

Although the claimant denied using profanity and a racial slur in the workplace, the review examiner found her not to be credible. Held she was discharged for deliberate misconduct in wilful disregard of the employer's interest and is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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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 her position with the employer on June 16, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 24, 2021. 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 December 9, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the circumstances surrounding the claimant's separation. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 employer failed to show that the claimant was discharged using profanity, racial slurs, or other disrespectful language when speaking to a server at a coffee shop on the employer's property, 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. On June 19, 1981, the claimant began working full time for the employer, a hospital, as a registered nurse and case manager. The claimant was supervised by the Director of the Case Management Department. She earned approximately \$140,000 per year.
2. The claimant is part of the Massachusetts Nurses' Association, a nurses' union.
3. The employer maintains a policy concerning employee conduct. The policy prohibits disruptive or disrespectful conduct, dishonesty, and unlawful harassment, including harassment based on race.
4. The purpose of the policy is to ensure that employees can feel safe at work and perform at the highest level in order to provide good patient care without worrying about discriminatory or aggressive behavior.
5. Employees who violate the code of conduct are subject to discipline up to and including termination.
6. The claimant was aware of the policy.
7. The claimant signed the policy.
8. The employer provides anti-harassment training, anti-bullying training, and anti-discrimination training both during orientation and continuously throughout employment. Training occurs more than once a year.
9. The claimant regularly completed the assigned trainings.
10. The employer maintains an expectation of workplace conduct that all employees treat everyone with respect and act in a professional manner. The purpose of the expectation is to encourage a professional workplace. If there is a conflict in the workplace, employees are expected to seek support from human resources.
11. The claimant was aware of the employer's expectation.
12. The claimant has had managerial experience.
13. In 2019, the claimant was placed on a performance improvement plan because the claimant had displayed unprofessional behavior, including becoming angry about assignments, throwing objects, and having a negative attitude.
14. In March of 2021, the claimant took part in a strike organized by her union. She struck for approximately 6 weeks.
15. In April of 2021, the claimant returned to work due to financial need.

16. On April 7, 2021, the claimant received a verbal warning concerning attendance and absenteeism and was given an action plan. The claimant was informed that failure to comply with the action plan and continued absenteeism would result in discipline, up to and including termination. The claimant was provided with a written record of the conference, including the reason for the conference, a description of the event, that the claimant had a performance improvement plan for the issue, an action plan for improvement, and the consequences of failure to improve. The claimant commented that her absences were due to worsening multiple sclerosis and signed the written documentation of the verbal warning.
17. The claimant had attendance concerns because she was on intermittent leave under the Family and Medical Leave Act, due to multiple sclerosis.
18. On April 9, 2021, the claimant received a verbal warning concerning her use of disparaging and inappropriate comments about coworkers, which violated the employer's standards of conduct behavior policy. She had told her manager the one of her coworkers would complain if she "had to get her fat ass off the chair." The claimant was informed that further [occurrences] of unprofessional behavior could result in discipline up to and including termination. The claimant was provided with a written record of the conference, including the reason for the conference, a description of the event, that the claimant had a performance improvement plan for the issue, an action plan for improvement, and the consequences of failure to improve. The claimant signed the written documentation of the verbal warning.
19. The claimant made the comment because she was upset about being assigned to a floor with over 30 patients by herself instead of the emergency room or intensive care unit. The claimant had requested the emergency room or intensive care unit because she was having trouble walking due to her multiple sclerosis. She made the comment to the manager out of frustration in what she believed to be a confidential conversation.
20. On April 27, 2021, the claimant and the employer had a first conference concerning a violation of the employer's Appearance and Hygiene policy by wearing a sweatshirt that did not cover parts of her front and back. The claimant's sweatshirt had ridden up, exposing her midsection. During the conference, the claimant was informed that further [occurrences] of lack of professionalism could result in discipline, up to and including termination. The claimant was provided with a written record of the conference, including the reason for the conference, a description of the event, an action plan for improvement, and the consequences of failure to improve. The claimant signed the record of conference.
21. The claimant had worn this sweatshirt once a week for two years before the warning was issued. After the warning was issued, the claimant apologized, explained that she did not know it was against the dress code, put on a gown for the rest of the day, and never returned to work in that article of clothing again.

