Claimant engaged in deliberate misconduct when she refused to move her car immediately and used foul language toward her supervisor, but because it was not her intention to act in wilful disregard of employer's interest, she may not be disqualified under G.L. c. 151A, § 25(e)(2).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member

Issue ID: 0022 9892 37

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 affirm.

The claimant was discharged from her position with the employer on September 12, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 29, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties at the initial hearing and only by the claimant and the employer's agent at the continued hearing, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 9, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, or knowingly violate 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 to give the employer a further opportunity to testify and present other evidence, and to obtain additional evidence from both parties pertaining to the final incident. Both parties attended the remand hearings. Thereafter, the review examiner issued his 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 neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy is supported by substantial and credible evidence and is free from error of law, where the claimant refused to comply with an employer request in the exact manner that the employer specified.

Findings of Fact

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

1. From December 3, 2015 until September 7, 2017, the claimant worked as a full-time (40 hours per week) wellness nurse for the employer, an assisted living facility.

2. The employer maintained two parking lots: an employee parking lot and a manager/resident parking lot.

3. At the time she was hired, the claimant was told that she could park in either of the parking lots.

4. Throughout her employment, the claimant parked at the manager/resident parking lot. Prior to the incident which eventually led to her discharge, no one from the employer had told the claimant that she could not park in the manager/resident parking lot and she had never been asked to move her car.

5. The employer maintained a parking policy regarding the use of the employee and the manager/resident parking lot. The language of the policy is unknown.

6. The employer maintained no policies regarding what is expected of an employee if a resident needs their parking spot.

7. The claimant never received nor was she aware of any of the employer's parking policies.

8. The claimant reported directly to the employer's resident care director (the RCD).

9. The employer maintained an "Employee conduct" policy, contained within its employee handbook, in order to ensure a safe and respectful environment for its employees and residents. The policy read, in relevant part, "The following types of conduct are violations of the Standards of Conduct because they demonstrate disrespect for co-workers and interfere with a harmonious workplace environment: [. . .] Boisterous or disruptive activity in the workplace, including foul or uncivil language [. . .], Insubordination or other disrespectful conduct."

10. On July 25, 2017, the claimant was given a copy and signed an acknowledgment as having received the most recent version of the employee handbook, containing the "Employee conduct" policy.

11. Notwithstanding the "Employee conduct" policy, the claimant and the RCD often employed the use of profanity during casual conversations with one another, sometimes expressing frustration. The claimant and the RCD did not

engage in the use of profanity with each other in a confrontational manner, in disagreement, or in front of residents.

12. Because of this, the claimant, who had also witnessed other employees swearing in the workplace, believed that she could use profanity as a manner of expressing frustration in front of the RCD without consequence.

13. The claimant was never given specific instructions regarding when the use of profanity was allowed by the employer.

14. The employer did not prohibit the claimant from hugging residents.

15. On September 7, 2017, the employee parking lot was full due to construction taking up a large number of the spots available.

16. On September 7, 2017, the employer's enriched life director (the ELD), the RCD, and the employer's assistant executive director (the AED) had their cars parked in the street.

17. On September 7, 2017, the claimant's car was parked in the manager/resident parking lot.

18. During the afternoon of September 7, 2017, the claimant (who was scheduled to be out of work on September 8, 2017) was completing time-sensitive service plans which were due by the end of her shift at 5:30pm.

19. On or around 3:45pm on September 7, 2017, as the claimant was completing these time-sensitive service plans for the employer, the ELD and one of the employer's residents (the resident), who resided at the employer's facility, approached the claimant in her office. The ELD asked the claimant if she could move her car so that the resident may take her spot in the parking lot.

20. At the time, the resident was parked in the street. The resident could not remain parked in the street overnight because her vehicle would be towed.

21. The claimant, who wanted to finish her service plans prior to the end of her shift, told the ELD and the resident that she was "in the middle of something important," and said that she could move her car at the end of her shift at 5:30 p.m. The claimant did not want to be set back the 10 to 12 minutes which would have taken her to walk to her car, move it, and then walk back to her office.

22. The resident agreed to wait until 5:30 p.m. for the claimant to move her car. The claimant told the resident that she would come find her once she was ready to move her car so that the resident could take her parking spot. The ELD and the resident, who did not cry in front of the claimant, then left the claimant's office.

23. The claimant did not perceive the resident to be agitated or experiencing anxiety. The claimant perceived the resident to be calm.

24. The claimant did not specifically tell the ELD why she wanted to wait until the end of her shift to move her car because she perceived that, after saying that she was "in the middle of something important," this had been accepted by both the ELD and the resident.

25. Moments after leaving the claimant's office, and outside of the claimant's presence, the resident began to experience anxiety, in front of the ELD, related to the parking situation.

