

The claimant's insubordination constituted deliberate misconduct in wilful disregard of the employing unit's interest, where the claimant agreed to terminate a subordinate employee on a number of occasions but ultimately did not follow through until nearly one month after being first instructed to do so.

**Board of Review
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BOARD OF REVIEW DECISION

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 reverse.

The claimant was discharged from his position with the employer on April 14, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 23, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which was attended by both parties at the first session and only by the claimant at the second session, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 24, 2017. 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, 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 in order to make further findings regarding the claimant's state of mind and to clarify the specific reason for termination. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Upon consideration of these initial consolidated findings, we again remand the case to the review examiner for further subsidiary findings as to the reasons for the claimant's termination. Thereafter the review examiner issued revised consolidated findings. 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 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 policy, 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 an Executive Director (ED) for the employer, an assisted living facility, from 09/26/16 until 04/04/17. The claimant's annual salary was \$91,000.00.
2. The employer has a policy in their Employee Handbook that prohibits insubordination. The policy states: "Refusing to obey direct instruction from a supervisor; insubordination ... may be considered just cause for immediate dismissal."
3. The employer discharges all employees it determines to engage in insubordination.
4. The claimant received the employer's policy upon hire having signed off on receipt of the handbook.
5. The purpose of the employer's policy is to ensure efficient and harmonious business practices.
6. The employer has a policy in their Employee Handbook that prohibits: "Disrespectful or discourteous conduct, failing to give a high degree of courteous service to any Resident, family member, supervisor or fellow employee; using vulgarity, gambling, swearing, or fighting on company premises, coercion, intimidation, violence or threats against Residents."
7. The employer determines discipline for violators of the policy depending upon the severity of the incident.
8. The claimant received the employer's policy upon hire having signed off on receipt of the handbook.
9. The purpose of the policy is "to set an example."
10. The employer has a policy in their Employee Handbook that prohibits harassment, both sexual and otherwise.
11. The employer determines discipline for violators of the policy on a case by case basis.
12. The claimant received the employer's policy upon hire having signed off on receipt of the handbook.
13. The purpose of the policy is to ensure a safe working environment.

14. The employer has a policy that prohibits: "Revealing confidential information to unauthorized persons."
15. The employer discharges all employees who violate the policy.
16. The claimant received the employer's policy upon hire having signed off on receipt of the handbook.
17. The purpose of the policy is to protect confidential information.
18. The employer has a policy that prohibits use of personal cell phones during work hours.
19. The employer determines discipline for violators on a case by case basis.
20. The claimant received the employer's policy upon hire having signed off on receipt of the handbook.
21. The purpose of the policy is to ensure productivity.
22. The employer expects employees not to incur "unauthorized absences."
23. During his employment, the owner learned the claimant had engaged in a conversation with an employee while he played a card game on his computer.
24. During his employment, the owner learned the claimant often took personal calls on his cell phone while at work.
25. In "February or March" 2018, the Director of Adult Day Health (DADH) reported to the Human Resources (HR) Department that the claimant had said to her: "I like your ghetto ass."
26. The DADH refused to write a statement regarding the incident because she was intimidated by the claimant's position as ED so the HR Department did not investigate her complaint.
27. In February 2017, the claimant hired a new Facilities Supervisor with whom he was previously acquainted without the approval of the owner. The position was not publicly posted and the claimant hired the individual with no input from the owner.
28. The claimant, as the Executive Director, was authorized to hire new employees.
29. The owner believed the new hire was not necessary and not in the budget.

30. On 02/22/17, the owner told the claimant in-person to terminate the Facilities Supervisor's employment.
31. The owner told the claimant: "We do not need him, let him go."
32. The claimant argued that the hire was necessary due to an upcoming retirement and advocated for retaining the Facilities Supervisor.
33. The claimant "respectfully disagreed" with the owner's decision but told her he would discharge the newly hired Facilities Supervisor.
34. On or about 02/28/17, the owner learned that the Kitchen Supervisor had reported to the HR Department that the claimant frequently used "vulgar language" in the presence of employees. The owner did not discuss the matter with the claimant.
35. On 03/01/17, the owner and claimant again met in-person and discussed the Facilities Supervisor position.
36. The owner told the claimant: "The [Facilities Supervisor] position needs to be eliminated."
37. The claimant indicated that he would discharge the Facilities Supervisor but continued to advocate for the position as necessary to the facility.
38. The claimant did not believe the owner's instructions to terminate the Facilities Supervisor were ambiguous.
39. The claimant did not believe that the owner was merely making a suggestion when she instructed him to terminate the Facilities Supervisor.
40. On 03/01/17, the owner told the claimant to do "most of" the facility's shopping online so he would not be away from the facility during work hours.
41. On 03/01/17, the owner instructed the claimant to inform a newly promoted nurse of her new job duties and to give her a written copy of her job description; the claimant failed to follow the owner's instructions.
42. The claimant did not believe that he was permitted to ignore a directive from the owner if he disagreed with it.
43. On 03/01/17, the owner was informed that the Kitchen Supervisor had alleged to the HR Department that the claimant had made comments to him that he believed constituted sexual harassment. Neither the owner nor the HR Department discussed the allegations with the claimant.
44. From 03/05/17 until 04/12/17, the owner was outside the country.

