

Review examiner credited the claimant's direct testimony over the employer's hearsay evidence, finding that he did not make racially derogatory remarks to coworkers. Thus, the findings do not establish that the claimant engaged in misconduct. His discharge is not disqualifying under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0033 8638 35

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 reverse.

The claimant was discharged from his position with the employer on February 19, 2020. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 2, 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 March 26, 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 afford the claimant the opportunity to offer testimony. Both parties attended the first day of the remand hearing. Only the claimant attended the second day of the hearing. Thereafter, the review examiner issued his 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 engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where following remand, the review examiner reasonably credited the claimant's testimony and found that the claimant did not use demeaning language or racial slurs while at the employer's workplace.

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 an electrical contractor. The claimant worked as a full-time electrician for the employer. The claimant worked for the employer from late November 2019 to 2/19/20.
2. The employer expected the claimant to not demonstrate racism in the workplace.
3. The claimant worked on 2/19/20. A subcontractor had its workers on the same worksite. One of these workers spoke to the claimant. The worker spoke in Spanish. The claimant asked this worker to “speak English.” The claimant asked this because he did not understand the worker.
4. The employer’s president never heard the claimant use the “N” word racial slur while at work.
5. The claimant never used the “N” word racial slur while at work.
6. The employer discharged the claimant because it determined that the claimant demonstrated racism on the worksite on 2/19/20 and because it determined that the claimant used the “N” word racial slur at work.

Credibility Assessment:

In the hearing, the employer’s president testified that the claimant taunted a subcontractor’s workers and told them to speak English. The president testified that this happened on a jobsite on 2/19/20 and that it amounted to racism. The president testified that he later asked other workers about the claimant and that they told him that the claimant used the “N” word racial slur at work. In the hearing, the claimant testified about what happened on 2/19/20. The claimant testified that another worker spoke Spanish to him and that he did not understand. The claimant testified that he asked this worker to speak English because he did not understand him. The claimant also testified that he never used the “N” word racial slur at work. Given the totality of the testimony and evidence presented, the claimant’s testimony in its entirety is accepted as more credible than the president’s testimony because the president was not a direct party to the alleged racist behavior on 2/19/20; the owner did not hear the claimant say the “N” word racial slur at work; and the employer did not present any witnesses to the claimant’s alleged use of the “N” word racial slur at work. In the hearing, the president testified that he was in a hallway on 2/19/20 when the claimant allegedly demonstrated racist behavior toward the other workers. The owner was thus was not a direct witness to or a participant in the claimant’s interaction with the other workers.

Of note, the president testified in the hearing that he discharged the claimant for other reasons aside from the alleged racist behavior. This contention is rejected. The claimant’s alleged racism was the final operative event that caused the employer to discharge the claimant. The president did not discharge the claimant

before the 2/19/20 incident or before he determined that the claimant used the “N” word racial slur at work.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. However, as discussed more fully below, we believe that the review examiner’s consolidated findings of fact now support the conclusion that the claimant is qualified for benefits.

Since the claimant was discharged from his employment, we analyze his eligibility for benefits 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] . . . (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, . . .

In his initial decision, the review examiner decided the claimant’s eligibility under the “deliberate and wilful misconduct” prong of G.L. c. 151A, § 25(e)(2), as opposed to the “knowing policy violation” prong. Since the employer did not present evidence that the claimant’s alleged acts violated any written policy, we believe the review examiner properly analyzed this case under the “deliberate and wilful misconduct” prong.

We note at the outset that “the 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). Thus, it is the employer’s burden to establish that the claimant actually engaged in the alleged conduct, that such conduct violated a reasonable expectation or uniformly enforced rule or policy, and that the conduct was done deliberately in wilful disregard of the employing unit’s interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In determining whether the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest, our first inquiry is whether the claimant actually engaged in the misconduct alleged by the employer. In this case, the employer’s evidence referred to two incidents as the basis for the claimant’s termination: (1) his interaction with a coworker on a job site where he allegedly used demeaning language by ordering the coworker “to speak English” and (2) his interaction with another coworker in a separate incident where the “N” word was allegedly used. The review examiner’s consolidated findings address both of these allegations. Relative to the

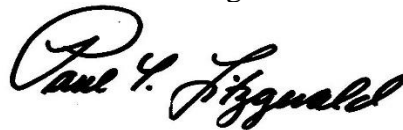
first alleged misconduct, the review examiner found that the claimant did not understand the conversation of the co-worker in question and, therefore, did not use the term “speak English” in a derogatory, or demeaning manner. *See* Finding of Fact # 3. Regarding the other alleged misconduct, the review examiner found that the claimant “never used the “N” word” in the workplace. *See* Finding of Fact # 5.

In rendering his consolidated findings, the review examiner provided a lengthy credibility assessment where he explained in detail, with references to the underlying record, why he viewed the employer’s testimony to have been less believable than the claimant’s. 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 this case, the review examiner’s assessment is reasonably related to the underlying evidence, and we find no reason to disturb it. In so concluding, we note that the record also indicates the employer relied on hearsay testimony, did not cross examine the claimant during the first remand hearing, and did not participate in the second remand hearing.

Since the consolidated findings provide that the claimant did not engage in the alleged wrongdoing of unprofessional conduct, the employer has not met its burden to establish misconduct.

We, therefore, conclude as a matter of law that that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer’s interests, or for a knowing violation of a uniformly enforced rule or policy, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning February 16, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

DATE OF DECISION - June 5, 2020

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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 July 1, 2020¹. 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

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.

MJA/rh

¹ See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (coronavirus) Pandemic, dated 5-26-20.