22. On May 23, 2021, the claimant had an interaction (the May 23, 2021 incident) with an employee of a coffee shop located in the hospital atrium.
23. There were two workers at the coffee shop that day, one of whom was African American.
24. The claimant is white.
25. On the morning of May 23, 2021, the claimant ordered a cup of tea from the coffee shop. After waiting in a longer than average line, the claimant placed her order, but was given the wrong beverage. The claimant learned that she had been given the wrong beverage after she had returned to her workstation.
26. On May 23, 2021, at approximately 7:30 a.m., the claimant returned to the coffee shop with her incorrect beverage.
27. At the time the claimant returned to the coffee shop, it was fairly busy. The two workers were filling in-person orders and on-line orders.
28. The claimant walked up to the counter, skipping the line. The claimant put her drink down on the counter and told the African American worker that she had not completed her beverage order correctly and demanded that the worker remake her order immediately.
29. The claimant was visibly frustrated, tapping her fingers on the counter and sighing deeply.
30. The worker was in the middle of making another order and told the claimant that she would take care of the drink after a moment.
31. The claimant responded with an elevated tone of voice, telling the worker to hurry up, asking what was wrong with her, and asking to speak with the manager.
32. The server was apologetic and told the claimant that she would get [sic] begin remaking her order as soon as possible.
33. The claimant continued to speak to the server for 3-5 minutes, asking if she was done yet, and instructing her on how to make the order correctly.
34. The other customers were uncomfortable. Some left the line, and one tried to intervene.
35. When the worker completed the order she had been preparing, she remade the claimant's order and served her the new beverage.

36. When the claimant received her remade order, she told the worker “Next time, speak English you fucking nigger” and walked away.
37. The worker was visibly shaken by the claimant’s remark.
38. At least one witness reported the incident to a security guard, who had also seen the incident occur and heard the claimant’s statement.
39. That witness reported the May 23, 2021 incident to the employer.
40. The employer asked that witness to speak to human resources and to submit a statement describing the incident, which the witness did.
41. The security guard reported the incident to his supervisor and an email was sent to the employer containing the security guard’s statement.
42. On May 26, 2021, the employer began an investigation into the May 23, 2021 incident.
43. The last day the claimant performed services for the employer was May 26, 2021.
44. The investigation included interviewing the claimant and the witness to the event, reviewing video of the incident, reviewing reports made concerning the incident, including the written statement made by the witness and a report made by the security guard. The video had no sound.
45. On May 26, 2021, the claimant was interviewed by a human resources representative.
46. Before the interview, the employer asked the claimant if she wanted union representation. The claimant told the employer that there was no union representative there at the time. The employer asked if the claimant was declining union representation. Although the claimant did not explicitly state that she was declining the offer of union representation, she was comfortable answering the employer’s questions, and did not inform the employer that she wanted union representation at any time during the interview.
47. During the meeting, the claimant was notified that witnesses to the May 23, 2021 incident reported that she used profanity and a racial slur when speaking to one of the coffee shop workers.
48. The claimant did not admit to using profanity or racial slurs. She admitted that she was upset about her order being made incorrectly, that she had to wait 25 minutes for her order, that she told the server “Don’t you speak English” and stated that the server was rude to her.

49. The claimant denied ever receiving discipline in the past.
50. The employer did not find the claimant's statements credible, as the claimant denied having ever been issued any discipline in the past despite written documentation of verbal warnings and a conference all signed by the claimant and because her recounting of the incident did not match with the reports of witnesses and the video evidence.
51. Beginning May 26, 2021, the claimant was placed on administrative leave pending the results of the investigation.
52. On June 16, 2021, the claimant was terminated.
53. The claimant was informed of her termination through a termination notice mailed to the claimant and signed by the chief human resources officer.
54. The claimant was terminated because her use of profanity and a racial slur on May 23, 2021 and her dishonesty during the May 26, 2021 interview violated the employer's employee conduct policy.
55. In preparation for the instant hearing, the claimant requested her personnel file and the employer provided it.
56. On August 24, 2021, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Section 25(e)(2) of the Law commencing the week beginning June 13, 2021 and until she has had at least 8 weeks of work and has earned an amount equivalent to or in excess of 8 times the claimant's weekly benefit amount. The claimant appealed the Notice of Disqualification.

