Claimant's loud and insistent complaints about a coworker to the Owner constituted deliberate misconduct in wilful disregard of the employing unit's interest where the claimant was repeatedly reprimanded for similar behavior in the past and continued even after being told to stop during the incident in question. Employer's decision to verbally reprimand the claimant rather than discharge her for past incidents is not evidence that the employer found such behavior acceptable.

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Issue ID: 0019 4856 55

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Danielle Etienne, 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 reverse.

The claimant was discharged from her position with the employer on August 14, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 5, 2016. The claimant 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 awarded benefits in a decision rendered on December 14, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, and, thus, she 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 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, including the recorded testimony and evidence from the hearing, the review examiner's decision, the employer's appeal, and the claimant's letter in response to our request for argument.

The issue before the Board is whether the review examiner's conclusion that the claimant did not have the requisite state of mind to commit deliberate misconduct because the employer previously condoned the claimant's behavior is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as [a] full time crew member for the employer, a fast food restaurant, from September 1, 2011, until August 10, 2016 when the employer discharged the claimant.

2. The claimant's work schedule was 4:00 a.m. to 11:00 a.m., Monday to Saturday.

3. The employer maintains a policy that prohibits complaining about another employee in the employer's sales area. The policy also prohibits loud talking. The employer does not have a set disciplinary policy for violations of this policy.

4. The employer expects employees to be respectful of the Owner.

5. The claimant was aware of the expectation given that the Owner informed her of it many times during her employment.

6. On August 10, 2016, the claimant asked the employer's Owner for permission to leave work early due to a medical appointment. The Owner replied that the claimant could leave work early as long as the work was completed.

7. The claimant's medical appointment was for 10:30 a.m. The claimant wanted to leave work at 10:00 a.m.

8. On August 10, 2016 at about 9:45 a.m., another employee went on a break. The break was to last 15 minutes. The claimant believed the other employee was taking too long on her break on purpose because the claimant could not leave until the other employee completed her break.

9. At about 10:00 a.m., the claimant began to complain in a raised voice "she's doing this on purpose, she knows I have a doctor's appointment". The Owner asked the claimant about two or three times to stop complaining because the other employee was entitled to a break. The claimant continued to complain in spite of the Owner's directive to stop. The Owner asked the claimant to punch out and stay home for the rest of the week while he decided whether he would terminate the claimant's employment.

10. The claimant was complaining because she was anxious about her appointment and in a rush.

11. During the claimant's employment, the claimant had been disrespectful at work many times. The employer reprimanded the claimant many times for using a

loud voice and vulgar language at work. The employer's Owner admittedly "let things get out of hand" with respect to the claimant's disrespectful behavior.

12. The employer discharged the claimant for being disrespectful to the employer's Owner.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the employer's previous "condonation" of the claimant's behavior allowed the claimant to believe that she was not acting in wilful disregard of the employer's interest. Rather, we believe that the review examiner's findings of fact compel the conclusion that the claimant acted deliberately and in wilful disregard of the employing unit's interest and, thus, is ineligible for benefits.

Because the claimant was terminated from her employment, her qualification 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 . . . .

Under this provision of the statute, it is the employer's burden to establish that the claimant engaged in the alleged conduct, and that such conduct violated either a written, uniformly enforced rule or a reasonable expectation so as to constitute misconduct. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996). As the employer never indicated that the claimant was discharged pursuant to a formal rule or policy, it cannot be said that the claimant's discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

In order to establish that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, the employer must show that the claimant committed the conduct alleged, that the claimant's actions were deliberate or intentional, and that she was aware that she was acting in a manner contrary to the employer's expectations. Here, it was largely undisputed that the claimant committed the alleged misconduct — loudly complaining about the length of a coworker's break. Despite the claimant's testimony to the contrary, the review examiner also credited the employer's testimony that the claimant continued to do so even after the Owner asked her to stop several times. By its nature, the conduct is deliberate rather than unthinking or accidental.

However, our analysis does not end there. To determine whether the claimant's deliberate misconduct was done "in wilful disregard of the employer's interest," 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." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). The proper factual inquiry is to ascertain the claimant's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). The review examiner explicitly found that the claimant was aware of the employer's expectation to be respectful towards the Owner, that the employer had previously reprimanded the claimant for speaking loudly and using inappropriate language at work, and that, during the incident in question, the claimant continued her behavior even after the Owner asked the claimant to stop.

Despite the findings described above, the review examiner concluded that the claimant did not possess the requisite state of mind because the employer "condoned" the claimant's similar behavior in the past. This was in error. It is true that, if the employer fails to discipline employees who violate a certain rule, a claimant may over time come to believe that such conduct is in fact acceptable to the employer. S*ee* Gold Medal Bakery, Inc. v. Comm'r of Division of Unemployment Assistance, 74 Mass. App. Ct. 1105 (2009) and New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 533–535 (2004). However, this is merely evidence that may be relevant to determining whether the claimant was aware of the employer's expectation and thus whether she acted "in wilful disregard of the employer's interest." It is not an independent basis for excusing a claimant's misconduct.

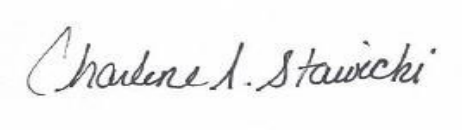
The review examiner's conclusion that the employer "condoned" the claimant's behavior seems to be based on the Owner's testimony that he "let things get out of hand." However, in context, the Owner was not testifying that he allowed the claimant or other employees to commit such misconduct without consequence; rather, he was explaining that he should have been more willing to terminate employees for misconduct rather than merely reprimanding or warning them. Repeated reprimands cannot be a basis for concluding that the claimant believed such conduct was acceptable to the employer. In addition, the findings indicate that, during the incident in question, the Owner asked the claimant to stop multiple times, but the claimant continued to loudly complain. Even if the claimant was previously uncertain of the appropriateness of her behavior, the employer's directive to stop would have removed any doubt in her mind that her actions were contrary to the employer's wishes. In light of this, it is clear that the claimant's actions were not only deliberate but in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that, under G.L. c. 151A, § 25(e)(2), the claimant's discharge is attributable to deliberate misconduct in wilful disregard of the employing unit's interest.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending August 13, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 3, 2018

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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.

JRK /rh