

**After complaining about a coworker's sexual harassment, the claimant was subject to continued harassing behavior. Her angry responses were reasonable under the circumstances, even if disruptive to the workplace. Held the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, but that any misconduct was due to mitigating circumstances.**

**Board of Review  
19 Staniford St.  
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: 0032 9964 35**

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 December 11, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 23, 2020. 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 March 26, 2020. We accept the employer's application for review.

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, she was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the employer did not prove that the claimant's angry complaints about being harassed at work was deliberate misconduct or that it was done 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 findings of fact and credibility assessment are set forth below in their entirety:

1. On 08/13/18, the claimant began full-time employment as a non-union Apprentice for this employer's family run chimney sweep company.

2. The claimant, (a female) was assigned to work with a skilled chimney sweep who had worked with this employer for more than 20 years, [A] (a male). They worked together initially in the same van team.
3. While working together, [A] began acting sexually inappropriately with the claimant.
4. On 06/12/19, [A] would repeatedly drop items in front of the claimant and then would brush up against the claimant's hip when she bent to pick up the dropped items.
5. [A] also made inappropriate sexual comments to the claimant. After a job when the claimant was removing an under layer of her work clothes beneath her sweatshirt, [A] asked the claimant if she removed her bra in the same manner.
6. The behavior by [A] made the claimant very uncomfortable.
7. On 06/20/19, the claimant made a complaint of sexual harassment to the Office Manager/Co-Owner, [B]. The claimant was assured that she would no longer have contact with [A].
8. The claimant was assigned to work with a different seasoned worker, [C].
9. In July 2019, the claimant was directed to attend a training class at work that [A] was running as the instructor. The claimant was upset because she felt employer management was not taking the proper steps to protect her from [A]. To protest, the claimant sat with her back to [A] and ignored questions from [A]. The Office Manager/Co-Owner, who was at the training, told the claimant to respond to [A] and the claimant responded.
10. After the training, the claimant spoke with the Office Manager/Co-Owner and stated she intended no disrespect towards the Office Manager/Co-Owner but it had been less than two weeks since she informed management about the sexual harassment problem and she was upset that she was directed to attend a training run by her abuser.
11. Later in July 2019, the claimant filed a sexual harassment complaint with the Massachusetts Commission Against Discrimination (MCAD).
12. The claimant would continue to see [A] when she was in the office but she did everything in her power to avoid any contact with [A].
13. On 12/10/19, when the claimant arrived at work, parking was tight but the claimant found a space and was in the process of backing into the space when [A] arrived and intentionally parked his truck in a manner that the back of his

- truck was blocking access to the space the claimant was attempting to back into to park.
14. On 12/10/19, the claimant saw [A] looking at her and laughing. It was clear that [A] was intentionally harassing the claimant to cause her delay in punching in to work.
  15. On 12/10/19, after eventually parking her car, the claimant went into the office and angrily complained of [A]'s harassing treatment of her in the parking area.
  16. On 12/11/19, the claimant went into the office to apologize to management for her angry response to the parking lot harassment the previous day. The claimant also stated to [A], who was in the office when she was speaking to management, that he acted like jerk in blocking her the previous day.
  17. On 12/11/19, the claimant then left the office, got into the van with [C] and [C] started driving the van from the office.
  18. On 12/11/19, [A] ran from the office and yelled for [C] to stop the van. [C] stopped the van to see what [A] wanted and [C] rolled down the window on the passenger side where the claimant was sitting. [A] began yelling and swearing in the claimant's face. [A] was so angry that spit was coming from his mouth. [A] screamed at the claimant that he was going to "get her fired".
  19. When [C] recovered from the shock of [A]'s angry outburst, he rolled up the window and drove off.
  20. [C] stated to the claimant that she would probably be fired.
  21. The claimant felt she had done nothing wrong given [A]'s harassing behavior towards her but she was concerned given [A]'s threats to get her fired and his long relationship with the employer owners.
  22. Later on 12/11/19, when the claimant returned to the office, she was directed to meet with the Office Manager/Co-Owner, who gave the claimant her final check and told her that she was being discharged.
  23. The claimant was never given any reason for her discharge.
  24. The claimant never received any prior disciplinary warnings before her sudden discharge on 12/11/19.
  25. The claimant believes she was discharged on 12/11/19 in retaliation for her bringing sexual harassment complaints against the long-time employee, [A].

