A claimant who lit a marijuana cigarette just outside of her employer's establishment is disqualified under G.L. c. 151A, § 25(e)(2), because she deliberately used the marijuana on company property, knowing the employer prohibited this. The fact that she used it because she was in pain does not mitigate her behavior. There were no findings that she was so overridden by pain that she could not wait until she got home to light the marijuana cigarette.

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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 her position with the employer on September 21, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 30, 2018. 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 19, 2019.

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, 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 accepted the employer's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision to award 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 claimant lit a marijuana cigarette outside of the employer's store while in her uniform after her shift ended.

Findings of Fact

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

1. The claimant worked part time as a store clerk for the instant employer, a trucking company, from 08/23/13 until 09/15/18.

2. The employer maintains a **Standards for Performance & Behavior** policy that states in part:

   Below is an overview of the performance and behaviors expectations [Employer] has of its employees while working:

   ● **Being constantly aware of your safety needs, as well as those of your customers and co-workers**:
   - Not possessing, using, or distributing alcohol or illegal drugs on Company property.

3. The purpose of the policy is to ensure the safety of employees and customers.

4. The claimant signed an acknowledgement for receipt of the employee handbook most recently on 01/16/16.

5. All employees are subject to the policies.

6. Disciplinary action for being in violation of the policies is at the discretion of the employer based on the nature and severity of the incident.

7. The employer expects employees not to possess, use or distribute alcohol or illegal drugs on company property.

8. The purpose of the expectation is to ensure the safety of the employees and customers.

9. The claimant signed an acknowledgement of the employee handbook most recently on 01/16/16.

10. On 09/15/18, the claimant was given a marijuana cigarette from her neighbor when she was on her way to the bus stop. The marijuana cigarette was in a glass tube and the claimant put it in her coat pocket.

11. On 09/15/18, the claimant reported to work at 10:30 a.m. because she thought that she had to work that morning for a "celebrating food" event.

12. The claimant found out that she wasn't scheduled for that morning but that she was scheduled to work later that day at 3 p.m. The claimant left and went back home.

13. While at home, the claimant looked for the marijuana cigarette but couldn't find it. She was worried that she had dropped it while at the store earlier in the morning.

14. At approximately 2 p.m., the claimant called and asked the grocery manager if he could look in the grocery office to see if he could find the marijuana cigarette that she believed she had dropped.

15. The grocery manager did not find anything and told the claimant "don't you ever have me do that again." After getting off the phone, the claimant found the marijuana cigarette in her coat pocket.

16. The claimant reported back to work at 3 p.m. for her shift. She went over to the grocery manager and asked him to write her up because she felt bad for putting him in that position earlier by asking him to look for the marijuana cigarette.

17. The claimant did not get written up at that time and worked her scheduled shift from 3 p.m. until 8 p.m. at which time she punched out.

18. The claimant has "bone on bone arthritis" in both of her knees and was in a lot of pain when her shift ended. The claimant took one of the electric carts outside to wait for her ride home because of the pain.

19. The claimant took the marijuana cigarette out of the glass tube and lit it because it would help with her pain. The claimant immediately put the marijuana cigarette out because she thought a customer had seen her light it. The claimant still had the glass tube in her hand.

20. The claimant was slumped forward rubbing her legs and knees because of the pain.

21. An employee who was off duty drove by and saw the claimant slumped over in the cart and called the store and reported it to the store manager.

22. The store manager went outside and saw the claimant in the cart and saw what he believed was a "glass pipe" in her hand. The claimant was in her uniform with her name tag still on.

23. The store manager asked the claimant if she was okay and told her to bring the electric cart back inside.

24. On 09/17/18, the store manager reported the incident to the store director. The grocery manager also reported that the claimant had called him to look for her marijuana cigarette in the store on 09/15/18.

25. The entire matter was reported to Human Resources (HR) and the claimant was notified that she was suspended on 09/18/18.

26. During the suspension meeting, the claimant originally told the employer that she had her glasses in her hand but ultimately admitted that it was a marijuana cigarette and a glass tube and she thought that the customers had turned her in.

27. The claimant also told the employer that it was medication because she had a medical marijuana card but ultimately admitted that she did not have a card for medical marijuana.

28. The claimant also provided a written statement where she indicated that she "didn't think of the repercussions of the no drug policy."

29. HR made the decision to terminate the claimant for consuming the marijuana cigarette on company property.

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 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. As discussed more fully below, we reject the review examiner's legal conclusion that the findings support a conclusion that the claimant is eligible to receive benefits.

There is no dispute that the claimant was discharged from her job for violating the employer's policies and expectations prohibiting the possession or use of illegal drugs on company property. 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 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 section of law, the employer has the burden to show that the claimant is ineligible to receive unemployment benefits.[1] Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Following the hearing, the review examiner concluded that the employer had not carried its burden. After reviewing the record and the review examiner's findings of fact, we disagree.

