Claimant, who was discharged for admittedly engaging in sexually inappropriate conversations in the workplace was not disqualified, where the employer failed to provide requested documents from its investigation, and the review examiner found other employees (including supervisors) allowed the claimant's behavior, or engaged in such conduct themselves.

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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 affirm.

The claimant was discharged from her position with the employer on March 14, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 13, 2019. The employer 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 awarded benefits in a decision rendered on July 13, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined 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 of the employer, and, thus, was entitled to benefits pursuant to 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 take additional evidence regarding the employer's policies, expectations, and investigation into the claimant's alleged misconduct. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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's discharge for engaging in inappropriate sexual conversations and conduct in the workplace was not for a knowing violation of a reasonable or uniformly enforced policy of the employer, or deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

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 for the employer, a health care provider, as a material handler technician, from January 24, 2015, until March 14, 2019. The claimant was paid $16.49 per hour.

2. The employer's revised Harassment in the Work Place Policy, effective March 18, 2018, states, in part:

Sexual Harassment is one form of Unlawful Harassment. Sexual harassment is unwelcome conduct which involves sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

● Submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; or

● Such advances, requests 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.

● Either the targeted individual is offended OR any other individual(s) that witness behaviors and take offense

● Unwelcome sexual advances whether they involve physical touching or not;

● Sexual epithets, jokes, written or oral references to sexual conduct (including in texts, posts, emails, computer screens or conversations);

● Comments about an individual's body or comments about an individual's sexual activity;

● Displaying sexually suggestive objects, pictures, cartoons;

● Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;

● Inquiries into one's sexual experiences;

● Discussion of one's sexual activities or gossip about one's sex life.

(Remand Exhibit 9, Pages 7 and 8)

● Corrective Action will be taken as deemed appropriate under the circumstances, up to and including termination.

(Remand Exhibit 9, Page 11)

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3. The policy is a measure to ensure a work environment free from harassment and to ensure employees comply with federal and state law.

4. All employees are subject to the Harassment in the Work Place Policy.

5. The claimant received and signed for the revised Harassment in the Work Place Policy on September 11, 2018. (Remand Exhibit 9, Pages 14 and 15)

6. In February 2019, two of the claimant's male coworkers (Coworker A and Coworker B) complained about the claimant and two other material handler technicians, one male (Coworker C) and one female (Coworker D) speaking to each other about sex, sexual activities, making sexual jokes, and about the claimant sitting on people's laps.

7. Coworker A and Coworker B reported to the Senior Employee Relations Consultant (SERC) the behavior of the claimant, Coworker C, and Coworker D, had been going on daily and they could no longer tolerate it.

8. The employer investigated Coworker A's and Coworker B's complaint.

9. When the claimant learned from Coworker C and Coworker D of the investigation, she spoke with Manager A who told her she was not in trouble.

10. The claimant did not report anything to the SERC prior to Coworker A's and Coworker B's complaint.

11. The SERC interviewed the claimant, Coworker C, Coworker D and 9 other employees.

12. The investigation revealed the claimant talked about sexually explicit conduct, having sex, and about body parts, about 3 times a week which violated the employer's sexual harassment policy:

    ● Either the targeted individual is offended OR any other individual(s) that witness behaviors and take offense

    ● Sexual epithets, jokes, written or oral references to sexual conduct (including in texts, posts, emails, computer screens or conversations);

    ● Comments about an individual's body or comments about an individual's sexual activity;

- Inquiries into one's sexual experiences;

- Discussion of one's sexual activities or gossip about one's sex life.

13. The SERC interviewed the claimant who told her many employees used profanity but did not provide specific instances of sexual comments or behavior which the claimant did not consider to be a big deal.

14. The claimant admitted she talked about blind dates, sex, and sitting on Coworker C's lap, who is gay, with Coworkers C and Coworker D.

15. The claimant did talk about blind dates, sex, and sitting on Coworker C's lap with Coworkers C and Coworker D. The claimant did not think anything would happen to her employment if her comments about blind dates, sex, and sitting on coworker's [sic] lap were reported "because everyone was doing it." The Manager, 2 Supervisors (Supervisor A and Supervisor B), the lead and 2 Materials Technician talked about sex.

16. On one occasion Supervisor A, a male, said to the claimant: "You look really good, I could say something" and winked at the claimant. Manager A laughed at the comment. Supervisor B, a female, loved to hear the claimant's stories. The Lead told the claimant she was going to give him a heart attack.

17. Of the 9 other employees the SERC interviewed, only one made an allegation another coworker made inappropriate sexual comment [sic]. The SERC investigated and determined the allegation was unsubstantiated. No discipline was imposed.

18. On March 14, 2019, the claimant was terminated for violating the employer's Harassment in the Work Place Policy.

19. The claimant was terminated based on the findings of the investigation; the severity of the conduct; the pervasiveness of the conduct; the conduct happening on a regular basis and not being a single incident meriting a final written warning.

20. Coworker C and Coworker D were also terminated.

21. The claimant had no prior warnings.

22. The claimant did not expect to be terminated because Manager A told her she was not in trouble and everyone talked about sex.

23. At termination, the claimant provided names of employees who made inappropriate sexual comments. The SERC later interviewed the employees and determined the allegations were unsubstantiated.

Credibility Assessment:

> The employer declined to enter into the record any documents generated during the course of its investigations (before or after the claimant's termination), such as witness interview notes, memoranda, or reports regarding the conclusions of its investigation. The testimony of the SERC about the employer's investigation and what was said to her by the claimant's coworkers was hearsay. The only direct testimony about the behavior of coworkers and what was said by Manager A was from the claimant. The claimant's testimony is not refuted and deemed credible.

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 ultimate 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.

The review examiner initially awarded benefits after analyzing the claimant's separation under 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 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. *See* Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

We remanded the case to take additional evidence regarding the employer's policies, expectations, and investigation into the claimant's alleged misconduct — including documentary evidence from the employer's investigation. After remand, we conclude that the employer has not met its burden.

The claimant was discharged for violating the employer's sexual harassment policies by talking with coworkers about blind dates and sex and sitting on a coworker's lap. Where the claimant admitted to engaging in this behavior, there is no dispute that she violated the employer's relevant policies and expectations regarding appropriate workplace conduct.

After remand, however, the review examiner also found that other employees also talked about sex in the workplace, including a manager, two supervisors, a "lead," and two of the claimant's peers. While the review examiner duly found that the employer's investigation concluded that the only *substantiated* instances of sexually inappropriate misconduct were attributed to the claimant and her two coworkers who were also discharged, the review examiner accepted as credible the claimant's version of events that such conduct was permitted by supervisors as unrefuted.

The review examiner's credibility assessment noted that the employer declined to submit any of the documents it generated during its investigation, despite being asked to do so in the Board's remand order. The review examiner accepted the claimant's direct testimony about what her supervisors and coworkers did in the workplace over the employer's uncorroborated hearsay. Although we might have weighed the testimony and evidence differently, 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). We believe the assessment is reasonable in relation to the evidence presented.

While discharging the claimant may have been an appropriate decision for the employer to make, the employer's failure to produce documentary evidence regarding its investigation led the review examiner to credit the claimant's testimony over the employer's. Where the review examiner accepted the claimant's testimony that many of her coworkers engaged in the same type of inappropriate behavior as she admittedly had, but most of those coworkers escaped discharge, the employer failed to meet its burden to establish a knowing violation of a reasonable and uniformly enforced policy. For the reasons discussed above, the employer also failed to meet its burden to establish deliberate and wilful misconduct. We, therefore, conclude as a matter of law that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interest, or for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending March 16, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 25, 2019

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

JPC/rh