**The claimant spontaneously blurted out a swear word in reaction to hurting her finger and, therefore, was not consciously aware at the time of the act that she was violating the employer's policy prohibiting swearing on the job. Her violation was not knowing or in wilful disregard of the employer's policy.**

**Board of Review**
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**Issue ID: 0021 4320 63**

# BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric M. P. Walsh, 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 January 10, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 8, 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 10, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 give the claimant an opportunity to testify and provide other evidence. Both parties attended the remand hearing. We subsequently remanded the case a second time to obtain additional evidence and a third time for subsidiary findings from the record. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the review examiner's original conclusion that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer under G.L. c. 151A, § 25(e)(2), by using foul language at work 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 for the employer, a skilled nursing facility, from September 21, 2016 to January 10, 2017 as a Certified Nursing Assistant.

2. The employer had a policy that prohibited swearing in any circumstances.

3. The employer discharged all employees for using abusive language due to the mental anguish it can cause residents.

4. The claimant knew the policy and understood its purpose.

5. The claimant heard other employees use vulgar language in the workplace in the past, but does not know if management was aware of it.

6. On October 17, 2016, the claimant received an informal discussion for having a personal conversation on the phone, which was loud and unprofessional, in the resident care area. The claimant's aunt called the claimant multiple times regarding the claimant's child and the claimant told her aunt to stop calling because it could get her fired. The claimant was loud when she told her aunt to stop.

7. On January 7, 2017, the claimant and another CNA were moving a bed out of a room. The claimant was pulling while the other CNA was pushing. The claimant's finger got jammed between the bed and the doorway. The claimant blurted out, "Shit!"

8. The bed was being removed from a room at the end of the hall. The room had a resident in it. That resident in the room, from which the bed was being moved, did not complain, nor was he interviewed.

9. On January 8, 2017, a resident, whose room is located at the other end of the hall near the nurses' station, complained to one Licensed Practical Nurse and two Certified Nursing Aides that he no longer wanted the claimant to provide him care due to her foul language being used as she provides him care.

10. The Director of Nursing investigated by taking statements from the Licensed Practical Nurse and the two Certified Nursing Aides who received the similar complaints from the resident.

    a. One CNA wrote: "While assisting with morning care for [the resident], he stated that [the claimant] uses foul language while caring for him. He stated that it makes [him] very uncomfortable and that he prefers that she doesn't take care of him."

b. The other CNA wrote: "While washing [the resident] he stated that [the claimant] swears and using inappropriate language while providing care. He does not want her in his room."

c. The LPN wrote: "[The resident] reported that [the claimant] on 3-11 was using foul language while caring for him. Not aimed @ him or anyone in the room [with] other aides. Made him uncomfortable. He would prefer she not take care of him if she's going to talk that way."

11. The Director of Nursing interviewed the resident as well. The resident reported to the Director of Nursing that he did not like foul language being used in his room. The Director asked the [resident] whether the language was being directed at him, to which he replied it was not. The resident reported that the claimant used the term "MF." The Director solicited clarification from the resident who stated that the claimant used the term "mother fucker."

12. The Director of Nursing determined that the claimant used the term "mother fucker" in the presence of the resident during the 3:00 p.m. to 11:00 p.m. shift on January 7, 2017.

13. On January 9, 2017, the employer took a statement from the claimant. The claimant stated, "I haven't got a clue as to what these allegations are about. But I'm sure that I didn't swear at or to a resident, in his room or at him. I might have been talking to someone and he heard me swear but that is the extent of that. I was moving a bed on Saturday in [other resident's] room and banged finger. I hurt finger pretty bad. I swore then from being in pain from injury."

14. The employer did not receive an injury report from the claimant.

15. The claimant denied to the employer when confronted that she used foul language while providing care to any resident.

16. The claimant did not use foul language when providing care to a resident.

17. On January 10, 2017, the employer discharged the claimant from employment for her behavior, which left the resident feeling extremely uncomfortable.

At the hearing, the claimant testified that she may have used foul language on another occasion when she hurt her finger and that it could have been heard at that time. Ultimately, the claimant denied intentionally using foul language around a resident, while the employer's witness at the hearing had no direct knowledge of the alleged incident. In weighing the claimant's direct testimony against the employer's hearsay testimony, it is concluded that the claimant's testimony was more substantial and credible.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the consolidated findings of fact are supported by substantial and credible evidence; and (2) whether the original conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's consolidated findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence.

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 . . . .

After remand, the review examiner found that the claimant was aware of the employer's policy prohibiting the use of abusive language, including swearing, while at work. The review examiner further found that the employer discharged the claimant on January 10, 2017, because a resident complained that the claimant had used the term "mother fucker" in his presence. In order to deny benefits to a claimant for a knowing violation, at the time of the act causing the employee's discharge, the employee must have been "consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996).

Here, the review examiner found that the claimant only swore on one occasion, and she did not use the word "mother fucker." Rather, while moving a bed out of a resident's room with another CNA on January 7, 2017, the claimant blurted out, "shit," when her finger got jammed between the bed and the doorway. These findings show that the claimant spontaneously used foul language due to the sudden and unexpected pain of injuring her finger. *See* Still, 423 Mass. at 815. Since the claimant did not intentionally swear while at work, we cannot conclude that she was "consciously aware" that her actions were in violation of the employer's swearing policy. Id. at 813. Thus, the employer has failed to show that the claimant engaged in a *knowing* violation of the employer's policy.

Furthermore, we conclude that the claimant's use of foul language while at work does not amount to deliberate misconduct in wilful disregard of the employer's interest. In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause [her] discharge." Id. In order to evaluate the claimant's state of mind, we must "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 the same

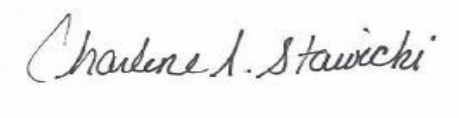
reasons stated above, that the claimant's outburst was due to sudden pain, we find that the claimant has set forth mitigating circumstances to excuse her failure to comply with the employer's expectation that she refrain from using foul language while at work.

We, therefore, conclude as a matter of law that the claimant is entitled to benefits because her separation from employment is not attributable to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of an employer rule or policy, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending January 21, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - December 12, 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

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.

SVL/rh