To induce subordinates to perform unpleasant work duties and generally to boost morale, the claimant created a system of awarding compensatory time off the books. He granted time for work done during regular work hours and simply for fun, such as to celebrate Cinco de Mayo and just for showing up. His efforts to keep this hidden from the employer demonstrated that he knew he was doing something he was not supposed to be doing. It showed wilful disregard of the employer's interest to pay compensatory time only for time worked outside normal work hours and to track it through the formal payroll system. Held the claimant was disqualified under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0021 7092 80

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 28, 2017. He filed a claim for unemployment benefits with the DUA, effective April 30, 2017, which was denied in a determination issued on August 18, 2017. 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 January 6, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, he 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. Both parties responded. 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 was not acting deliberately and in wilful disregard of the employer's interest when he displayed his shirt tail through his pants zipper to two women at lunch or when he awarded "funny comp time" to subordinates, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. From August 11, 2004 until May 12, 2016, the claimant worked for the employer, a local municipality.

2. Most recently, beginning in or about July of 2014, the claimant was employed full-time (35 hours per week) by the employer as its police department's Director of Occupational Health.

3. On July 11, 2014, the claimant signed as having received the police department's full set of rules, regulations, policies, and procedures.

4. Among those documents, the claimant was provided with the employer's "Rule 102," entitled, "THE CONDUCT AND GENERAL RIGHTS AND RESPONSIBILITIES OF DEPARTMENT PERSONNEL – AMENDED." In it, the employer prescribed, under Section 3, the requirements of employee conduct, including that, "Employees shall conduct themselves at all times, both on and off-duty, in such a manner as to reflect most favorable on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees."

5. Rule 102 also prohibited "**NEGLECT OF DUTY**," specifically noting, "This includes any conduct or omission which is not in accordance with established and ordinary duties or procedures as to such employees or which constitutes use of unreasonable judgment in the exercising of any discretion granted to an employee."

6. The claimant was also provided with the department's Rule 109, which outlined a system of progressive discipline, whereby "progressively stricter disciplinary action shall be taken against persons who persist in violations of the Rules and Procedures." Under such a scheme, however, the department noted, "It is not necessary for the proper implementation of progressive discipline that all stages of discipline be exhausted, nor that progressive discipline start at any one level or proceed with any particular incrementation. Much is left open to the discretion of the person imposing the discipline, it is simply to be recalled that progressive discipline be used as a guiding precept."

7. During the claimant's tenure as occupational health director, he had a number of disagreements with the assistant director of the department, who came to "detest" him.

8. In particular, the assistant director objected to, among other things, the perceived lack of support that she received from the claimant, especially regarding her authority to assign work to subordinate clerks in the department.

9. The assistant director was specifically concerned about her inability to obtain full compliance with various filing tasks that she assigned the clerks to complete, despite such filing being part of their normal job duties.

10. As a result of difficulties experienced by the assistant director in that regard, and seeking to assist her in obtaining compliance, the claimant – who was aware of the prior occupational health director's frequent use of discretion to let staff leave their assigned shifts early at periods of low workflow in the office – directed the assistant director, in or about April 2016, to begin awarding "fun" or "funny" compensatory (comp) time to the clerks who agreed to complete certain filing tasks.

11. Although the assistant director objected to the practice, she eventually agreed to do so.

12. In addition to such "funny" comp time being awarded for completing filing, the claimant, in an effort to boost office morale, also began awarding such time for other reasons, including to mark various holidays, to acknowledge a witty or humorous comment by an employee, or, in one occasion, because staff spent time meeting an employee's infant child.

13. Pursuant to the collective bargaining agreement between the clerks' union and the employer, "Based on the operations and budgetary needs of the Department, supervisors or managers may, upon an employee's request, agree to compensate overtime with time off rather than monetary payment."

14. Such formal comp [sic] time was occasionally provided to the members of the occupational health department for working beyond their assigned hours. In particular, the claimant, as his predecessor had done, provided formal comp [sic] to certain of the department's clerks for driving to the municipality's City Hall to obtain documents during their lunch breaks, which time would be tracked in the employer's online time management system.

15. Because the "funny comp time" awarded by the claimant was, however, granted solely to members of occupational health staff, and was not part of the employer's official system of compensatory time, the claimant tracked the "funny comp" hours awarded in his own personal book and directed the department's staff not to report such hours through the employer's formal online system.

16. Over the course of his time as director, the claimant also facilitated the business of the department by holding regular lunch meetings with the assistant director and the on-staff nurse practitioner.

