

Claimant discharged for deliberate misconduct, where review examiner credited employer's testimony that he refused to perform assigned tasks and swore at him.

**Board of Review
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Issue ID: 0031 4010 02

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 his position with the employer on June 25, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 19, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 9, 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 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 remanded the case to the review examiner to allow the employer an opportunity to testify and present evidence. 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, which concluded that the claimant's discharge for alleged insubordination and attitude problems did not constitute deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy of the employer, 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 as a line leader for the instant employer, a mattress production company, from 07/23/14 until 06/25/19.
2. The employer maintains a General Conduct and Work Rules policy that states in part:

The following list is provided to help you understand [Employer]'s rules of conduct. It is impossible to provide an exhaustive list; therefore, the list represents only examples of unacceptable conduct.

Examples of unacceptable conduct are:

- Insubordination
 - Use of abusive language, fighting, threats or intimidation.
3. The employer maintains this policy to ensure appropriate behavior in the workplace and compliance with directives.
 4. The claimant acknowledged the employee handbook at the time of hire [sic] on 03/21/16.
 5. All employees are subject to the policy.
 6. Disciplinary action for being in violation of the policy is at the discretion of the employer based on the nature and severity of the incident.
 7. The employer expects employees to conduct themselves in a professional manner and comply with directives regarding job duties.
 8. The purpose of the expectation is to ensure appropriate behavior in the workplace and to ensure that business needs are met.
 9. On 06/25/19, the claimant began work at 6:30 a.m., he was working as the team lead with 2 other employees.
 10. The topper manager notified the Vice President of Operations (VPO) that the claimant's team wasn't working on the toppers as instructed.
 11. At approximately 10:30 a.m., the VPO approached the claimant to find out why he hadn't been working on producing or taping the mattress toppers 4 hours into his shift.
 12. The claimant was very agitated said he wasn't going do the job and questioned why another employee was not working on the mattress toppers.

13. The VPO did not raise his voice to the claimant during their interaction.
14. The claimant told the VPO “I’m not fucking going to do any of the job and if you want to take me from my lead position I can leave today.”
15. This took place in front of other employees in the plant and the VPO radioed the claimant’s manager.
16. The claimant only began setting up the machine after the VPO questioned why he wasn’t working on the mattresses.
17. The VPO instructed the claimant’s manager to come to the area so that they could all have a meeting.
18. The VPO, manager, and the claimant met and the claimant apologized to the VPO about his reaction.
19. The decision was made to terminate the claimant based on the egregiousness of his behavior and that it took place in front of other employees.
20. The claimant did not have any prior warnings on the job.

Credibility Assessment:

At the initial hearing, the claimant testified that he never refused to do the job as instructed by the employer.

At the remand hearing, the VPO presented testimony that the claimant directly refused to do the job and swore at him during that interaction. Although the VPO was hesitant to quote the claimant’s statement due to the vulgar language, he provided direct testimony that the claimant said “I’m not fucking going to do any of the job.” The claimant’s testimony did not change from the initial hearing, he still directly denied swearing and refusing to do the job. However, he testified that he was “mad” and “said things I wasn’t supposed to.” The claimant also testified that he apologized to the VPO and asked for forgiveness if he had shown any lack of respect. Based on these statements, it is more likely that the claimant did engage in the behavior which he denied and his testimony is no longer deemed credible.

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.

The review examiner 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 either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Solely on the basis of the claimant's testimony at the initial hearing, the review examiner concluded the employer had not met its burden. After remanding the case in order to take the employer's testimony, however, we now conclude that the employer has met its burden.

The consolidated findings show that the employer maintains a policy that prohibits both insubordination and use of abusive language. *See* Consolidated Finding # 2 and Remand Exhibit 7. The claimant signed an acknowledgement of this policy on March 21, 2016. *See* Consolidated Finding # 4 and Remand Exhibit 8. The employer determines discipline for those who violate this policy based on the nature and severity of the incident. *See* Consolidated Finding # 6. Where there is no evidence that the employer uniformly enforces discipline for violations of the policy, we conclude that the employer failed to meet its burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule.

Arising from the employer's above-referenced policy, however, was an expectation that employees would conduct themselves in a professional manner and follow the directives of supervisors without being insubordinate. As in the policy, the employer's expectations are reasonable. The claimant was aware of the expectations, as he was aware of the underlying policy.

After remand, the review examiner found that on June 25, 2019, the claimant's day began at 6:30 a.m. When a manager reported to the vice president of operations (VPO) that the claimant and his crew were not performing a task as instructed, the VPO approached the claimant to find out why he had not been working on the task four hours into his shift. The claimant was very agitated, refused to perform the assigned task, and asked why another employee was not performing the task. In front of all of the other employees on the plant floor, the claimant told the VPO, "I'm not fucking going to do any of the job and if you want to take me from my lead position, I can leave today."

The VPO summoned and met with the claimant's manager, while the claimant finally began setting up the machine he had been told to work on. Shortly thereafter, the claimant's manager and the VPO summoned the claimant to meet with them. The claimant apologized to the VPO for his actions, but the VPO discharged the claimant because of the egregiousness of his conduct and because it took place in front of other employees.

At the initial hearing, the claimant denied refusing to perform tasks as assigned and denied swearing at the VPO. After remand, the review examiner provided a credibility assessment citing her reasons for accepting the employer's version of events over the claimant's, noting particularly that the employer's reluctance at repeating the claimant's profanity and the claimant's admission that he was "mad," and that he had "said things I wasn't supposed to," and that he apologized to the VPO "if he had shown any lack of respect." 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). In light of the evidence presented, we believe her assessment is reasonable.

In order to determine whether the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest, we must also consider his state of mind at the time of the behavior. *See 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).

Here, the review examiner found that the claimant knew the employer expected him to perform tasks as directed by his manager and not to use abusive language in the workplace. The expectation is reasonable. There is no indication that the claimant's refusal to perform assigned tasks and swearing at him in front of other employees was accidental. Since the claimant denied engaging in the behavior, he has not offered any mitigating circumstances for his conduct. Thus, the employer has met its burden to demonstrate the requisite state of mind to support disqualification from benefits.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending June 29, 2019, 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 – December 10, 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

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