

**Claimant delivery driver engaged in deliberate misconduct in wilful disregard of the employer's interest when he asked for a tip, then insulted the customer who declined to give him one.**

**Board of Review  
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**Issue ID: 0026 1932 70**

## **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. Benefits were denied on the ground that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest and, therefore, he was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on July 21, 2018. The employer appealed to the DUA Hearings Department. Following a hearing on the merits attended only by the employer, the review examiner reversed the agency's initial determination in a decision rendered on October 2, 2018. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On January 30, 2019, the District Court ordered the Board to afford the claimant an opportunity to present evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence. Both parties participated in the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant, a delivery driver, deliberately mistreated customers and asked for tips in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

### **Findings of Fact**

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a Delivery Expert for the employer, a pizza shop, from 9/13/17 until 6/18/18 when he became separated.
2. The claimant was hired to work full time, 40 to 50 hours a week, earning \$6.00 or \$11.00 an hour depending if he was on the road.
3. The claimant was discharged for asking customers for tips and mistreating customers. The employer has no written, uniformly enforced policy or rule, accompanied by specific consequences, which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the General Manager in conjunction with the Area Supervisor and Human Resources.
4. The employer expects employees not to ask customers for tips or mistreat them. This is necessary to respect others and adhere to the employer's expectations.
5. The claimant was made aware of the employer's expectations in this regard through the employee application he completed and the expectations that are posted in the workplace. (Remand Exhibit 7) He was made further aware of the employer's expectations through a warning for previous similar behavior.
6. On 6/12/18, a customer had ordered food which the claimant delivered. The transaction was paid for by credit card. The claimant gave the customer the receipt and said to the customer, "What no tip?" and joked about giving him a \$20 tip. The customer told the claimant he would have got a tip if he had been professional and told the claimant to have a good night. In response the claimant called the customer a "dumb ass". When the customer asked the claimant what he had said, the claimant told the customer he was just kidding.
7. On 6/13/18, the General Manager received a call from the customer who told him what had happened. The General Manager spoke to the claimant and told him he had given him several chances to make right. He told the claimant that he had spoken to him before about asking for tips and had told him if it happens again he would be let go.
8. The claimant had received a prior written warning on 3/5/18 for asking a customer for a tip.
9. On 6/14/18, the General Manager informed the Area Supervisor of the incident. Both the General Manager and the Area Supervisor spoke to Human Resources about the matter.
10. On 6/18/18, the General Manager informed the claimant that his employment was being terminated.

Credibility Assessment:

Although the claimant contended at the remand hearing that he did not ask the customer for a tip on 6/12/18, his contention is not deemed credible given his testimony of the events. The claimant testified that as he gave the customer her food, he noticed \$2 or \$3 dollars in her hand and asked her “Anything else?” He testified further that as the customer shut her door, she opened it again and asked him if he called her a “jack ass”. Given this testimony it is more likely than not that the claimant called the customer a name after not receiving a tip. In support of this finding the employer provided documented coaching reports at the initial hearing for similar behavior towards customers on past occasions.

### Ruling of the Board

In accordance with our statutory obligation, we review the entire record and 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 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. As discussed more fully below, we conclude that the consolidated findings made after considering the claimant’s testimony and other evidence support the original legal conclusion that the claimant is ineligible 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 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, 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).

Because there are no findings to indicate that the employer treated other employees who violate these work rules equally, we cannot conclude that the claimant knowingly violated a reasonable and *uniformly enforced* rule or policy within the meaning of G.L. c. 151A, § 25(e)(2). Alternatively, the claimant will be ineligible for benefits, if the employer shows that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest.

In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). 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." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

The consolidated findings show that the employer discharged the claimant for asking customers for tips and mistreating customers. Consolidated Finding of Fact # 3. As stated in Consolidated Finding # 4, a rule that prohibits mistreating customers is necessary to ensure that customers are treated respectfully, and this is reasonable. We believe that the expectation not to ask for tips is self-evidently a reasonable policy. As a matter of common knowledge, tipping is voluntary and at the customer's discretion, as it is an expression of appreciation for service. A worker who asks for a tip insults or, at the very least, embarrasses the customer. We might even go so far as to say that it subtly converts a voluntary gesture of good will into a demand of an additional fee for service. As an experienced delivery person, the claimant should have understood this. But, even if he did not, the employer's documentary evidence shows that it communicated its expectation not to ask for tips and not to treat customers poorly if they do not tip on several occasions over the course of the claimant's employment. *See* Consolidated Finding of Fact # 5.

The claimant's discharge followed an incident on June 12, 2018, where a customer accused the claimant of asking for a tip and calling her a "dumb ass." *See* Consolidated Findings of Fact ## 6-7 and 9-10. In his defense, the claimant denied either asking for a tip or calling the customer a dumb ass. Consolidated Finding of Fact # 6 shows that the review examiner did not believe him. 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 test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). The review examiner's credibility assessment explains why she did not accept the claimant's denial. The employer's documentary evidence of prior complaints for the same behavior indicates that the incident, as alleged on June 12, 2018, was not out of character. Even the claimant's description of the encounter, where he explains that after giving the customer the food, he asked, "Anything else?" indicates that he expected something more from her. Given this evidence, we believe the review examiner's credibility assessment is reasonable in relation to the record.

Inasmuch as the claimant denied engaging in any wrongdoing, he did not present evidence of mitigating circumstances to suggest that he was not acting in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has met its burden to show that it terminated the claimant's employment for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning June 17, 2018, 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 – May 20, 2019**



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](http://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.

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