Although the employer only presented hearsay evidence regarding allegations that the claimant engaged in sexual harassment, there were sufficient indicia of reliability to conclude that the hearsay was reliable. The claimant denied the conduct, offering no reasonable explanation for his conduct. Thus, the claimant is denied benefits 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
Michael J. Albano
Member

Issue ID: 0027 2067 45

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 September 18, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 28, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 10, 2019.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding his separation and for the review examiner to again consider written statements in the record which addressed the claimant's alleged misconduct. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the employer's allegations of sexual harassment consisted largely of hearsay and the claimant denied the allegations.

Findings of Fact

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

1. The claimant worked full-time as a lead technician for the employer's pharmacy business from 3/1/17 until 9/17/18. The claimant worked from 2:30 p.m. until 11:00 p.m. on four weekdays and alternating weekends, with one weekday off each week. The claimant also worked various overtime hours. The claimant was paid $16.83 per hour.

2. The employer maintains a workplace policy that prohibits sexual harassment. The policy reads in relevant part: "The Company is committed to providing a work environment that is free of sexual harassment. The Company recognizes the right of all individuals to be treated with respect and dignity…Sexual harassment of individuals occurring in the workplace or in other settings in which individuals of the Company may find themselves in connection with their employment is unlawful and will not be tolerated by the Company…" The policy contains a list that reads: "Examples of Conduct That May Constitute Sexual Harassment." Prohibited behaviors that are contained in this list include: "verbal abuse, jokes or language of a sexual nature; use of sexually degrading words; conversation or gossip with sexual overtones…verbal comments of a sexual nature about an individual's appearance or sexual terms used to describe an individual…"

3. The employer's sexual harassment policy contains a section that reads: "Any individual violating this policy will be subject to appropriate discipline, including possible termination of employment." The employer's Vice President determines whether an employee who violates the sexual harassment policy will be discharged or issued a less severe form of discipline.

4. On 7/13/17, the claimant attended an annual training session where the employer's sexual harassment policy was reviewed. The claimant received a copy of the policy and he signed a confirmation form, confirming that he received and read the policy. The claimant was aware that the employer expected him to refrain from engaging in behaviors prohibited by the sexual harassment policy. The claimant was aware that he could be subject to discipline, including termination of his employment, if he engaged in the prohibited behaviors.

5. Sometime in approximately early September, 2018, the Vice President conducted an exit interview with an employee who tendered her resignation and would be leaving after one additional workday because she obtained a new job. The employee informed the Vice President that during her term of employment, the claimant made inappropriate comments to her and other female employees. The employee told the Vice President that she did not make a complaint sooner because she did not want it to disrupt her work environment. The employee told the Vice President that a former employee

quit her position months earlier because of the claimant's behavior. The employee told the Vice President that the claimant made the inappropriate comments in Spanish, because he was aware that the employees to whom he directed his remarks understand Spanish. The employee claimed that, despite having told the claimant to stop making inappropriate comments, he continued. The employee reported that the claimant made comments about a female employee, stating that the employee's "butt looks big in those jeans" and that her "pussy is fat". The Vice President asked if the other employees would be willing to speak with her about the matter. The employee recommended to the other employees that they speak with the Vice President about the claimant's behavior.

6. The Vice President spoke with two other employees, one of whom claimed to be a friend of the claimant and stated that she did not want the claimant to know that she was involved in the matter. The employees told the Vice President that they were uncomfortable with the claimant and no longer wanted to hear inappropriate comments from the claimant. The female employees reported being uncomfortable in the workplace because of the claimant's behavior; they confirmed the statements previously reported by the first employee. A day later, the Vice President asked the two employees if they were willing to sign statements, confirming that they reported to her the remarks made by the claimant. The employees agreed they would sign such statements. Two employees signed written statements on 9/20/18; one employee signed a statement on 9/24/18. The Vice President promised the employees that she would not release their names to anyone.

7. On 9/17/18, the Vice President informed the claimant that there was a complaint against him and he was being suspended, pending investigation.

8. On 9/18/18, after speaking with the three female employees, the Vice President spoke with the claimant and informed him of the specific complaints made by the female employees. The claimant told the Vice President that this was not him, that he was a professional and should not be having this conversation with the Vice President; the claimant apologized. The claimant did not deny making the statements reported by the female employee. The claimant told the Vice President that he was joking; he stated that the statements he made to the female employee were commonly used phrases by Spanish-speaking people and perhaps the Vice President did not understand because the phrases were spoken in Spanish. The claimant told the Vice President that the employee took his remarks the wrong way. Based upon her conversation with the claimant, the Vice President concluded that the claimant made the remarks reported by the female employees.

9. The Vice President concluded that the claimant violated the sexual harassment policy by making sexual remarks to female employees.

10. On 9/18/18, the Vice President notified the claimant that his employment was terminated because he violated the sexual harassment policy by making remarks of a sexual nature to female employees.

Credibility Assessment:

The Vice President appeared at the initial hearing held on January 9, 2019. The Vice President subsequently separated from the employer and did not attend the remand hearing held on June 10, 2019. The employer's Chief Operating Officer attended the remand hearing.

During the first hearing, the Vice President presented written statements that were redacted to hide the identities of the employees who complained about the claimant's behavior, as well as the identities of the individuals who recorded the complaints. The font used to prepare the statements is identical; the format is the same on each document. The signatures were removed; however, the handwriting where the dates were recorded, and the dates themselves, are different on each document. During the first hearing, the Vice President testified that after meeting with the three employees and hearing their complaints, she subsequently asked them if they would sign statements, confirming the words they reported to her. The Vice President testified to having obtained signatures from the employees on different days. The Vice President did not request the employees write statements. Given the identical format of the statements, and the testimony of the Vice President that she asked if the employees would sign statements, it is concluded that the employer's Vice President prepared the statements and obtained the employees' signatures on the dates shown on each document. The content of each statement is consistent with the direct testimony of the Vice President, who interviewed each of the individuals.

