The review examiner reasonably accepted as credible the testimony of the employer's three witnesses that the claimant admitted to reporting to work intoxicated. The claimant, as a supervisor, understood this was contrary to the employer's alcohol policy. As the claimant denied being intoxicated at the remand hearing, he did not establish mitigating circumstances for his misconduct and is, therefore, not entitled to benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0078 4955 10

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 affirm.

The claimant separated from his position with the employer on August 5, 2022. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 30, 2022. 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 April 25, 2023. 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 obtain testimony from the claimant, as he was unable to connect to the initial hearing due to technical issues beyond his control. Only the claimant 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 claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest, because he was intoxicated on the job and could not provide any explanation mitigating his intoxication, 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 November 2, 2000, the claimant began working as a full-time second shift supervisor for the employer, a manufacturing company.

2. The claimant was responsible for managing all of the employer's second shift employees at the employer's factory.

3. The claimant worked Mondays to Fridays during the second shift (3:00 p.m. to 12:00 a.m.)

4. While working, the claimant is expected to be in the front office.

5. The claimant's direct supervisor was the employer's lead supervisor.

6. The employer maintains an alcohol in the workplace policy that states that no employee shall report to work while under the influence of alcohol.

7. The alcohol policy is found in the employer's handbook.

8. The policy states, in relevant part: "Employees shall not report to work or perform work for the Company under the influence of alcohol. . . . Any violation of this policy may subject the employee to disciplinary action, up to and including termination of employment."

9. On November 7, 2022, the claimant received and signed off on the employer's handbook acknowledging that he had received it.

10. The claimant, as a supervisor, knew the policy and trained and explained this policy alongside other policies to employees that he supervised.

11. The alcohol policy is meant to promote safety at the workplace. Particularly, because the employer is a manufacturing company where machines are operated, the alcohol policy is meant to ensure that employees' ability to operate the machines and to do their work is not compromised.

12. Violating any of the employer's policies leads to disciplinary action that depends on the type and severity of the infraction.

13. The claimant does not have any underlying medical conditions.

14. The claimant's wife is a nurse.

15. The employer's factory is typically very hot during the summer season.

16. The claimant has never suffered from any medical conditions caused by the heat in the building.

17. The claimant was on vacation from July 25, 2022, to August 3, 2022. The claimant was scheduled to return to work from his vacation on August 4, 2022.

18. On August 3, 2022, the claimant texted the employer's plant manager asking if he could extend his vacation. The plant manager said no.

19. The claimant reported to work on August 4, 2022, as scheduled.

20. On August 4, 2022, at around 5:00 p.m., one of the employer's furnace seatbelts broke.

21. The employer's maintenance manager contacted maintenance personnel to go into the plant and fix the seatbelt.

22. When the maintenance personnel went into the plant to fix the seatbelt, they did not find the supervisor on duty i.e., the claimant.

23. The maintenance personnel informed both the employer's plant manager and the employer's maintenance manager that there was no supervisor on site.

24. The plant manager called the claimant at 8:59 p.m. The claimant did not pick up the call.

25. The claimant called the plant manager at 9:12 p.m. During the call, the plant manager felt that the claimant did not "sound like himself."

26. The plant manager reviewed video footage from the factory and saw the claimant staggering out of the back office, and two employees supporting him and helping him walk back into the back office.

27. The claimant was intoxicated.

28. The plant manager called the lead supervisor and asked him to go to the factory and see what was going on.

29. The lead supervisor went into the factory and arrived at 10:38 p.m.

30. The lead supervisor found the claimant in the back office with his feet on the top of the table.

31. When the lead supervisor walked into the back office, the claimant attempted to stand up.

32. When the claimant attempted to stand up, he fell down.

33. The lead supervisor asked the claimant if he was alright.

34. The claimant stated that he had messed up, and that he did not want to lose his job.

35. The claimant told the lead supervisor that he was drunk.

36. The lead supervisor called the plant manager and told him that the claimant was intoxicated.

37. The plant manager called the maintenance manager and asked him to go into the factory. The plant manager wanted two managers to be present as witnesses to the incident.

38. The maintenance manager went into the factory arriving at around 11:05 p.m.

39. The maintenance manager found the claimant in the back office.

40. When the maintenance manager arrived, the claimant stood up and went to smoke a cigarette at the loading dock.

41. The maintenance manager followed the claimant to the loading dock.

42. At the loading dock, the claimant told the maintenance manager that he had "screwed up" and did not want to lose his job. The claimant further stated that he had not had a drink since 2:00 p.m.

43. The maintenance manager and the lead supervisor decided to close the factory and send everyone home.

44. The lead supervisor called the claimant's wife. The wife came and picked up the claimant from work.

45. On the following day, i.e., August 5, 2022, the claimant was called into a meeting with the employer's Human Resources (HR) manager, the plant manager, the maintenance manager, and the lead supervisor.

46. In the meeting, the events from the previous night were discussed. The claimant admitted that he was wrong and stated that he did not want to lose his job. The claimant further stated that he was scared that his wife would divorce him.

47. The employer's plant manager told the claimant that the employer has zero tolerance for intoxication at work.

48. The claimant did not explain why he had been drunk at work the previous day.

49. In the meeting, the claimant was discharged because of being intoxicated at work the previous day, which violated the employer's alcohol policy.

50. The employer discharged the claimant on August 5, 2022, for being at work while intoxicated, which violated the employer's no alcohol policy and expectation, and which jeopardized the safety of personnel he supervised, and of the factory in general.

51. At no point on August 4 or August 5, 2022, did the claimant claim that he had suffered from "heat frustration" or any other related medical condition caused by the heat on August 4, 2023.

