Claimant driving instructor's discharge for inappropriate sexual remarks and physical contact with his driving student was for deliberate misconduct in wilful disregard of the employer's interest within the meaning of 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

Issue ID: 0031 7385 89

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 due to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which the agency approved in a determination issued on August 27, 2019. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on October 9, 2019. The claimant sought review by the Board, which dismissed his appeal,[1] and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On February 21, 2020, the District Court ordered the Board to review the claimant's appeal on its merits. Consistent with this order, we have reviewed the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, and the District Court's Order.[2]

The issue before the Board is whether the review examiner's decision, which concluded that the claimant driving instructor engaged in deliberate misconduct in wilful disregard of the employer's interest by making inappropriate remarks and having physical contact with a student, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

[1] The claimant filed his appeal 13 days beyond the 30-day appeal period set forth under G.L. c. 151A, § 40. Because the filing deadline is prescribed by statute, it is considered jurisdictional and necessitated dismissal of the appeal. *See* Hamer v. Neighborhood Housing Services of Chicago, et al., 138 S.Ct. 13, 17 (U.S. 2017).

[2] Although we do not agree with the District Court's legal conclusion that the Board has jurisdiction to decide this matter, we have complied with the court's order.

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

1. The employer is a driving school. The claimant worked for the employer as a full-time driving instructor. The claimant worked for the employer from 12/23/18 to 7/26/19.

2. The employer's president supervised the claimant.

3. The employer created a policy titled "General rules for on-the road-instructors." The policy reads, in part, "There is to be absolutely no physical contact with any student at any point in time. The only possible exception to this rule is if the instructor needs to gain control of the vehicle and grabs the steering wheel. In the course of doing so they may briefly come into contact with the student's hand or forearm." The policy reads, in part, "Avoid conversations about religious & political beliefs, sexual preferences, or behaviors, & personal dating experiences, past or present, of either the student or the instructor." The employer presented the policy to the claimant when the claimant started his employment.

4. The claimant gave lessons to a female student (Student 1). The claimant told Student 1 to text him personally if she wanted lessons from him. The claimant asked personal questions. The claimant said that Student 1 had "nice luscious lips."

5. Student 1's father sent a text message to the employer's president on 2/11/19. In the text message, the father wrote:

   Hi [president]– I would like to switch [Student 1's] 2:00 lesson with [claimant] to a different instructor. She has had him on more than (one) occasion and he makes her very uncomfortable. Among other concerns: he talks about other students' driving mistakes and personal qualities, he has told her to text him personally if she wants him for a lesson, asks many personal questions, and most recently told her that she had "nice luscious lips" as a result of being a trumpet player in the band. [Student 1] was up all night worrying about today's lesson…[I am] not ok with [Student 1] being in the car with this man and I hope that you can make a change and address this concern ASAP. Please call me so that I know you received this and to set up a chance to discuss further."

6. After the president received the father's text message on 2/11/19, he assigned Student 1's lesson to another instructor.

7. Student 1's father met with the president to further discuss the claimant's behavior. The president did not interview Student 1 about the claimant's behavior.

8. The president met with the claimant on 2/11/19 to discuss the report from Student 1's father. The claimant denied the allegations. The president told the claimant that the employer does not tolerate such inappropriate behavior and he told the claimant to stop it.

9. The claimant gave a lesson to a female student (Student 2) on 4/02/19. The claimant talked about serial rapists. The claimant told Student 2 that he was a virgin until he was eighteen. Student 2 reported the claimant's behavior to her mother. Student 2's mother then reported the claimant's behavior to the president. The president did not interview Student 2 about the claimant's behavior.

10. After the president received the report from Student 2's mother, he assigned other instructors to teach lessons to Student 2. The claimant did not teach any more lessons to Student 2.

11. The president met with the claimant to discuss the report from Student 2's mother. The claimant reported that Student 2 misunderstood the conversation. The president told the claimant that his behavior was unacceptable and that he must stop it.

12. The employer never gave any written warnings to the claimant.

13. The claimant gave a lesson to a female student (Student 3) on 6/08/19. Student 3 wore jeans. The claimant placed his left hand on Student 3's inner thigh, grabbed the jean fabric, shook it, and asked why Student 3 had so many clothes on.

14. The claimant taught lessons to Student 3 prior to 6/08/19. On one occasion, the claimant told Student 3 that he was fired from previous employment because he had sex with female students. On another occasion, the claimant placed his left hand on Student 3's shoulder, ran his hand down her arm, placed it on her knee, and assured her that she was doing a great job.

15. Student 3 is the niece of the president's former business partner. The former business partner told the president that he needed to speak with Student 3. Student 3 was scheduled to take her road test. The president waited to speak with Student 3 because he did not want to upset her and jeopardize her road test success.

16. The president spoke with Student 3 in person in late July 2019. Student 3 reported what the claimant had done on 6/08/19 and on the two previous occasions.

17. The employer discharged the claimant on the day after the president spoke with Student 3 about the claimant's behavior. The employer discharged the

claimant because he made inappropriate remarks to Student 3 and he made inappropriate contact with Student 3.