Credibility Assessment:

Only the claimant attended the initial hearing held on December 1, 2021. The employer attended the first session of the remand hearing held on February 2, 2022. Both the employer and the claimant attended the second session of the remand hearing held on March 28, 2022. Both the employer and the claimant were represented by attorneys. There were multiple discrepancies between the claimant's testimony and the employer's testimony. The primary difference concerned the claimant's behavior and statements made when the claimant visited the coffee shop in the hospital atrium on the morning of May 23, 2021, which resulted in the claimant's termination for violation of the employer's policy. The claimant maintained that her behavior interacting with the worker was, for the most part, professional and respectful, that she did say "don't you speak English" to the worker, and that she did so out of frustration from not being served in an appropriate manner and time. The employer, however testified that the claimant was belligerent and disrespectful during her interaction with the worker, that she raised her voice, repeatedly demanded that the worker serve her immediately, belittled the worker

while she was remaking the beverage, and ultimately directed profanity and a racial slur towards the worker, who was African American. The employer's testimony is considered to be more credible where the employer was able to provide a witness and two reports of the claimant's behavior and evidence of multiple warnings issued to the claimant for unprofessional behavior in violation of the employer's policies.

During both hearings, the claimant stated that she did not receive any warnings or discipline from the employer, but that she did have a few conversations with her supervisor regarding an interaction with a colleague and an article of clothing. The employer, however, was able to provide documentary evidence of multiple warnings issued to the claimant for unprofessional behavior, including warnings that further violations of the employer's policies would result in discipline up to and including termination. The claimant signed all the warnings and provided comments on one of them. However, during the investigation into the May 23, 2021 incident, the claimant maintained that she had not received discipline from the employer, despite the employer having the documentary evidence showing the various warnings she had received in the past. During the hearing, the claimant testified that she was not aware that those documented events were warnings, however, this statement is not considered to be reasonable where the claimant was placed on a performance improvement plan for some of the same behavior in 2019, where the claimant received written documentation of the warnings that stated that the conversations were either verbal warnings or a first conference, and where the claimant signed these documents and made comments on one of them. The claimant's denial of receiving warnings undermines the claimant's credibility.

Although the claimant testified that she would never have used a racial slur towards anybody, the weight of the evidence indicates that she did use profanity and a racial slur towards an African American worker on May 23, 2021, and that this was the reason that she was terminated from her position.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that employer did not meet its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Because the claimant was discharged 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

Under this provision of the statute, “[T]he 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).

As an initial matter, there was insufficient evidence in the record to determine whether the employer imposed the same discipline for similar violations of its policy. *See* Consolidated Finding # 5. For this reason, the employer has not established that the claimant was discharged for violating a *uniformly* enforced policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

At the outset, the employer must show that the claimant engaged in the behavior which ultimately led to the discharge. In this case, the employer explained that it discharged the claimant after it determined that she had directed profanity and a racial slur at a server in a coffee shop on the employer's premises. Consolidated Findings ## 25, 36, and 54. While the claimant testified that she never made such remarks, the review examiner rejected her testimony as not credible on the grounds that the employer presented documentary evidence and witness statements corroborating its contentions about the claimant's behavior. *See* Consolidated Findings ## 38–41, and 44. Such an assessment is within the scope of the fact finder's role, and, 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). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Our analysis does not end here, however. In this case, the dispositive issue is whether, in engaging in the misconduct in question, the claimant acted deliberately and in wilful disregard of the employer's interest. “Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest.” Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). This analysis turns on an examination of the claimant's state of mind at the time of the misconduct. 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 claimant was aware the employer expected its employees to treat everyone with respect and comport themselves in a professional manner. Consolidated Findings ## 10 and 11. Such an expectation is facially reasonable as it serves to promote a safe and healthy workplace environment. The claimant maintained that she did not use either profanity or a racial slur,

conceding only that she asked the server if they “spoke English” because she was irritated and felt the server had been rude. Consolidated Finding # 48. While the claimant’s frustration was no excuse for the comments she made, the defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. See Lagosh v. Comm’r of Division of Unemployment Assistance, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant’s defense of full compliance, the review examiner properly found that mitigating factors could not be found). Accordingly, the record does not include any mitigating circumstances for her misconduct.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged for deliberate misconduct in wilful 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 for the week of June 13, 2021, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 27, 2022

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.

LSW/rh