

The claimant continued to drink alcohol on the job and engage in unprofessional behavior towards other co-workers after being repeatedly reprimanded for similar behavior in the past. The employer's decision to verbally reprimand the claimant rather than discharge him for past incidents is not evidence that the employer condoned such behavior. Held the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest and he is ineligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0076 0807 13

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 separated from his position with the employer on March 28, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 1, 2022. 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 September 23, 2022. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 had failed to show that the claimant knew his unprofessional behavior was contrary to the employer's expectations because the employer had previously condoned the similar behavior, 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 as a part-time cook with the employer, a restaurant, from 2017, through March 28, 2022, when he separated from his employment.

2. The claimant's direct supervisor was the manager.
3. No rules or policies were presented.
4. The employer maintained an expectation that employees do their jobs and act professionally toward each other.
5. The purpose of these expectations is to ensure the business runs smoothly.
6. The employer communicated the expectations to the claimant verbally over the course of his employment and during a March 19, 2022, meeting with the owner/bookkeeper (owner).
7. At times during his employment, the claimant reported to work under the influence of drugs and alcohol and acted unprofessionally toward employees. The claimant was not formally disciplined for his actions.
8. On March 19, 2022, the owner spoke with the claimant about other employees complaining about him and to fix his attitude while at work.
9. On or about March 26-27, 2022, numerous employees sent text messages to the owners stating they would not come back to work if the claimant continued to work for the employer.
10. On March 26, 2022, the manager texted the owner, stating in part, "You know what's going on, you leave it up to me, you know I don't wanna (sic) work with them, there's your answer." In response the owner replied, "ok, he is gone. I will tell him today."
11. On March 28, 2022, the owner texted the manager, "I put an ad, I will do interviews this week. Hopefully we find someone who can get along with everyone."
12. On March 28, 2022, the owner texted the claimant terminating his employment because his co-workers refused to continue to work with him.

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 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. However, as discussed more fully below, we reject the review examiner's conclusion that the claimant did not understand that his unprofessional behavior was contrary to the employer's expectations.

Because the claimant was discharged from his employment, his 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 the employer did not provide formal rules or policies regarding employee behavior, it cannot be said that the claimant’s discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy. We, therefore, consider only whether the claimant engaged in deliberate misconduct in wilful 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).

As a threshold matter, the employer must show that the claimant engaged in the conduct for which he was discharged. The review examiner found that the claimant had a history of engaging in unprofessional behavior while on his shift. *See* Finding of Fact # 7. In support of this evidence, the employer submitted screen captures from surveillance footage dated March 25, 2020. This footage, which was admitted into evidence as Exhibit 6, showed the claimant drinking alcohol while on shift and relaxing while all the other employees were busy performing their job duties.¹ Thus, there is no question that he was engaging in the unprofessional behavior for which he was fired.

One reason that the review examiner concluded that the employer did not meet its burden is because the owners decided to fire the claimant only after receiving complaints about his behavior from other employees, and they threatened to quit. This mischaracterizes the significance of this evidence, as it overlooks the reason *why* the other employees were complaining. The other employees complained because they were frustrated by the claimant’s continued unprofessional behavior. *See* Findings of Fact ## 9 and 10. The evidentiary significance of these complaints is

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).

that they further corroborate the employer's contentions that the claimant continued to engage in unprofessional behavior up to the date he was terminated.

There is also no question that the claimant was aware that the employer did not approve of this behavior. While the claimant was not formally disciplined for his actions, the owner had warned the claimant about his behavior on several occasions, most recently on March 19, 2022. Findings of Fact ## 6–8. Since nothing in the record suggests that his conduct was unthinking or accidental, we can further infer that it was deliberate.

Despite the evidence discussed above, the review examiner concluded that the claimant did not possess the requisite state of mind because the employer had “condoned” the claimant’s similar behavior in the past. This was an error. It is true that, if the employer fails to discipline employees who violate a certain rule, a claimant may over time come to believe that such conduct is in fact acceptable to the employer. *See Gold Medal Bakery, Inc. v. Comm’r of Division of Unemployment Assistance*, 74 Mass. App. Ct. 1105 (2009) and *New England Wooden Ware Corp. v. Comm’r of Department of Employment and Training*, 61 Mass. App. Ct. 532, 533–535 (2004).

However, here, the record shows that the employer did not ignore the misconduct. The claimant had been reprimanded, albeit verbally. Even if the claimant had previously been uncertain as to whether his actions were acceptable, the employer’s directive on March 19, 2022, was an unequivocal instruction to the claimant that he needed to stop acting unprofessionally. Finding of Fact # 8. Moreover, the employer provided unchallenged testimony that the claimant’s unprofessional behavior continued even after he had received the warning on March 19, 2022. Thus, the termination could not fairly be characterized as a surprise.

The claimant did not present any evidence of mitigating circumstances that caused him to behave this way at work. 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 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 March 27, 2022, 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.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 21, 2022



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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