18. The president asked Student 2 to write a summary about the claimant's behavior toward her. Student 2 wrote a text message and sent it to the president. Student 2 wrote:

    Good morning [president]. I don't remember what day it was, but it was the only lesson I had with [the claimant]. When he picked me up from school, he was with another kid...so we drove to [Location A] to drop him off. Then on the way back from dropping him off, [the claimant] was talking about serial rapists and how you never know who you can trust now a days. Then went on to talk about how he doesn't like driving because everyone's stupid and doesn't know what they are doing and it makes him really mad. He brought up how he wants to kill people when he's driving. Then he asked me where I lived, where I went to school, if I liked school, if I played sports, where I worked, and I kept my answers to a minimum because I felt uncomfortable. But I said I didn't play sports because I work after school and he said "Yeah, I played sports and worked in high school, that's why I was a virgin till I was 18" and I just dismissed it and didn't answer him. I felt really uncomfortable and was thinking about how that's not something that an older man should be talking about. He just kept talking but I blocked it out and drove to the next kid's house because I didn't want to be alone with him anymore. Then when me and the next kid switched, [the claimant] had a little bit of an attitude with him and grabbed the wheel out of his hand when he wasn't doing anything wrong and there was no need to grab it. When I got home, my mom asked me what was wrong and I immediately told her everything and that is when she contacted you then later that day, we spoke on the phone.

[Credibility assessment:][3]

In the hearing, the president testified that Student 3 told him about the claimant's inappropriate behavior. In the hearing, the claimant denied the alleged inappropriate behavior.

Given the totality of the testimony and evidence presented, the president's testimony is accepted as credible and it is concluded that the claimant engaged in the inappropriate behavior toward Student 3. Specifically, the employer submitted substantial and credible evidence to compel a conclusion that the claimant engaged in the inappropriate behavior. In the hearing, the president credibly testified about what Student 3 told him and the record does not feature any indication that Student 3 had any motivation to lie. This hearsay information is thus reliable. Furthermore, the president credibly testified in the hearing about what Student 1 and Student 2 had reported and the record does not feature any

[3] The review examiner's credibility assessment appears in his decision under the Conclusions & Reasoning section. For purposes of our decision, we have copied and placed here the portions of that section which include his credibility assessment.

> indication that these students had any motivation to lie. This hearsay information is thus reliable and shows a pattern of inappropriate behavior toward female students. The employer received reports of inappropriate behavior from three female students and this is a strong indicator that the claimant indeed engaged in the inappropriate behavior toward Student 3.
>
> . . .
>
> The employer expected the claimant to not make inappropriate remarks to students. The employer expected the claimant to not make inappropriate physical contact with students. These expectations were reasonable. The claimant doubtless understood these expectations because they are self-evident. . . .

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 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 findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's 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 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 . . . .

"[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).

The employer discharged the claimant for making inappropriate sexual remarks as well as inappropriate physical contact with a student on June 8, 2019 (Student # 3). *See* Findings of Fact ## 13, 14, and 17. Although the claimant denied engaging in any of this alleged behavior, the findings show that the review examiner accepted the employer's version of events. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless the assessment is unreasonable in relation to the evidence

presented, it 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.) "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.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.)

Even though the employer's president did not have any first-hand knowledge of the alleged misconduct, the review examiner determined that his hearsay evidence, which included complaints from parents or students, was more reliable than the claimant's direct testimony. *See* Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988) (hearsay evidence is not only admissible in informal administrative proceedings, but it can constitute substantial evidence on its own if it contains "indicia of reliability."). Indicia of reliability include, among other things, whether the underlying testimony was detailed and consistent, whether it was made by a person with a motive to lie, and whether it was corroborated by other evidence in the record. Covell, 439 Mass. at 785–786. The complaints against the claimant were detailed and, as the review examiner explained, there was no indication that any of the students who lodged the complaints had a motive to lie. Further, reports of similar behavior from three separate individuals suggested a pattern of behavior, rendering each one more reliable.[4] We believe his assessment was reasonable in relation to the evidence presented.

The type of misconduct at issue is among the list of prohibited behaviors in the employer's written policy, which was provided to the claimant when he started working for the employer. *See* Finding of Fact # 3. However, even if the claimant's conduct violated this policy, we agree that the employer did not meet its burden under G.L. c. 151A, § 25(e)(2), to show a knowing violation of a reasonable and uniformly enforced policy. This is because the employer did not follow its own progressive disciplinary procedure in this case. As the review examiner noted, the employer testified that its practice is to issue a verbal warning, followed by discharge or a written warning for the second offense, and finally discharge for the subsequent offense.[5] Here, the claimant received two verbal warnings for the first two infractions before being terminated for the third. *See* Findings of Fact ## 8 and 11.

Alternatively, a claimant may be disqualified under G.L. c. 151A, § 25(e)(2), if the employer proves that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. We believe that the employer has met this burden.

[4] The employer also testified that each student lived in a different town, never drove together in the same driving school car, and did not know each other, implying that the girls did not collaborate to fabricate the same misconduct. This testimony, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

[5] This testimony about the employer's progressive discipline practice is also part of the unchallenged evidence in the record.

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).

There is no question that, by June 8, 2019, the date of the final incident, the claimant was aware that his employer expected him not to make sexual remarks to his driving students, as he had been warned twice in the last few months to stop it because it was unacceptable behavior. *See* Findings of Fact ## 8 and 11. The record shows that the claimant knew that he was not supposed to touch students either. The review examiner observed that the expectation prohibiting inappropriate physical contact with students is self-evident. We agree, but there is more concrete evidence here. The claimant had been given a written policy, which makes explicit that there is to be absolutely no physical contact with students except in order to grab the wheel to gain control of the vehicle. *See* Finding of Fact # 3. He also conceded during his testimony that he knew such conduct was not acceptable.[6] As these expectations are designed to protect driving students from sexual harassment, they are, of course, reasonable.

In this case, the claimant's defense is a complete denial of any inappropriate verbal or physical acts. By denying the behavior, he presents no mitigating circumstances to excuse the misconduct.

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

[6] Although also not included in the findings, the review examiner asked the claimant during the hearing wither he knew that he was not supposed to have physical contact with students. His response, "Absolutely," was not challenged.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning July 21, 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 - March 13, 2020

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 (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.

AB/rh