[1] Because the review examiner focused much of her analysis in Part III of her decision on the deliberate misconduct provision in G.L. c. 151A, § 25(e)(2), and we conclude that the claimant is subject to disqualification under that same provision, we think it unnecessary to delve in the knowing violation part of the statute.

The claimant was fired for violating the employer's expectation that she not "possess, use or distribute alcohol or illegal drugs on company property." Finding of Fact # 7. It is reasonable to conclude that the claimant was aware of the expectation, as she signed for written policies stating it. Finding of Fact # 9. The claimant also readily testified that she was aware of the policies and expectations.[2]

We are first confronted with the question of whether the claimant possessed or used the marijuana cigarette. Mere possession of such a cigarette cannot be a basis for disqualification under Chapter 151A, pursuant to G.L. c. 94C, § 32L.[3] So, we turn to whether the claimant used it. Although the review examiner did not find that the claimant inhaled from the cigarette, she did find that the claimant lit it, intending to use it. *See* Findings of Fact ## 18 and 19. We think that the act of lighting the marijuana cigarette is beginning to use it. Therefore, the claimant's actions violated the employer's expectation and constituted misconduct.[4]

The issue central to this case is the claimant's state of mind at the time she used the cigarette. In order for the claimant to be denied benefits, the employer must show that the misconduct was deliberate and done in wilful disregard of the employer's interest. The "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). 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." Id.

Here, we conclude that the claimant's actions were deliberate, as opposed to accidental or unintentional. She was in pain on September 15, 2018, so she decided to take the marijuana cigarette out of its glass tube and use it. The claimant testified in various ways during the hearing that she knew the rules but made the decision to smoke the marijuana cigarette anyway. Nothing in the findings suggests that her conduct was done without thinking or without understanding what she was doing (lighting a marijuana cigarette to use it) on the employer's property. There is sufficient evidence in the record to support a conclusion that she engaged in deliberate misconduct.

To determine whether the employee acted 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

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[2] At one point, the claimant testified that she knew that the employer wanted "safety first" overall. She also testified that "there is a time and a place for everything. That was not the place because it was on company property." While not explicitly incorporated into the review examiner's findings, this testimony is part of the unchallenged evidence introduced at the hearing and, 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).

[3] The statute provides, in part, that: "neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender . . . any form of public financial assistance including unemployment benefits . . . ."

[4] Although possessing the marijuana may not have been prohibited by law, using it in a public space violates the Massachusetts laws on the recreational use of marijuana, and, therefore, its use outside the store was illegal. *See* G.L. c. 94G, § 13(c).

expectation and the presence of any mitigating factors." Id. As we have stated above, the claimant knew the employer's policies and expectations regarding use of illegal drugs on company property. We also note that the claimant's actions on the day of the incident clearly suggest that she knew she did something wrong. When she lit up the marijuana cigarette, she thought that a customer had seen her do it. So, she immediately put it out. If the claimant really thought that she could smoke the cigarette in front of the store, on one of the employer's electric carts, and in her uniform, she would not have immediately put it out when she thought someone saw her. Moreover, later, the claimant lied to the employer twice about her use of the cigarette on September 15, 2018, in an apparent effort to cover up her actions. During her suspension meeting, the claimant initially told the employer she had eyeglasses in her hand. She later admitted it was a marijuana cigarette and its glass tube. Finding of Fact # 26. She also told the employer that she had a medical marijuana card. Later, she admitted that this was false. Finding of Fact # 27. We think it clear from these findings that the claimant knew the employer's expectations. The expectations themselves are certainly reasonable, inasmuch as the prohibition against drug use is driven by safety concerns. *See* Finding of Fact # 3.

However, the review examiner concluded that the claimant's actions were due to mitigating circumstances. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). The findings of fact do not show that the claimant was so overridden by pain that she could not wait until she got home to light the marijuana cigarette. Thus, these findings do not support a conclusion that the claimant's actions were mitigated.

The review examiner's decision notes that the claimant testified that she was in pain and that the pain is so great at times that it clouds her decision-making. However, no findings were made that the claimant was in so much pain that she was not thinking clearly on September 15, 2018.

The decision further concludes that the claimant "made a bad judgment call at the time." We disagree. The "bad judgment call" concept derives from the SJC's decision in Garfield, where it held that a manager rearranging a store's schedule without permission was a good faith error of judgment, essentially because he was trying to keep the store open in his absence, which was in furtherance, rather than wilful disregard, of the employer's interest. 377 Mass. at 98–99. In the present case, there is no suggestion that the claimant believed she was acting in the employer's interest.[5]

We, therefore, conclude as a matter of law that the employer carried its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), by using marijuana on the employer's property.

[5] When asked why she went to smoke the cigarette when she did on September 15, 2018, the claimant testified that she thought she could get away with it. This testimony is also part of the unchallenged evidence in the record.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning September 16, 2018, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 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