26. The ELD never told the claimant that the resident subsequently experienced any anxiety related to the parking situation. The ELD, instead, remained with the resident and attempted to calm her down.

27. Had she known that the resident became upset and experienced anxiety because of the parking situation, the claimant would have moved her car right away. The claimant would have done so because she would not have wanted the resident to be upset.

28. On or around 3:50pm on September 7, 2017, the claimant left her office and was on her way to another resident when she saw the resident talking to one of the employer's receptionists. At that point, the resident, who hugged people on a regular basis and who was not crying at the time, stretched out her arms in an attempt to hug the claimant.

29. The claimant did not hug the resident, but, instead, as a result of feeling urgency in her attempt to finish her service plans before the end of her shift, walked past her. The claimant was not upset with the resident and did not say anything to the resident as she walked past her.

30. On or around 4pm on September 7, 2017, the employer's program director (the PD) approached the claimant in her office and asked her if she could move her car. The claimant told the PD that she had spoken [to] the ELD and the resident, and that the resident had agreed to the claimant moving her car at 5:30 p.m. The PD then offered to move the claimant's car for her, to which the claimant responded, "Absolutely not." The PD then left the claimant's office.

31. At no time during the conversation did the PD tell the claimant that the resident was upset.

32. It is unknown why the PD did not tell the claimant why it was important that she move her car immediately.

33. On or around 4:10 p.m. on September 7, 2017, after talking to the PD, the claimant, still not aware that the resident was upset, approached the AED and asked her if there was any specific policy regarding the use of the parking lot. The AED then told the claimant that she was required to give up her parking spot for the resident because "residents come first."

34. After speaking with the AED, the claimant went back to her office with the intention of moving her car within the next 5 to 10 minutes.

35. Around 4:15pm on September 7, 2017, the RCD approached the claimant in her office and asked her to move her car. The claimant, who was experiencing frustration after being asked to move her car on several different occasions within a short period of time, told the RCD, in a neutral tone and without yelling, "Are you fucking kidding me?" The claimant was neither frowning nor smiling when she uttered the phrase.

36. At the time she said "Are you fucking kidding me?," the claimant did not intend to act in an aggressive, confrontational, or disrespectful manner towards the RCD. The claimant was not angry at the RCD, but frustrated and surprised because she believed that the parking spot situation had already been settled.

37. The claimant understood the phrase, "Are you fucking kidding me?," to have different possible meanings depending on the circumstance. The claimant understood that the phrase may be uttered sometimes out of frustration, sometimes in a comical manner, and sometimes confrontationally.

38. Between the times that the claimant was asked to move her car by the ELD and the RCD, neither the ELD nor the RCD checked to see if any spots had opened up in the manager/resident parking lot that the resident could use. It is unknown if anyone else from the employer's workplace checked the parking lot.

39. After uttering the phrase, "Are you fucking kidding me," the claimant left her office and proceeded to immediately move her car.

40. The claimant spent approximately 10 to 12 minutes walking to her car, moving her car, and walking back to her office.

41. At no time on September 7, 2017 did the claimant refuse to move her car.

42. At no time did the claimant refuse to move her car due to a belief that the employer was targeting her.

43. Prior to the claimant moving her car, and for unknown reasons, no one from the employer's workplace had told the claimant that the resident was upset due to having to wait for the claimant's parking spot.

44. Because the resident had initially agreed, in her presence, to wait until 5:30 p.m. for the claimant to move her car, and because no one from the employer told her that the resident subsequently became upset, it did not occur to the claimant that she was repeatedly asked to move her car because this is what the resident wanted.

45. After moving her car, the claimant was approached by the RCD and the employer's interim executive director (the ED). The claimant was told that she was being placed on suspension pending an investigation for being insubordinate by allegedly refusing to move her car and by swearing at the director.

46. Concluding that the claimant had violated its policies and expectations regarding insubordination by allegedly refusing to move her car and by swearing at the director on September 7, 2017, the ED decided to discharge the claimant.

47. On September 12, 2017, the ED, along with the RCD, met with the claimant and discharged her from her employment effective immediately.

48. On September 14, 2017, the claimant filed a claim for unemployment benefits with an effective date of September 10, 2017.

CREDIBILITY ASSESSMENT

The AED testified that the claimant had received a copy of the employer's parking policy upon hire. The claimant, on the other hand, denied having receiving [sic] such policy or ever being told that she was not allowed to park in the manager/resident parking lot. Where the AED admitted to not yet being hired by the employer at the time the claimant was hired, where the RCD admitted to being unclear on the parking policy, and where the claimant provided unrebutted testimony that she had been parking at the manager/resident lot since December 2015 without being told that she could not, I conclude that the claimant neither received nor was aware of any of the employer's parking policies.