26. On 12/11/19, the claimant filed a claim for unemployment benefits effective 12/08/19. The claimant requested a hearing on the initial 01/23/20 determination that she was not eligible for unemployment benefits.

[Credibility Assessment:<sup>1</sup>]

The claimant's testimony regarding her mistreatment by [A] was consistent and credible and was supported by the credible evidence. The claimant's testimony regarding the abusive treatment towards her by [A] was unrefuted, as [A] did not attend the hearing.

### 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 11 erroneously states that the claimant filed a sexual harassment complaint with the Massachusetts Commission Against Discrimination (MCAD) in July, 2019. It was undisputed that the MCAD complaint was not filed until after the claimant separated in December, 2019. In adopting the remaining findings, we deem 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 eligible for benefits.

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 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 asserts that it discharged the claimant for her alleged angry, disruptive outburst in the parking lot on December 10, 2019, in violation of its workplace policy. *See* Exhibit 4D. Because the employer did not present evidence that it terminates all employees who engage in this

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<sup>1</sup> The credibility assessment appears in the review examiner's decision under the Conclusions & Reasoning Section.

type of behavior, it did not meet its burden to prove a knowing violation of a reasonable and *uniformly* enforced policy under G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may establish that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. 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 "[T]ake 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).

During the hearing, the employer's office manager testified that she witnessed the claimant screaming at [A] through the window of her van on December 11, 2019. Finding of Fact # 18 states that it was [A] who was yelling and swearing at the claimant. In rendering this finding, the review examiner accepted the claimant's description of the incident based upon her consistent and, in his view, credible testimony. "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 such assessments 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 his assessment was reasonable in relation to the evidence presented.

The review examiner did find that the claimant was angry when she went into the office the day before to complain about [A]'s behavior in preventing her from pulling into a parking space. *See* Finding of Fact # 15. However, even if we assume that the claimant displayed angry outbursts on both days, it does not change our decision. The issue on appeal is not whether the employer was justified in ending the claimant's employment, but whether her conduct disqualifies her from receiving unemployment benefits. In our view, it does not.

In its appeal, the employer correctly points out that Finding of Fact # 11 inaccurately states that the claimant filed a complaint with MCAD in June, 2019. However, the employer argues that this error undermines the whole hearing decision, because the review examiner believed she was fired in retaliation. We disagree. The incorrect MCAD date is a harmless error, as it does not matter to our analysis when the claimant filed her MCAD complaint. Finding of Fact # 7 accurately states that, in June, 2019, the claimant had complained to the employer that [A] was sexually harassing her.

Moreover, for unemployment benefits, it is not necessary for the claimant to show that the discharge was retaliation for complaining about this coworker's sexual harassment. Our focus is the misconduct for which she was fired. We consider whether it was deliberate and done in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The record shows that, two weeks after the claimant complained about her coworker's sexual harassment, she was forced to interact with him in a classroom training. *See* Findings of Fact ## 9 and 10. The review examiner found that this coworker harassed her again on December 10,

2019, by intentionally blocking her access to a parking space, then laughing at her. *See* Findings of Fact ## 13 and 14. Despite her June complaint to the employer, it was evident that the claimant would continue to be subject to this coworker's on-going harassment, and that the situation was beyond her control. We further believe that, under the circumstances, her angry reactions to it were reasonable, even if disruptive to the workplace. Thus, we agree with the review examiner that the claimant was not acting in wilful disregard of the employer's interest, but in response to the mitigating circumstances of the coworker's on-going mistreatment. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control).

We, therefore, conclude as a matter of law that the employer failed to sustain its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy or engaged in 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 affirmed. The claimant is entitled to receive benefits for the week beginning December 14, 2019, and for subsequent weeks if otherwise eligible.



Paul T.

**BOSTON, MASSACHUSETTS**

Fitzgerald, Esq.

**DATE OF DECISION - May 20, 2020**

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 ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020<sup>2</sup>. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day following the thirtieth day.

To locate the nearest Massachusetts District Court, see:  
[www.mass.gov/courts/court-info/courthouses](http://www.mass.gov/courts/court-info/courthouses)

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<sup>2</sup> *See* Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.

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