The employer witness at the second hearing testified that the individuals who provided the statements did not want their names in the hearing record and were unwilling to attend the hearing because they claimed to feel threatened, based upon their interactions with the claimant during the term of his employment. This is consistent with the fact that the initial complaint received by the Vice President came from an employee who was leaving the Company and would no longer have to work with the claimant.

The Review Examiner credited the information provided in the employee written statements because it was consistent with the testimony provided by the Vice President and established the reason for the claimant's termination. The claimant offered no suggestions or explanation as to why the Vice President might misrepresent any information provided to her by the female employees, nor did he suggest the existence of any other circumstances that caused his discharge. Likewise, it was the claimant's testimony that he had been warned by at least one female employee that he and his co-worker were "fresh" and "would be fired" because of this behavior. It is unlikely that such a statement would have been made to the claimant, had he not engaged in offensive behavior toward the female

> employee. In light of the above, greater weight was given to the direct testimony and information contained in the redacted documents presented by the employer's Vice President. The claimant's testimony that he did not make the statements reported by the female employees was not credible in light of the above and therefore was given no weight.

Ruling of the Board

In accordance with our statutory obligation, we review the 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 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. As discussed more fully below, we conclude that there is sufficient evidence in the record to support the review examiner's decision to deny benefits under G.L. c. 151A, § 25(e)(2).

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 . . . .

Under these provisions, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In her decision, the review examiner concluded that the employer had not shown that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer. She reasoned as follows:

> The employer presented evidence of a workplace policy that prohibits sexual harassment. Since the employer utilizes discretion in determining whether an employee who violates the policy will be discharged, it failed to establish that the claimant was discharged for violating a uniformly enforced or policy.

We agree that the employer has not shown that the policy is capable of uniform enforcement, because the Vice President determines whether a violation of the sexual harassment policy will lead to termination of employment or something else. Consolidated Finding of Fact # 3. It is not clear from the policy what would be taken into account by the Vice President. In this way, the

employer has not shown that the policy is or can be uniformly enforced, as that term is understood under G.L. c. 151A, § 25(e)(2).

We next consider whether the record supports the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The employer discharged the claimant after it concluded that the claimant had violated its sexual harassment policy "by making sexual remarks to female employees." Consolidated Finding of Fact # 9. The claimant testified during the remand hearing that he knew the employer's written policy, and that he knew that he was not supposed to engage in the behaviors listed in the policy. *See* Consolidated Findings of Fact ## 2 and 4.

The initial question is whether the claimant made the alleged sexual remarks at all. The review examiner found in her decision that he did. Her consolidated findings of fact and credibility assessment clearly indicate that he did. The claimant denied the behaviors attributed to him in his testimony during the remand hearing.

The employer's case rested largely on hearsay. No person who witnessed the alleged sexual remarks, or who had been the target of the remarks, testified during the hearing. The Vice President testified as to what several employees told her regarding the claimant's behavior. The employer also submitted statements, initially signed by the complaining employees but then redacted by the employer prior to the hearing, containing the allegations against the claimant. *See* Exhibit # 6. We must decide whether this evidence constitutes substantial and credible evidence that the claimant engaged in misconduct prior to his separation.

"Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627–628 (1984), *quoting* New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981); G.L. c. 30A, § 1(6). In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value. *See* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). Indicia of reliability can be assessed by determining, among other things, whether it was corroborated by other evidence in the record. Covell v. Department of Social Services, 439 Mass. 766, 785–786 (2003).

In the credibility assessment, which accompanies the consolidated findings of fact, the review examiner notes that she afforded greater weight to the Vice President's testimony than to the claimant's testimony. For the reasons stated in the assessment, we think that the review examiner was reasonable in relying on the Vice President's testimony. In that testimony, the Vice President testified to a conversation that she had with the claimant prior to his separation regarding the allegations against him. Most importantly, during that conversation, the claimant did not deny that he made the offending statements. He indicated that he was joking, that his co-workers had misunderstood him, and that his remarks were taken the wrong way. Consolidated Finding of Fact # 8. Moreover, as the review examiner noted in her assessment, the claimant testified that two co-workers told him that he would be fired, and he had reported to the employer that his co-workers were saying that he was "fresh." The Vice President's testimony about her conversation with the claimant, as well as the claimant's testimony that his co-workers

said that he was "fresh," lend reliability to the employees' allegations that the claimant had made inappropriate comments in the workplace. We think that this evidence was sufficient for a reasonable mind to conclude that the claimant had engaged in the alleged behaviors.

During the remand hearing, the claimant denied making the comments. Nothing in the consolidated findings of fact suggest that his remarks were accidental or done without thinking what he was doing. Consequently, we conclude that the claimant engaged in deliberate misconduct. Moreover, he did so in wilful disregard of the employer's interest. The wilful disregard analysis takes into account the claimant's knowledge of the employer's expectations, the reasonableness of the expectations, and any mitigating circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). As stated previously, the claimant was aware of the employer's prohibition on sexual harassment. Such expectations were a reasonable means of creating a safe work environment, in which all employees were treated with respect. No mitigating circumstances were presented. Again, the claimant denied the alleged conduct. *See* Lagosh v. Comm'r of Division of Unemployment Assistance, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found).

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence in the record and free from error of law, because the employer presented sufficient evidence to conclude that the claimant engaged in sexual harassment in the workplace and that his misconduct was not mitigated.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning September 16, 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 - July 10, 2019

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.

SF/rh