Public social media posts of racist, sexist, homophobic and anti-Semitic content, where the claimant identified himself as working for the public employer, were not, in this instance, protected by the First Amendment. Held the claimant's discharge was for deliberate misconduct in wilful disregard of the employer's interest. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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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, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 24, 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 determination and awarded benefits in a decision rendered on November 27, 2021. 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 willful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, 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 failed to show that the claimant's public social media posts rose to the level of deliberate misconduct in willful disregard of the employer's interest because they were not done in the workplace or directed towards any specific persons, and that the employer further failed to show how the posts interfered with its interest of ensuring a workplace free of harassment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On September 15, 2018, the claimant began working as an operations, maintenance, and construction laborer for the employer, a water and sewer services company.

2. The employer has a Harassment Prevention Policy which defines sexual harassment separate from harassment other than sexual harassment.

3. The Statement of Policy states "The [employer] believes that everyone should be treated with respect and dignity [sic] supports the right to work in an environment that is free from all forms of harassment, including sexual harassment, and retaliation. It is the [employer] policy that no employer … may harass another on any basis. This policy also applies to vendors, interns, contractors, or others who visit the [employer] property.

4. The Harassment Prevention Policy includes the following in its definition of Sexual harassment:

a. Sexual harassment may also involve employee behavior directed at non-employees or non-employee behavior directed at employees.

5. The Harassment Prevention Policy defines harassment other than sexual harassment, in its entirety, as "Verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his or her protected category, or that of his or her relatives, friends, or associates, and that (1) has the purpose or effect or creating an intimidating, hostile, or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities is also prohibited."

6. The Harassment Prevention Policy has an Employee Responsibilities section which states "Each [employer] employee is personally responsible for ensuring that he or she does not harass or retaliate against any other employee or non-employee in the workplace pursuant to this policy."

7. The Harassment Prevention Policy has a Disciplinary Action section which states, "If it is determined that inappropriate conduct has been committed by an [employer] employee, we will take such action as is appropriate under the circumstances. Such action may range from counseling to termination of employment and may include such other forms of disciplinary actions as we deem appropriate under the circumstances."

8. The employer's Code of Conduct states employees "[M]ay not harass, intimidate or discriminate against any co-worker or any member of the public in doing your job."

9. The employer's Code of Conduct states employees are not permitted to, "Threaten or harass others-this includes racial, ethnic, or sexual harassment of any kind – in the course of your employment."

10. The employer's Code of Conduct states employees are not permitted to, "Post, pin-up, or attach any photographs, drawings, or other materials on or in [employer] property which may be offensive to other members of the workforce."

11. The employer's Code of Conduct states, "[Employer] will not tolerate discrimination against other employees or members of the general public in the discharge of official duties… Engaging in such discrimination may be cause for disciplinary action, up to and including termination …"

12. The employer's Code of Conduct states, "No employee should be subject to any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature which interferes with his or her work performance or creates an intimidating, hostile, or offensive work environment."

13. The employer Information Technology User Responsibilities Policy has a section regarding social media which states, "Keep in mind that personal use of social media has the potential to result in disruption in the workplace. Conduct that violates [employer] policies may result in disciplinary action up to and including termination from employment."

14. The claimant received the Harassment Prevention Policy, Code of Conduct, and Information Technology User Responsibilities upon hire.

15. The claimant states on his Facebook page that he was an employee of the employer.

16. On June 15, 2020, the employer received an email from a member of the public regarding posts on social media the citizen felt was concerning and offensive.

17. The employer placed the claimant on an investigative leave beginning June 16, 2020 after receiving the complaint.

18. The employer investigated the claimant's social media profile.

19. The claimant has an extensive history of sharing "memes" on his Facebook page which are sexual, racial, homophobic, or transphobic in nature.

20. The claimant's Facebook profile is public.

21. The employer typically holds pre-disciplinary hearings prior to enforcing discipline for an employee violation of its policies.

22. On June 23, 2020, the employer held what it described as a "pre-termination hearing" for the claimant related to his social media posts.

23. On June 25, 2020, the employer discharged the claimant because of his posts on his Facebook page.

24. The employer expects the claimant would not have a public Facebook page posting racist or sexist content.

25. The reason of [sic] the employer's expectation is to maintain a work environment free from harassment and discrimination and [sic] maintain public reputation.