During the initial hearing, the RCD offered the PD's hearsay testimony that the claimant said, "Absolutely not," in response to her request to move the car. The claimant, however, while admitting that she used the words "Absolutely not" during her conversation with the PD, directly and consistently testified that she said so, not in response to being asked to move her car, but in response to the PD's offer to move the car for her. Because the claimant's testimony was direct, specific, and consistent throughout, I credit same. Furthermore, where none of the employer's witnesses provided direct testimony alleging that the claimant ever refused to move her car in their presence, I conclude that at no time the claimant refused to move her car.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We set aside Consolidated Finding of Fact # 41, that the claimant did not refuse to move her car at any time on September 7, 2017, the portion of Consolidated Finding # 46, which states that the claimant "allegedly" refused to move her car, and the portion of the Credibility Assessment in which the Review Examiner concludes that at no time did the claimant refuse to move her car. These findings are set aside in light of 1) Consolidated Findings ## 20 and 21, which state that, when asked to move her car by the ELD at 3:45 p.m., the claimant responded that she would move her car at 5:30 p.m., as she was in the middle of something important at the time, and 2) Consolidated Finding # 30, which states that, around 4:00 p.m., when the PD asked the claimant to move her car, the claimant responded that she would move her car at 5:30 p.m., which the resident had agreed to. The latter three findings show that the claimant refused to move her car at the moment she was asked to do so by the employer on two occasions, and she only agreed to move it when it was convenient for her. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe the credibility assessment is reasonable in relationship to the evidence in the record. As discussed more fully below, we believe the review examiner's decision to award benefit should be sustained.

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 . . . .

Since the employer did not present a written parking policy for review, and the written insubordination policy in the record does not contain language regarding the consequences of a policy violation, we cannot conclude that the claimant's separation from employment was due to a knowing violation of a reasonable and uniformly enforced policy of the employer. Therefore, at issue here is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

After remand, the review examiner found that the claimant was discharged from employment because she was insubordinate to the employer when she *allegedly* refused to move her car and swore at the director. As explained above, we find that the record establishes the claimant did refuse to move her car twice when asked to do so to allow a resident who lived at the employer's

facility to have her spot, as there were limited parking spaces, and the resident could not park on the street overnight. Specifically, the claimant told two different managers that she would move her car at the end of her shift, rather than at the moment she was being asked to move it. It was only after the claimant's supervisor asked her to move her car a third time, at approximately 4:15 p.m., half an hour after she was first asked to move it, that the claimant proceeded to move her car. At this time, the claimant had already decided to move her car, as she had just asked the Assistant Executive Director (AED) if there were any policies regarding the use of the parking lot, and the AED told her that residents come first, so the claimant was required to give up her parking spot for the resident.

In order to deny benefits, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] 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. Here, there was no dispute amongst the parties that the claimant did not agree to move her car immediately when asked, and she instead informed the employer that she would move it at the end of her shift, which was approximately two hours after the first request to move her car was made. We find that the claimant engaged in deliberate misconduct when she twice refused the employer's reasonable request that she immediately move her car so that the resident could park there. However, the review examiner found that the claimant did not move her car immediately because the resident initially agreed to the claimant's offer to move her car at the end of her shift, and the claimant was not subsequently made aware that the resident became very upset that she had to wait that long for a parking spot. It did not occur to the claimant that she was repeatedly asked to move her car because that was what the resident wanted, despite her initial acquiescence to the claimant's offer. The review examiner further found that, had the claimant known the resident was upset that the claimant had not moved her car right away, the claimant would have immediately moved her car. These findings establish that the claimant's actions, at most, show a good faith lapse in judgment, rather than wilful disregard of the employer's interest. *See* Garfield, 377 Mass. at 97.

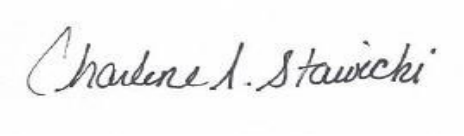
The second reason for the claimant's discharge was her use of foul language toward her supervisor, the RCD. When the supervisor asked the claimant to move her car at approximately 4:15 p.m., the claimant responded, "Are you fucking kidding me?" before walking away to go move her car. The review examiner found that the claimant did not intend to act in an aggressive, confrontational, or disrespectful manner when she said this. Rather, the claimant reacted this way because she was frustrated and surprised at the third request to move her car in a short period of time, given that she believed the issue with the parking spot had been settled the first time she was approached. The review examiner also found that because the claimant and her supervisor had previously used foul language in casual conversation, the claimant believed it was acceptable to use profanity when speaking to her supervisor to express her frustration in any given situation. Since the claimant's use of foul language was prompted by a feeling of frustration and surprise, as she had at that point been approached by three different people over the course of half an hour, we can reasonably assume that she uttered this language unthinkingly, and, therefore, we cannot conclude that she acted with intentional disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant's discharge is not 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 affirmed. The claimant is entitled to receive benefits for the week ending September 16, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 30, 2018

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