

The claimant's actions constituted deliberate misconduct in wilful disregard of the employing unit's interest, where the claimant held and attempted to kiss his supervisor but did not quickly stop even though he understood that his actions were unwanted and unwelcome.

**Board of Review
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Issue ID: 0023 8638 67

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 October 16, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 21, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 8, 2018. 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 make additional findings from the existing recording. 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 decision, which concluded that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where the claimant maintained that he was not aware that his attempts to kiss his supervisor were unwelcome.

Findings of Fact

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

1. Prior to working for the employer, the claimant had participated in, as part of his employment in positions for prior employers, several trainings on the prevention of sexual harassment in the workplace.
2. From March 28, 2016, until October 16, 2017, the claimant worked as a full-time (40 hours per week) maintenance technician for the employer, a real estate management company.
3. The employer maintained a policy in order to ensure that its employees are free from sexual harassment. The policy read, in relevant part, "It is the Companies' policy to prohibit harassment of any employee by any Supervisor, employee, customer or vendor on the basis of sex or gender. [. . .] 'Sexual harassment' means sexual advances, request for sexual favors, and verbal or physical conduct of a sexual nature when: [. . .] such advances, request or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. [. . .] Examples of prohibited behavior include [. . .] verbal or physical conduct of a sexual nature, such as uninvited touching [. . .] Violation of this policy will result in disciplinary action, up to and including discharge."
4. At the claimant's time of hire, the employer provided him with a copy of the sexual harassment policy.
5. The claimant generally worked at a building owned by another company (the client) for which the employer provided property management services.
6. Throughout his employment, the claimant became friendly with the employer's property manager (the manager). Whenever the claimant greeted the manager, he would typically give her a hug and a kiss on the cheek.
7. The claimant and the manager were never involved in a romantic relationship.
8. Prior to the incident that took place sometime in August 2017, the claimant had never perceived the manager to be uncomfortable by their customary hug and kiss on the cheek.
9. Sometime in August, 2017, as the claimant was performing maintenance work in one of the client's units, the manager walked into the unit.
10. Upon seeing the manager, the claimant approached her and said to her, "My kiss."
11. The claimant then proceeded to grab the manager's left wrist, put his right hand over her shoulder and behind her head, and attempted to give her a kiss.

12. Over a period of 10 seconds, the manager said “no” to the claimant at least 2 or 3 times while she was giggling. The claimant heard the manager say “no” at least 2 or 3 times but did not immediately release the manager as he attempted to kiss her.
13. Even though the manager was giggling, the claimant was aware that she did not wish for him to continue holding her and attempting to kiss her because the manager said “no” at least 2 or 3 times.
14. The claimant did not believe that the manager said “no” at least 2 or 3 times in a playful or joking way.
15. After approximately 10 seconds of having said “no” at least 2 or 3 times, the manager yelled “No” in a more forceful manner and the claimant released her. The manager then exited the unit.
16. On or around the same day of the incident, the manager reported to both of the employer’s owners (the owners) that the claimant had grabbed her wrist, put his hand on the back of her head, and tried to kiss her.
17. The owners reported the incident to the employer’s third-party human resources company (the HR company), which conducted an investigation into the manager’s allegations against the claimant.
18. On September 1, 2017, after taking statements from both the claimant and the manager, the HR company submitted an investigation report to the owners, concluding that the claimant had violated the employer’s sexual harassment policy.
19. Concluding that the claimant had violated its policies and expectations regarding sexual harassment by attempting to kiss the manager and not releasing her despite her saying “no” on several occasions, the owners decided to discharge the claimant.
20. Prior to discharging the claimant, the owners wanted to meet with the client’s owners (the client owners) of the building in which the claimant worked. Because the claimant was friends with the client owners and occasionally went on personal vacations with them, the owners were concerned about potential business repercussions and losing the contract at this property if they were to discharge the claimant without speaking with the client owners first.
21. Because the client owners were themselves on vacation, the owners were unable to meet with them until sometime in October 2017, at which point they informed them of their intention to discharge the claimant.
22. The claimant continued working for the employer until October 16, 2017.

23. On October 16, 2017, the owners met with the claimant and discharged him from his employment effective immediately as a result of his attempt to kiss the manager and not releasing her despite her saying “no” on several occasions on August 2017.

24. On November 20, 2017, the claimant filed a claim for unemployment benefits with an effective date of November 19, 2017.

Credibility Assessment:

Although the claimant’s testimony that the manager giggled is deemed to be credible—it being direct and unrefuted—his testimony as to his state of mind is not. The claimant admittedly grabbed the manager’s wrist, placed his arm over her shoulder and behind her head, and attempted to give her a kiss without releasing her after she said “no” to him at least 2 or 3 times over a period of approximately 10 seconds. Although the claimant testified that he believed that the manager was “joking around” as she initially giggled upon the claimant putting his hands on her, he admits that she did say “no” to him at least 2 or 3 times before he eventually released her following a more forceful “No.” Given that the claimant admitted that the manager said “no” to him at least 2 or 3 times over a period of 10 seconds, it is concluded that the claimant was aware that she did not wish for him to continue holding her and attempting to kiss her—because she specifically said “no”—and that he knew the manager did not say it in a playful or joking way, regardless of the fact that she initially giggled.

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. And, as discussed more fully below, we believe that the review examiner’s consolidated findings of fact support the legal conclusion that the claimant’s conduct constituted deliberate misconduct in wilful disregard of the employer’s interest.

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 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, despite a delay in actually discharging the claimant, it was undisputed that the claimant was discharged for allegedly sexually harassing his manager by holding her and attempting to kiss her during an incident sometime in August 2017. 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 claimant testified that, based on their past interactions, he believed his attempts to touch and kiss his supervisor were welcome and that when he realized that the supervisor wanted him to stop, he immediately did so. However, the review examiner instead concluded that, despite the fact that the manager was initially giggling during the incident, the supervisor repeatedly said "no," and the claimant understood that she wanted him to let go of her and stop attempting to kiss her, but he did not quickly do as asked. "The responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985) (citation omitted). Such credibility determinations 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. Even if we were to reach a different conclusion, we must accept the review examiner's findings if they are reasonable in relation to the evidence presented at the hearing. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) ("[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence."). In this case, the review examiner's conclusion regarding the claimant's state of mind is reasonable in relation to the record.

Having concluded that the claimant continued to attempt to hold and attempt to kiss the manager despite knowing that this action was unwelcome and unwanted, 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 under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending October 21, 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 – July 30, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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