did so just to irritate the claimant. As a result, the claimant had a fractious relationship with the Lead Carpenter, and that individual had yelled and screamed at the claimant in recent months. Both coworkers had complained to the supervisor with some frequency that the claimant was "coddled" and should be sent on outside jobs more often. On February 2, 2016, when the supervisor assigned the claimant to accompany the Paint Lead to an outside job unrelated to the claimant's sign painter duties, the claimant genuinely believed that this assignment was a result of the coworkers' demanding that the supervisor stop coddling the claimant. Owing to the ongoing friction between himself and his coworkers, the claimant, approximately a year prior to his discharge, had been prescribed fluoxetine to control his stress and had already had the dosage increased some months earlier. About three months prior to the culminating incidents, the claimant had found the dosage still insufficient to control his emotional response to the workplace circumstances, and had been trying during those three months to see a doctor to obtain an increased prescription. At the time of the incidents, the claimant was scheduled to see a doctor the following week, and, in fact, his dosage was increased at that appointment. During the approximately two-month period in which the employer conducted its investigation of the incidents, the claimant was assigned to a different work site and experienced no interpersonal difficulties.

Given all these circumstances, we conclude that the claimant's inappropriate conduct toward his coworkers on February 2 and February 4, 2016, was partially provoked by his genuine perception that he was being mistreated by his coworkers and was also mitigated by his inability to obtain the necessary medication to adequately control his emotional response to this perceived mistreatment.

We, therefore, conclude as a matter of law that the claimant lacked the necessary state of mind to have engaged in deliberate misconduct in wilful disregard of the employer's interests, within the meaning of G.L. c. 151A, § 25(e)(2). Accordingly, we conclude that the claimant resigned in anticipation of imminent discharge, which would not have been for disqualifying misconduct.

¹ The cited Board of Review decisions are unpublished, but available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 24, 2016, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 14, 2017



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

JN/rh