26. Other employees were previously disciplined for using a racially motivated name in the workplace. Those employees were not discharged.

27. On July 24, 2020, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification effective June 21, 2020, stating he was not eligible for benefits.

28. The claimant appealed the determination.

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 of fact 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 findings of fact and deems them to be supported by substantial and credible evidence.

The review examiner awarded benefits by 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 willful 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 the foregoing provision, 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 willful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The claimant's employer is a public entity. *See* Finding of Fact # 1.[1] A member of the public complained to the employer about offensive postings on the claimant's public Facebook page, where the claimant identifies himself as working for the employer. Following this complaint and upon discovering that the claimant's Facebook page extensively shares sexual, racial, homophobic, or transphobic content, the employer fired him for these posts. *See* Findings of Fact ## 16, 19, 20, and 23.

Following the hearing, the review examiner concluded the employer had not met its burden. As to the employer's failure to establish that the claimant's violated a reasonable and uniformly enforced rule or policy, we agree with the review examiner, as the findings show that discipline for the policy violations are discretionary and not uniformly enforced. *See* Finding of Fact # 7. As to the whether the claimant engaged in deliberate misconduct in willful disregard of the employer's interest, we conclude that the employer has met its burden.

The review examiner awarded benefits to the claimant based upon his conclusion that the claimant's social media postings were isolated from his employment, as they were not done at the workplace and not directed toward any one person or persons. In essence, the decision held that the claimant's First Amendment right to free speech, no matter how egregious that speech may be, shielded him from employment misconduct because the material was posted while he was off duty.

In 1968, in the seminal case of Pickering v. Board of Education, the United States Supreme Court established the principle that public employees do not relinquish their right to speak on matters of public importance or public concern simply because they have accepted government employment. Connick v. Myers, 461 U.S. 138, 140 (1983), *citing* Pickering v. Board of Education, 391 U.S. 563 (1968). In the Connick v. Myers decision, which proved to be another important public employee free speech case, the Supreme Court stated that, if employee expression cannot fairly be regarded as a matter of public concern, the government must be given wide latitude in managing its offices. Connick, 461 U.S. at 146. Together, these two landmark cases have formed the Pickering/Connick test, used by courts to determine whether a public employer violated an employee's free-expression rights.

In applying this test, we first determine, based on "the content, form and context of [the] given statement, as revealed by the whole record," whether the public employee was speaking "as a citizen upon matters of public concern." Connick, *supra* at 147–148. To be protected, the speech must first be on a matter of public concern. Waters v. Churchill, 511 U.S. 661, 668 (1994). Where the speech is about a matter of public concern, then a balance must be attained between the interests of the claimant, as a citizen, in commenting upon matters of public concern and the interest of the public employer in promoting the efficiency of the public services it performs through its

[1] The employer is a public authority in the [State A], which provides water and sewer services to certain municipalities and industry users.

employees. Pickering, *supra* at 568. In addition, "the employee's interest in expressing [himself] on [the] matter must not be outweighed by any injury the speech could cause" to the employer's interest. Waters, *supra* at 668 (citations omitted).

The Massachusetts Supreme Judicial Court addressed this issue in 2000, when a public employee was terminated from employment for making a racist statement at a public political event unrelated to her workplace. The Court held that the statement was an off-the-cuff remark, not concerned with any "political, social, or other concern to the community." Pereira v. Commissioner of Social Services, 432 Mass. 251, 259 (2000), *quoting* Connick, 461 U.S. at 146. Therefore, the statement was not a matter of public concern. Pereira, 432 Mass. at 259.

Nonetheless, because the public employee spoke away from the workplace and did not comment on internal office affairs, the Court continued with the Pickering/Connick balancing test. Pereira, 432 Mass. at 261. In Pereira, the claimant's single racist remark generated calls from people expressing outrage that a department employee would tell a racist "joke" and at least one department employee was refused entrance to a client's home because of the reported comment. Id. at 256. The court concluded that it was clear that the single remark, a "joke," was noticed beyond the political event, its racist impact felt, and that it carried the "clear potential" for undermining the employer's relations with its clients and the larger community. Id. at 263. It held the employer had met its burden and that it was justified in terminating Periera's employment. Id. at 264.