45. "Sometime in March," the owner learned the claimant was in a retail store during work hours shopping for furniture to buy for the facility.
46. The owner believed the claimant being away from the facility was "an unauthorized absence." The owner did not confront the claimant about the matter.
47. On 03/07/17, the owner observed the Facilities Supervisor's name on the minutes of a staff meeting and emailed the claimant asking why he had not terminated the Facilities Supervisor's employment; the claimant responded via email on 03/08/17 and continued to advocate for retaining him as being "good for the facility."
48. On 03/10/17, the employer emailed the claimant regarding the facility and its staffing; at the close of the email the owner stated: "You can release the [the Facilities Supervisor]."
49. On 03/19/17, the owner emailed the claimant:

"I have asked you to release [the Facilities Supervisor] on February 22nd and again during our meeting on March 1st and by my last email on March 10. I want you to release him effective immediately. He will not be on [the employer's] payroll As of Tuesday, 3-21-17. We will pay him for Monday but he does not need to work. Call me on my cell phone if you have any questions. Thanks. [Owner]." [sic]
50. On or about 03/20/17, the claimant discharged the Facilities Supervisor.
51. On 03/20/17, the claimant emailed the owner and informed her: "[The facilities Supervisor] has been separated from [the employer]."
52. The claimant continued working for the employer.
53. While still out of the country, the owner decided to discharge the claimant for not terminating the Facilities Supervisor in a timely manner.
54. On 04/05/17, immediately following a morning meeting in which survey software was discussed, the claimant went to the Director of Business Administration/ Human Resources' (DBA/HR) office, logged onto her computer, and installed the survey software.
55. The claimant installed the software on the DBA/HR's computer because she had indicated to the claimant at the meeting that she wanted the software on her computer.

56. The claimant did not believe accessing the DBA/HR's computer would jeopardize his employment.
57. While he was seated at her computer, the DBA/HR entered the office and said: "Why are you on my computer?"
58. The DBA/HR was concerned because her computer contained the employer's confidential financial information.
59. The claimant replied: "I'm logging into the survey." He then got up and left her office.
60. The claimant did not access any financial information while logged into the DBA/HR's computer.
61. The DBA/HR sent the owner an email notifying her that the claimant had accessed her computer without authorization.
62. The owner believed the claimant had violated the policy that prohibits employees from "Revealing confidential information to unauthorized persons."
63. Had the owner not been aware of the 04/05/17 computer incident, the claimant would still have been discharged for insubordination.
64. On 04/14/17, the owner and her husband met with the claimant and intended to notify him that he was discharged for insubordination.
65. On 04/24/17, the claimant filed his claim for unemployment benefits with an effective date of 04/23/17.

Credibility Assessment:

The employer owner provided convoluted testimony throughout the hearings and was unable to clearly articulate the final incident that caused her to discharge the claimant. However, after reviewing the testimony and evidence, the facts established that the reason for discharge was insubordination and had the claimant followed the owner's instructions and terminated the Facilities Manager's employment when first instructed to do so that the claimant would not have been discharged when he was.

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 original 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. However, as discussed more fully below, we reject the review examiner's legal conclusion. Instead we believe that the review examiner's consolidated findings of fact compel the conclusion that the claimant's failure to promptly discharge a subordinate, despite direct orders to do so, constituted disqualifying misconduct.

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 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

Under this provision of the statute, it is the employer's burden to establish that the claimant engaged in the alleged conduct, and that the claimant was aware that such conduct violated the employer's reasonable expectation so as to constitute misconduct. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996).

In this case, while the parties discussed numerous incidents of alleged misconduct that occurred over the course of the claimant's employment, the consolidated findings clarify that the claimant was discharged for insubordination, specifically for his failure to discharge the Facilities Supervisor in a more timely manner. *See Consolidated Findings of Fact* ## 53, 63, and 64.

To determine whether the claimant's actions were 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 Owner first instructed the claimant to discharge the Facilities Supervisor on February 22, 2017. The Owner again gave this same unambiguous instruction on March 1, 2017, March 7, 2017, March 10, 2017, and March 19, 2017. Each time, the claimant indicated that he would comply with the Owner's instruction. The claimant ultimately did not discharge the employee until March 20, 2017, nearly one month after first being instructed to do so. At the hearing, the claimant argued that he delayed the termination because he believed that retaining the Facilities Supervisor would be in the best interests of the employer and would in fact fit within budget. While the claimant, as Executive Director, was in a position in which he would naturally be expected to demonstrate independent judgment and decision-making, this does not excuse him from carrying out the clear instructions of his supervisor. The claimant acknowledged that the Owner's instructions were unambiguous, that he did not believe the Owner was merely making a suggestion, and that he did not believe that he was permitted to ignore the Owner's directives. Whereas the claimant's disagreement with the Owner's judgment might explain why he advocated for retaining the Facilities Supervisor during the initial conversation on February 22, 2017, this does not explain why he repeatedly agreed to carry out the Owner's orders but then failed to do as

promised. The claimant's repeated delays constituted deliberate insubordination, which was not mitigated by his disagreement with the Owner's judgment.

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

The review examiner's decision is reversed. The claimant is denied benefits for the week ending April 15, 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.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2018



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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