Credibility Assessment:

The employer's plant manager, the employer's lead supervisor, and the employer's maintenance manager testified in the hearings held on February 16 and March 23, 2023. The testimonies from these three witnesses were detailed, and consistent. These witnesses had firsthand knowledge of the events leading up to the discharge: the plant manager because he had called and spoken to the client that night and had observed him on security footage, and the lead supervisor and the maintenance manager because they had driven to the factory that night and had personally interacted with the claimant. The employer's witnesses' testimonies are credited as credible.

The claimant testified in the remand hearing held on June 23, 2023. The claimant alleged that he was not intoxicated on August 4, 2022. He alleged that that day, he suffered from "heat frustration" because it was too hot in the building. The claimant alleged that the heat made him feel unwell and "out of it" and was the reason why he was staggering. The claimant's allegations are found not to be credible because of the reasons described below.

On August 4, 2022, the claimant told the lead supervisor that he was drunk, that he had messed up, and that he did not want to lose his job. The claimant told the maintenance manager that he had not drunk since 2:00 p.m. that day, and that he had "screwed up" and did not want to lose his job. The claimant insists that he did not actually admit to being drunk. Even if it were true that he did not admit to being drunk, he still admitted to "messing up" and expressed a fear that he would lose his job. If the claimant had really suffered from a heat stroke or a similar medical condition caused by the heat, it is implausible that he would admit to messing up when such an event would not be his fault. The claimant expressed similar sentiments in the August 5, 2022, meeting where he admitted that he was wrong, stated that he did not want to lose his job, and further stated that he was scared that his wife would divorce him. It is implausible that a person who had suffered a medical condition would feel that they were wrong and would be afraid that their spouse would divorce them. It is more likely than not that the claimant felt that he was wrong, was afraid he'd lose his job and his marriage not due to a "heat frustration" but due to the fact that he was intoxicated at work. It is also similarly implausible that the claimant would not tell the employer at any point that he had suffered from a heat-related medical event. He did not mention that on the night in question (August 4) or during the meeting held on August 5. Further, the claimant

> testified that his wife, who is a nurse, picked him up and drove him home. If the claimant was not drunk and was suffering from a medical condition, it is implausible that his wife, a nurse, would fail to send him to a hospital for care and would instead drive him home. Further, it is implausible that an ordinary reasonable person would remain at work for hours after starting to feel unwell to the extent of staggering and needing support to move. The claimant alleged that he began to feel unwell at 8:00 p.m. and he left work past 11:00 p.m. Any ordinary reasonable person would immediately notify the employer of how they were feeling, and would get medical care for themselves, especially where the person had never experienced such a medical event before and where the event was serious enough to lead to staggering. The claimant's allegations that he was not drunk and that he was instead suffering from "heat frustration" are found to be untrue, and his testimony is found not to be credible. It is concluded that the claimant was intoxicated at work that night.

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 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. As discussed more fully below, we agree with the review examiner's conclusion that the claimant is not entitled to benefits.

As the claimant was discharged, his eligibility 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 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).

The employer did not provide evidence demonstrating that other similarly situated employees who violated the employer's alcohol in the workplace policy were discharged. Therefore, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy.

As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must show that the claimant engaged in the conduct for which he was discharged. The employer in this case discharged the claimant for being intoxicated during his shift on August 4, 2022. Consolidated Findings ## 19, 27, and 50. In a comprehensive credibility assessment, the review examiner rejected the claimant's contentions that he was not intoxicated because the employer's three witnesses testified to their firsthand knowledge of the claimant's behavior on August 4, 2022, and each independently verified that the claimant had admitted to making a mistake on that day. *See* Consolidated Findings ## 25, 26, 30–35, 42, and 46. Additionally, the review examiner noted that the claimant's testimony about his actions when he left the employer's factory detracted from his testimony because they appeared inconsistent with his contention that he was experiencing a medical event on August 4th. *See* Consolidated Findings ## 44 and 51. 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). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Pursuant to the review examiner's reasonable credibility assessment, Consolidated Finding # 27 confirms that the claimant engaged in the misconduct for which he was discharged. *See* Consolidated Finding # 50. Further, as the claimant had been drinking until just an hour prior to the start of his shift on August 4, 2022, and chose to report to work after drinking, we are satisfied that, in so doing, the evidence shows the claimant's actions were deliberate. *See* Consolidated Findings ## 3 and 42.

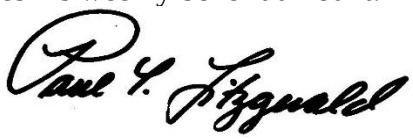
However, the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, the proper factual 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). 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 employer maintained a policy prohibiting employees from reporting to work while under the influence of alcohol. Consolidated Findings ## 6 and 8. This policy is facially reasonable as it serves to ensure employees' safety in a manufacturing environment. *See* Consolidated Finding # 11. As the claimant was responsible for training employees in all employer policies and admitted to understanding that he had made a mistake by reporting to work intoxicated, there is no question that he was aware his decision to report to work under the influence of alcohol was inconsistent with the employer's expectations. *See* Consolidated Findings ## 10, 34, and 42.

Finally, we consider whether the record indicated the presence of mitigating circumstances. On remand, the claimant maintained that he did not report to work while intoxicated. 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). As the review examiner reasonably rejected the claimant's testimony that he was not intoxicated, his continued denial precludes him from establishing mitigating circumstances for his misconduct.

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week of July 31, 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.



BOSTON, MASSACHUSETTS
DATE OF DECISION - August 31, 2023

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

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