In the case before us, the record shows that the claimant's actions consisted of much more than a single off-the-cuff remark. A careful review of the record provides us with numerous exhibits of the claimant's postings replete with comments, memes, and photos made and posted by the claimant on public social media platforms that contain racist, sexist, homophobic and anti-Semitic content. *See* Exhibits 11 and 13.[2] Following its pre-termination hearing, the employer wrote:

> I find that you did post racist images and remarks on the Facebook page of the [Town A] Social Justice and Equity Alliance, as well as racist and sexist images and remarks on your open Facebook page while identifying yourself as an employee of [Employer A]. . . . These images and remarks portrayed women and people of color in a revolting and graphic manner. Your posts were vile and abhorrent and would deeply disturb an average person.

Exhibit 8.[3] Having reviewed the sample postings in the record, we agree. In our view, none of the postings in question involved any "political, social, or other concern to the community." Connick, 461 U.S. at 146. They do not fall under the category of speech on a matter of public concern. *See* the examples listed in Pereira, 432 Mass. at 257–259 (2000).

[2] Exhibits 11 and 13 are screenshots of the claimant's social media postings. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

[3] Exhibit 8, the employer's June 25, 2020, termination letter to the claimant, is also part of the unchallenged evidence in the record.

As in Periera, because the postings were made outside of the workplace, we consider the balance between the claimant's interest in expressing himself against the potential injury the speech could cause to the employer's ability to perform its public services. The employer felt that, because the claimant identified himself as working for the employer, the posted images and remarks endangered the employer's public mission and undermined its efforts to maintain a harassment free and diverse workforce. *See* Exhibit 8. To be sure, at least one member of the public emailed the employer complaining that the social media posts were concerning and offensive. *See* Finding of Fact # 16.

In light of the employer's mission to engage with the public to provide water and sewer services, and the demonstrated connection being made between these postings and the employer, we believe that the employer has met its burden. It has shown that the claimant's conduct carried the "clear potential" for undermining the employer's relations with its clients and the larger community. It is also not a stretch to see how the postings could undermine the efficiency of the employer's internal operations, specifically its ability to maintain and promote a diverse workforce, free of harassment and discrimination. Its discharge did not abridge the claimant's First Amendment rights.

To determine whether the claimant is eligible for unemployment benefits, the case turns on whether this conduct was done deliberately and in willful 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 "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).

The findings show that the claimant was provided with the employer's policies on Harassment Prevention, Code of Conduct, and Information Technology User Responsibilities upon hire. Finding of Fact # 14. These policies explicitly prohibit "[verbal] or physical conduct that denigrates or shows hostility or aversion toward an individual because of his or her protected category," (Finding of Fact # 5); "racial ethnic, or sexual harassment of any kind" (Finding of Fact # 9); posting materials which may be offensive (Finding of Fact # 10); and discrimination (Finding of Fact # 11). The employer's Informational Technology policy further provides that conduct on social media which violates these policies may be cause for termination (Finding of Fact # 13). Specifically, the Information Technology policy states:

> When using personal social media on off duty hours, be aware others may associate you with [EMPLOYER] and therefore you should ensure the content of your social media posts is consistent with how you want to present yourself with colleagues and [EMPLOYER] customers.
>
> Keep in mind that personal use of social media has the potential to result in disruption in the workplace. Conduct that violates [EMPLOYER] policies may result in disciplinary action up to and including termination from employment.

See Finding of Fact # 13.[4]

The expectation in this policy, as well as the Harassment Prevention and Code of Conduct policies are inherently reasonable as they are expressly designed to avoid offending employees and members of the public. The claimant was aware of these expectations through his regular job duties and through his receipt of the policies upon hire. *See* Finding of Fact # 14. Since there is no suggestion that the claimant somehow posted this material inadvertently, we can infer that he did so deliberately.

We further find no mitigating circumstances for this behavior in the record. 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). The absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the claimant is not eligible for unemployment benefits because he was discharged for deliberate misconduct in willful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits as of the week beginning June 21, 2020, 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 - February 17, 2022

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

[4]Exhibit 12 is the Information Technology Policy. This portion of the policy appears on page 48. Again, this exhibit is part of the undisputed evidence in the hearing record.

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.

CAS/rh