17. In addition to work matters, the claimant often engaged in discussions with the assistant director and nurse practitioner regarding events in each of their personal lives.

18. On April 26, 2016, during the lunch meeting, the discussion between the three individuals turned to the topic of embarrassing moments they had endured.

19. The nurse practitioner told a story involving a time when she and her friends noticed that her husband's fly was down.

20. The claimant then began recounting a number of funny and/or embarrassing things he had done at church in order to get laughs (particularly from his teenage sons), including walking down the aisle with the bottom of his shirt protruding from his fly.

21. In order to demonstrate that particular act, the claimant turned away from the women, unzipped his fly, pulled a few inches of the bottom of his shirt through the opening, and zipped the fly up to the bottom of the protruding shirt section.

22. The claimant then turned and showed the protruding shirt section to the women, before again turning from their view, tucking the shirt back into his pants, and zipping up his fly before turning back towards him.

23. The claimant did not intend to convey anything of a sexual nature or to offend either of the women through his action.

24. Subsequently, asserting that she was offended by the claimant's actions in displaying the protruding section of his shirt through his fly to her, the assistant director reported the incident, as well as various other actions of the claimant – who had never previously received any type of discipline from the employer – while in his position as director (including the awarding of "funny comp time") to the police department's internal affairs bureau.

25. As a result of the complaint, the claimant was placed on leave by the employer on May 12, 2016.

26. After a number of witness interviews and evidentiary proceedings, the employer, concluding that the claimant had engaged in "conduct unbecoming" as a result of the "fly" incident, and "unreasonable judgment," relating to his awarding of "funny comp time," decided to discharge him.

27. The employer discharged the claimant on April 28, 2017.

28. The claimant filed a claim for unemployment insurance benefits on May 1, 2017. The effective date of the claim was April 30, 2017.

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 original 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 disagree with the review examiner's legal conclusion that the claimant is eligible 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 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. . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

We consider first whether the employer has established a knowing violation of a reasonable and uniformly enforced policy. In his decision, the review examiner quoted from the employer's written disciplinary policy, which provided for a system of progressive discipline. Specifically, Finding of Fact # 9 notes that the employer's policy expressly allows for discretion with the level of discipline imposed. The record also includes evidence of disciplinary action taken with various other employees who violated Rule 102.[1] Because the employer flexibly enforced its written discipline policy, with the level of discipline imposed based upon the circumstances in each case, we agree with the review examiner's conclusion that the employer has not demonstrated a violation of a *uniformly* enforced policy.

Alternatively, the claimant will be disqualified if the employer establishes that he engaged in deliberate misconduct in wilful disregard of the employer's interest. It is important to note that in analyzing the claimant's eligibility for unemployment benefits under this prong of G.L. c. 151A, § 25(e)(2), our decision is not driven by the interpretation of good cause or progressive discipline under civil service law or the parties' collective bargaining agreement.[2] "The issue . . .

[1] *See, e.g.*, Exhibit # 16B, which includes disciplinary actions and arbitration decisions involving other employees who received a range of sanctions for violating the employer's policy. None of these cases involved the exact same behavior as the claimant.

[2] We are also not bound by the arbitrator's decision in the grievance pertaining to the claimant's discharge, which was submitted with the claimant's written argument in this appeal on May 9, 2018.

is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.)

The employer terminated the claimant's employment for two forms of misconduct, including the incident at the April 26, 2016, lunch meeting, where he showed a portion of his shirt tail protruding through his fly to two females, and the award of "funny comp time" to his subordinates. We consider whether either action amounted to deliberate misconduct in wilful disregard of the employer's interest.

As for the lunch meeting incident, the review examiner found that the claimant did not intend to convey anything of a sexual nature or to offend the women. Finding of Fact # 23. 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). The review examiner found that the claimant did not intend to offend the two women. His assessment is reasonable in relation to the testimony presented by the claimant and the sworn testimony from the nurse practitioner. *See* Exhibit # 4E. That said, the fact that the act did offend the assistant director indicates that the claimant misread the situation and failed to appreciate the nature of his conduct. At the very least, he exercised poor judgment. The Supreme Judicial Court has stated, "[w]hen a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). The claimant is not disqualified for this lack of judgment.

We next consider the second basis for the claimant's discharge, which was the award of "funny comp time" to his subordinates. There is no question that the claimant understood that the employer had a formal system for granting compensatory time off in lieu of paying overtime for work performed outside of an employee's regular work hours. *See* Findings of Fact ## 13 and 15.[3] He also knew that the employer tracked the payment of compensatory time off through the payroll office.[4] He freely acknowledged that his "funny comp time" was not part of the employer's official system of compensatory time. *See* Finding of Fact # 15.

