Where use of an obscene hand gesture was a common occurrence and apparently tolerated in the workplace, the claimant's using it in gest with a colleague was not done in wilful disregard of the employer's interest. Board held her discharge for this behavior was not disqualifying under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0071 3085 48

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 her position with the employer on July 1, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 17, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on October 7, 2021. 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, she was 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 claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's hand gesture toward a peer employee constituted deliberate misconduct 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 are set forth below in their entirety:

1. The claimant worked full-time as a customer service supervisor for the employer's pharmacy business from 1/4/21 until 7/1/21. The claimant worked a varied schedule of 45 to 50 hours per week and was paid an annual salary of $65,000.

2. At the time of hire, the claimant received a copy of the employer's policy that prohibited sexual harassment. The employer [sic] was not issued a code of conduct or other policy that addressed obscene gesturing.

3. During the term of her employment, the claimant observed employees make obscene gestures by raising their middle fingers. The claimant also overheard people use obscene language. The claimant reported these behaviors to the supervisor of the team that the employees were part of.

4. On or about 6/24/21, the claimant was asked to manage a patient complaint. Approximately six to eight other employees were copied on the email message regarding the complaint, which was made by a medical clinic. The complaint stemmed from a patient of the clinic being asked to return a shipment of medicine that was sent from the employer's pharmacy by mistake. The clinic told the employer that the patient was bed ridden and was being asked to return the medicine. The claimant responded to the email, stating that she agreed with the patient; the claimant questioned why the employer would ask a patient to return medicine. A second supervisor who is a colleague of the claimant replied, stating that the employer could recover 50% of the cost of the medicine if it was returned to the manufacturer. The claimant replied that this is cold. Other supervisors supported the claimant's position and her choice to put the patient first. The second supervisor wrote that he would go along with whatever was decided by the majority. The group concluded that the patient should not be requested to return the medicine. The claimant contacted the clinic, apologized for the misunderstanding, and told the clinic that the patient could keep the medicine and dispose [of] it.

5. Approximately twenty to thirty minutes after the email exchange, the claimant saw the second supervisor in the Pharmacy department. The claimant smiled at the second supervisor and made a gesture to him by putting the palm of her right hand in the crux of her left elbow and raising her left forearm. The claimant was aware that this gesture was comparable to raising a middle finger. The claimant made this gesture because she felt empowered and intended to communicate that she "won." The second supervisor laughed but did not say anything to the claimant.

6. Prior to 6/24/21, the claimant had not made any such gesture in the workplace. The claimant would not have made the gesture to another employee. The claimant considered the second supervisor a friend.

7. The claimant's supervisor subsequently asked what happened in the pharmacy department during the afternoon of 6/24/21. The claimant told the supervisor about the gesture she made to the second supervisor. The supervisor told the claimant that there was zero tolerance for this type of action and that it violated the sexual harassment policy. The claimant told the supervisor that it did not cross her mind that this behavior would result in termination of her employment.

8. The claimant filed an initial claim for unemployment insurance benefits, effective 7/11/21.

9. On 7/20/21, the employer completed a DUA factfinding questionnaire, indicating that the claimant was discharged for making a gesture to a peer while on the pharmacy floor in front of other employees.

10. On 8/18/21, the claimant completed a DUA factfinding questionnaire, confirming that she was discharged from her work on 7/1/21. In her responses, the claimant wrote that she made an obscene gesture to another employee with her arms and that she thought the employee was her friend or she would not have done it.

11. On 8/17/21, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 25(e)(2) of the law for the week beginning 6/27/21 and indefinitely thereafter.

12. On 8/17/21, the claimant appealed the Notice of Disqualification.

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 are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact, except to note that Finding of Fact # 10 refers to only one of the claimant's responses in her DUA fact-finding questionnaire. Her responses included more about the incident which caused her discharge, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we disagree with the review examiner's legal conclusion that the claimant is ineligible 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).

In this case, the employer discharged the claimant for making an obscene gesture to a peer in front of other employees. *See* Finding of Fact # 9. Inasmuch as the employer did not participate in the hearing or present a copy of a policy addressing obscene gesturing, we agree that the employer failed to show that the claimant engaged in a knowing violation of a reasonable and uniformly enforced policy.

Alternatively, the employer may meet its burden by demonstrating that its discharge was due to deliberate misconduct in wilful disregard of the employer's interest. There is no question that the claimant deliberately made a gesture to her coworker on or about June 24, 2021, or that the claimant understood the gesture to be comparable to raising a middle finger. *See* Findings of Fact ## 4 and 5. However, deliberate misconduct, by itself, does not disqualify the claimant from receiving benefits. "Such misconduct must also be 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.)

The claimant has maintained that her gesture was made to a coworker who was a friend, that it was intended to be a humorous way of communicating her victory in resolving the customer complaint as she had proposed, and, in fact, he had laughed. As she stated, it did not cross her mind that the behavior was dischargeable. *See* Findings of Fact ## 5–7.[1] But, because the claimant admitted that she would never have made that gesture to any other employee and had reported others for essentially making the same obscene gesture of raising their middle finger, the review examiner concluded that the claimant knew the behavior was wrong, and, therefore, it was done in wilful disregard of the employer's interest. *See* Findings of Fact ## 3 and 6. We disagree.

It is significant that, when the claimant reported others for raising their middle finger at one another, apparently nothing was done. The claimant testified that the supervisor seemed very dismissive, telling the claimant, "yeah, yeah, I'll take it up with them," but the behavior continued, so the claimant thought "that's the way it is—office banter or whatever."[2] Apparently, the employer's zero-tolerance policy notwithstanding (*see* Finding of Fact # 7), the behavior was a common occurrence in this workplace and tolerated. "Failure to enforce a policy uniformly . . . influences the employee's belief regarding the consequences of his actions." New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 535 (2004).

In a later decision, the Appeals Court held that a claimant, who had sworn at his supervisor, did not act in wilful disregard of the employer's interest, where the vulgarities were not directed toward a client or anyone outside the company, the employee was not given an opportunity to apologize,

[1] 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).

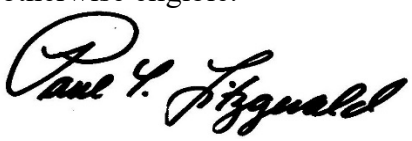
[2] These statements are derived from Exhibit 3, the claimant's responses to the DUA's fact-finding questionnaire, as well as her testimony during the hearing. The employer was not present to dispute these statements, and, thus, they are also part of the unchallenged evidence in the record.

he had never been warned or disciplined in any manner in the past, the record indicated that swearing was commonplace around the office, and there was no evidence of any other employee being disciplined for similar conduct. Wininger v. Dir. of Division of Unemployment Assistance, No. 10-P-1810, 2011 WL 5843130 (Mass. App. Ct. Nov. 22, 2011), *summary decision pursuant to rule 1:28*. The Appeals Court concluded that the record failed to support a conclusion that the claimant knew there would be consequences for his action. Id.

The circumstances of the pending appeal are very similar. In short, the claimant was aware that her gesture was not appropriate, but, because it was common and seemingly tolerated in the workplace, she reasonably inferred that the employer did not object to it. At most, this hand gesture was a poor choice of expressing humor with her friend. It was not done in wilful disregard of the employer's interest. "When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to show that the claimant's discharge was due to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced 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 June 27, 2021, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - January 14, 2022

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

AB/rh