

**When the claimant locked the breakroom door and attempted to put his hand down the front of a coworker's shirt, he engaged in deliberate misconduct in wilful disregard of the employer's interest. Claimant's later statement to the employer, that he knew he crossed the line when he locked the door, confirmed that he knew what he did was wrong.**

**Board of Review  
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**Issue ID: 0020 9405 51**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Rorie Brennan, 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 was discharged from his position with the employer on January 30, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 23, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 5, 2017. 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 afford the claimant an opportunity to present evidence. 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 conclusion, that the claimant's attempt to sexually touch a coworker in the employer's break room 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.

### **Findings of Fact**

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

1. The claimant worked full time as a Housekeeping Assistant for the employer, a skilled nursing facility, from 04/23/13 until 01/24/17. The claimant's rate of pay was approximately \$12.00 per hour.
2. The employer has a written Sexual Harassment Policy that prohibits "unwelcome or unwanted conduct of a sexual nature."
3. The Sexual Harassment Policy states: "Violations of this policy will not be permitted. Any employee or supervisor who violates this policy will be subject to discipline up to and including termination."
4. The claimant was aware of the policy having signed off on receipt of it.
5. The purpose of the policy is to ensure a safe working environment.
6. The claimant and Co-Worker A were longstanding friends outside of work.
7. The claimant and Co-Worker [A] had engaged in sexual banter outside of work during the course of their friendship.
8. On at least one occasion, the claimant had touched Co-Worker A's breasts outside of work.
9. Prior to 01/24/17, Co-Worker A was in a room alone pumping breast milk when the claimant entered.
10. The claimant attempted to touch Co-Worker A as she pumped breast milk; Co-Worker A avoided the claimant's advances.
11. Co-Worker A told Co-Worker B about the incident but did not report the claimant to management.
12. On 01/24/17, the claimant entered the breakroom in which Co-Worker A and other employees were eating lunch.
13. During the lunch break, the claimant said to Co-Worker A: "I need to get laid."
14. The claimant closed the door as the other employees exited, leaving him and Co-Worker A alone in the room.
15. The claimant locked the door.
16. Co-Worker A felt "confined" and "scared."

17. The claimant approached Co-Worker A and attempted to put his hands inside the front of her shirt.
18. Co-Worker A said to the claimant: "Leave me alone" and made her way to the door and left the room.
19. The claimant did not attempt to stop Co-Worker A from leaving the breakroom.
20. Co-Worker A felt scared of the claimant and his conduct towards her. She told Co-Worker B about the second incident.
21. Co-Worker B reported the claimant's conduct to her supervisor who told the Administrator.
22. The Administrator met with Co-Worker A who reported both incidents.
23. The Administrator interviewed other employees and learned of another employee who alleged the claimant had groped her buttocks while giving her a hug.
24. The Administrator obtained written statements from Co-Worker A and Co-Worker B.
25. On 01/27/17, the Administrator met with the claimant and confronted him with Co-Worker A's allegations.
26. The claimant told the Administrator: "I knew I crossed the line when I locked the door."
27. The claimant provided a written statement to the Administrator in which he denied "any sexual assault or restraint of my complaining co-worker. Banter and encounters between us occurred with common consent with no intent on my part to harm. I thought we had a personal friendship and had no intent to hurt or threaten her."
28. The claimant's mother's friend assisted him in preparing the statement.
29. The Administrator continued her investigation.
30. The Administrator determined that the claimant had violated the employer's Sexual Harassment Policy and that discharge was warranted.
31. On 01/30/17, the Administrator and Facilities Director discharged the claimant.

32. On 02/02/17, the claimant filed a claim for unemployment benefits with an effective date of 01/29/17.

### Credibility Assessment

The [claimant] and his representative did not attend the original hearing. Both parties attended the July 18, 2017 hearing remanded for additional evidence. At the remand hearing, the claimant submitted into evidence a letter from his former high school that substantiated his claim that he suffered from a learning disability that affected his reading comprehension. In addition, the claimant testified that he did not lock the door of the breakroom after closing it to be alone with Co-Worker A but did acknowledge that he attempted to grab her breasts, albeit in a joking manner.

The claimant's testimony conflicts with that of Co-Worker A, who testified that she witnessed the claimant lock the door, and the Administrator, who testified the claimant told her on 01/27/17: "I knew I crossed the line when I locked the door." The claimant testified that his actions that day were done "jokingly" and that he did not intend to actually touch Co-Worker A's breasts. However, it is concluded that the claimant's testimony is less reliable and less credible than that of the employer witnesses and the weight of the evidence suggests he did, in fact, lock the breakroom door and that he knew doing so "crossed the line" of permissible conduct at work.

### 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 also agree with the conclusion that the claimant is ineligible for benefits.

Because the claimant was terminated from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), 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 . . . (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 . . . .

Under this section of law, the employer has the burden of proof. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

As the consolidated findings provide, the employer discharged the claimant for violating its sexual harassment policy by locking the door when he was alone with Co-Worker A in the

breakroom, approaching her, and attempting to put his hands inside the front of her shirt. The review examiner further found that, while this was happening, the coworker felt “confined,” “scared,” and told the claimant to leave her alone. Consolidated Findings ## 14–18. This conduct would appear to violate the letter of the employer’s written Sexual Harassment Policy, which prohibits unwanted conduct of a sexual nature. Consolidated Finding # 2.

However, in order to determine whether an employee’s actions constituted deliberate misconduct, 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). During the hearing, the claimant seemed to be suggesting that, due to his learning disability, he was not fully able to understand what was written in the sexual harassment policy. *See* Remand Exhibit # 8.<sup>1</sup> He also asserted, as noted in the review examiner’s credibility assessment, that he was only “joking” with the coworker. Regardless of whether the claimant read or comprehended the written sexual harassment policy, and whether or not the claimant viewed his actions in the breakroom as a joke, the claimant later admitted that he knew he crossed the line when he locked the door. Consolidated Finding # 26. In short, the claimant acknowledged that he was aware that his behavior was unacceptable at the time he was doing it.

The fact that the claimant and Co-Worker A had engaged in consensual sexual contact outside of work does not mitigate the claimant’s behavior. *See* Consolidated Finding # 8. As the review examiner stated in her credibility assessment, the claimant knew that, by locking the door, he crossed the line of permissible conduct at work. 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). We think that the review examiner’s assessment is reasonable in relation to the evidence before her.

We, therefore, conclude as a matter of law that the employer has proven that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest within the meaning of G.L. c. 151A, § 25(e)(2).

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<sup>1</sup> Remand Exhibit # 8 is a letter from the claimant’s former high school special education teacher stating that the claimant had difficulty with reading comprehension. While not explicitly incorporated into the review examiner’s findings, this exhibit 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).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning January 22, 2017, 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 - September 28, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

**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](http://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