

**Claimant hotel house person, who refused to perform a task as instructed by his supervisor, then engaged in a verbal altercation with and directed a homophobic slur at that supervisor, was discharged for deliberate misconduct in wilful disregard of the employer's interest.**

**Board of Review  
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**Issue ID: 0033 2553 57**

### 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. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on December 26, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 4, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 12, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to allow the claimant an opportunity to provide testimony and evidence. 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 was discharged for deliberate misconduct in wilful disregard of the employer's interest, after an altercation where he refused to perform an assigned task, then engaged in a verbal altercation with a supervisor and called him a homophobic slur, 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 employer is a hotel. The claimant worked as a house person for the employer. The claimant worked for the employer from 5/01/2018 to 12/22/2019.
2. The claimant's house person role required him to clean the hotel's common areas.
3. A certain supervisor (Supervisor 1) supervised the claimant.
4. The employer created a handbook. The handbook features a policy titled "Policy Prohibiting Discrimination and Harassment in the Workplace." The policy reads, in part, "Conduct prohibited by this policy includes any verbal or physical conduct that could reasonably be perceived as denigrating or showing hostility toward an individual because of the individual's race, color, religion, gender, sexual orientation, national origin, age, disability, or other status protected by law. Harassing conduct prohibited by this policy includes...Epithets, slurs, negative stereotyping, or intimidating acts that are based on an individual's protected status." The employer will discharge workers who violate this policy.
5. The employer's handbook features a policy titled "Code of Behavior." This policy forbids "Refusing to obey the direction of a supervisor." The policy forbids "Coercion, intimidation, or threats against customers, supervisors, or fellow associates." The policy forbids "Disrespectful or discourteous conduct toward customers or supervisors." The policy forbids "Fighting on Company premises." The policy indicates that discipline for these infractions "can range, at the sole discretion of the Company, from a verbal warning to immediate discharge, depending on the nature, severity, and frequency of the offense."
6. The employer's handbook features a policy titled "Prohibited Conduct." The policy reads, in part, "Threatening conduct or any other acts of aggression or violence in the workplace will not be tolerated. Any employee determined to have committed such acts will be subject to disciplinary action, up to and including termination of employment, and/or legal action as appropriate."
7. The employer created a document titled "Receipt and Acknowledgement of Employee Handbook." The document reads, in part, "I have received and read a copy of the Employee Handbook." The claimant signed the document.
8. The claimant worked on 12/22/2019. Supervisor 1 directed the claimant to clean an elevator. The claimant refused. Supervisor 1 insisted that the claimant must comply because he was the supervisor. The claimant again refused. Supervisor 1 called the claimant a "Cabron." The claimant replied, "Okay, you're gay." Supervisor 1 told the claimant that he would hit him. The claimant replied, "Try." The two men did not touch each other.

9. The employer suspended the claimant on 12/22/2019 to investigate the altercation that happened that day between him and Supervisor 1. The employer's regional operations director and the employer's general manager conducted the investigation. The regional operations director and the general manager wanted to determine what happened between the claimant and Supervisor 1. The employer sought witnesses to the exchange between the claimant and Supervisor 1. Two housekeepers reported that they witnessed the exchange. The general manager asked the two workers to write statements. Both workers wrote statements. The general manager interviewed the claimant. The claimant wrote a statement. The regional operations director and the general manager interviewed Supervisor 1. Supervisor 1 wrote a statement.
10. The employer discharged the claimant on 12/26/2019. The employer discharged the claimant because he refused to clean the elevator on 12/22/2019, he had a verbal altercation with Supervisor 1, and he uttered slurs about Supervisor 1's sexual orientation. The employer determined that these behaviors violated its Policy Prohibiting Discrimination and Harassment in the Workplace, its Code of Behavior policy, and its Prohibited Conduct policy.
11. The employer discharged Supervisor 1 due to how he behaved toward the claimant on 12/22/2019.

#### Credibility Assessment:

In the hearing, the claimant testified that he did not intend to insult Supervisor 1 when he called Supervisor 1 "gay." The claimant's testimony in its entirety is rejected as not credible and it is concluded that the claimant intended to insult Supervisor 1. The claimant's statement that Supervisor I was "gay" was not a mere observation or mundane declaration because the claimant said it in response to an insult from Supervisor 1. From a common sense perspective, the claimant did not have any benign reason to reference Supervisor 1's sexual orientation in response to Supervisor 1's hostility.

#### 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 original 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 employer's testimony at the initial hearing, the review examiner concluded the employer had met its burden. After remanding the case in order to take the claimant's testimony, we also conclude that the employer has met its burden.

The consolidated findings show that the employer maintains policies that prohibit harassing conduct and the use of epithets toward an individual because of their sexual orientation and other protected statuses; insubordination; and threats or other acts of violence in the workplace. *See Consolidated Findings ## 4–6 and Remand Exhibit 10.* These policies are inherently reasonable, and claimant signed an acknowledgement of them. *See Consolidated Finding # 7 and Remand Exhibit 5.* But because the employer uses discretion when determining what discipline to impose based on the nature and severity of the incident, there is no evidence that the employer uniformly enforces these policies. Thus, 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 policies, however, are expectations that employees will follow the directives of supervisors without being insubordinate and will refrain from using offensive epithets or engaging in threatening, aggressive conduct in the workplace. As with the policies, the employer's expectations are reasonable. The claimant was aware of the expectations, as he was aware of the underlying policies.

After remand, the review examiner found that, on December 22, 2020, the claimant's supervisor instructed the claimant to clean an elevator. When the claimant refused, the supervisor insisted that the claimant clean the elevator because he was the supervisor. The claimant refused again, and the supervisor called the claimant "cabron." The claimant replied using a homophobic slur; the supervisor threatened to hit the claimant; and the claimant replied, "Try." *See Consolidated Finding # 8 and Remand Exhibits 8–9.*

The employer suspended the claimant, conducted an investigation of the incident (including interviews with the claimant, the supervisor, and other employees who witnessed the incident), and discharged both the claimant and the supervisor on December 26, 2019. *See Consolidated Findings ## 9–11.* The claimant was discharged for insubordination, as well as for his role in the verbal altercation with the supervisor, and for using a slur about the supervisor's sexual orientation. *See Consolidated Finding #10 and Remand Exhibit 6.*

After remand, the review examiner provided a credibility assessment rejecting the claimant's claim that he did not intend to insult his supervisor by calling him "gay." 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 expectations are reasonable. There is no indication that the claimant's refusal to perform assigned tasks and directing a homophobic slur at his supervisor were accidental. Thus, we conclude that his conduct was deliberate.

We next consider whether there were any 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). An argument could be made that the claimant was not thinking about the employer's policy when he called the supervisor "gay" in reaction to being called a "cabron". However, nothing in the record suggests any reason for the claimant's failure to clean the elevator, as directed. In this regard, the claimant has failed to demonstrate mitigating factors for his insubordination.

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 affirmed. The claimant is denied benefits for the week ending December 28, 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 29, 2021**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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](http://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.

JPCA/rh