[3] *See also* Exhibit # 16A, tab 2, p. 156 of the arbitration hearing transcript from November 8, 2017. The claimant testifies that he was formerly a director of human resources. He states, "Compensatory time is time that is given in lieu of paid overtime for additional hours that are worked." Although not explicitly incorporated into the review examiner's findings, this testimony 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).

[4] Finding of Fact # 14 refers to an online time management system, which the claimant described as being new. It had formerly been kept on an Excel spreadsheet by an administrative assistant in the claimant's department. *See* the claimant's testimony in Exhibit # 16A, tab 2, p. 167–168; *see also* Exhibit # 16B, joint exhibit 12, pp. 11–12, where the administrative assistant describes her system for tracking employees' formal compensatory time. This testimony is also part of the undisputed evidence in the record.

It was also undisputed that the claimant awarded this "funny comp time" for tasks that were part of his clerical staff's regular duties, such as filing, and for work performed during their regular hours, not in lieu of overtime. *See* Findings of Fact ## 9 and 10.[5] He also awarded this compensatory time for no work at all. He granted half an hour of time because a staff member visited the office with her new baby, to celebrate Cinco de Mayo, in honor of Queen Elizabeth's and Harriet Tubman's birthdays, and for simply showing up to work. *See* Finding of Fact # 12.[6]

The award of paid compensatory time off for duties performed during the regular work day amounts to the double payment of wages for the same tasks. Likewise, awarding paid compensatory time for no work at all amounts to authorizing the payment of wages that were not earned. Without the employer's authorization, the practice is a form of theft.

In his defense, the claimant asserts that he believed it was acceptable to grant compensatory time as a morale booster, particularly because his predecessor had done the same by letting employees leave early on some Fridays. *See* Finding of Facts ## 10 and 12. We disagree. The fact that another manager had allowed employees to leave early without being disciplined does not, by itself, establish that such conduct was condoned, where there is insufficient evidence that the employer had authorized this practice. *See* Board of Review Decision BR-108629 (Aug. 17, 2009) (the fact that other employees also stole scrap metal from the employer's garage without being discharged did not give the claimant permission to do so or the right to collect benefits, where nothing in the record showed that the employer condoned the thefts).

The evidence shows that the claimant knew he was doing something that he was not supposed to be doing. We see this in Finding of Fact # 15, where the review examiner found that the claimant tracked this "funny comp time" in his own personal book and directed his staff not to report the time through formal payroll because it was not part of the employer's official compensatory time system. He even went so far as to instruct the assistant director to rescind an email to staff, wherein she had communicated that they could earn half an hour of compensatory time for filing FMLA records, and to send another email telling them that "comp time" was on hold.[7] Verbally, the staff was then notified that the "fun comp time" was still up and running.[8]

A person's knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984). Although this "funny comp time" reward system may have made it easier to manage his clerical staff, the evidence shows that the claimant went to great lengths to keep his "funny comp time" off the books and hidden from the employer. Such efforts demonstrate that he knew the employer would not condone it. It was

[5] *See also* Exhibit # 16A, tab 2, pp. 176–177, where the claimant describes awarding compensatory time to staff to organize recruit files for storage during their regular work week.
[6] *See also* the claimant's testimony at Exhibit # 16A, tab 2, pp. 171–174.
[7] *See* emails, dated April 25 and 26, 2016, in Exhibit # 16B, joint exhibit # 5. The assistant director testified that the claimant told her that she could not put that in writing. *See* Exhibit # 4D, the September 8, 2016 investigative interview of the assistant director at pp. 15–16. The claimant testified that he could not remember saying that. *See* the claimant's testimony appearing in the parties' arbitration transcript from November 8, 2017 in Exhibit # 16A, p. 182.
[8] It is unclear whether the claimant spoke to the staff at this point or had the assistant director do so. *See* Exhibit # 4D, pp. 63–64 and Exhibit # 16A, pp. 179–180.

deliberate misconduct, and it was done in wilful disregard of the employer's interest to award compensatory time only for work performed outside of normal work hours and to track such time through proper payroll procedures.

We, therefore, conclude as a matter of law that the claimant's use of an informal compensatory time off scheme to manage his subordinates was 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 29, 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 - June 27, 2018

Paul T. Fitzgerald, Esq.
Chairman

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.

AB/rh