The employer fired the claimant for fostering a toxic work environment when she told two coworkers that if she made less than her other coworkers, she would sue the employer. However, there was insufficient evidence to ascertain how the statements fostered a toxic work environment. The Board held the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, and she was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0078 8171 22

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 December 14, 2022. She filed a claim for unemployment benefits with the DUA, effective December 18, 2022, which was denied in a determination issued on January 14, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on May 16, 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). 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 engaged in deliberate misconduct in wilful disregard to the employer's interest by creating a toxic work environment with litigious comments, 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 Medical Aesthetician for the employer, a med spa, from 6/13/22 until 12/14/22 when she became separated.

2. The claimant was hired to work part time, 20 to 25 hours a week, earning $30.00 an hour plus commission, bonuses and tips.

3. The claimant was discharged for fostering a toxic work environment. The employer has no written, uniformly enforced policy or rule, accompanied by specific consequences, which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the management team, which includes the partners and managers.

4. The employer expects employees to refrain from fostering a toxic work environment. This is necessary for the employer to maintain a comfortable working environment.

5. The claimant was aware of the employer's expectations in this regard. She received a copy of the handbook at hire containing the employer's expectations and acknowledged her receipt of the handbook on 6/2/22.

6. At the end of November 2022, the CEO was notified by a couple of employees that the claimant had made litigious comments. She had told the Aesthetician and Lead Nurse Injector if she was making less than others in the company, she would sue the employer.

7. There had been multiple issues with the claimant over the previous 6-week period prior to her discharge.

8. On 11/9/22, the claimant had made a sexual joke to the CEO's wife during a service the wife was having at the med spa. She had asked the CEO's wife if she ever had an orgasm from the machine that was being used on her that day. The claimant was subsequently warned by the Lead and another manager and was spoken to by the CEO who told the claimant her question was in poor taste.

9. Two months prior to her termination, the CEO was made aware that the claimant had smelled of marijuana and had been taken [sic] gummies while providing services to clients using medical equipment. The Lead spoke to the claimant addressing the employer's concerns telling the claimant her behavior regarding the same was unacceptable.

10. On 11/17/22, the Lead Nurse Injector spoke to the claimant and other employees about clocking in and out. There had been issues with the claimant clocking in and out. All nonexempt employees are expected to clock in and out. The claimant was told on two occasions that she needed to take lunches if she was working over 6 hours. The claimant had told the employer she was too busy to take lunch. The CEO, Lead, and Spa Manager met with all employees to inform them of the need to clock in and out. They were told if they did not clock in and out as expected, it could lead to their termination.

11. Lastly, there was a period were [sic] the employer was short staffed. The claimant had been asked to learn a new role at the front desk to cover for lunches and breaks. The claimant told the employer that she was not hired to work the front desk. All other employees had learned the front desk duties. The claimant refused, indicating that she makes no money if she is not servicing clients, which would happen if she was working the front desk. The employer spoke to the claimant on 12/7/22 regarding her refusal. The claimant became hostile while trying to discuss the matter.

12. The employer decided to terminate the claimant's employment only after the final incident had occurred at the end of November regarding the litigious comments.

13. On 12/14/22, the Team Lead and CEO met with the claimant. The claimant was informed that she was being let go for causing a toxic environment. The claimant grabbed her belongings and left.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portion of Finding of Fact # 5 that indicates that the claimant was aware that the employer expected employees to refrain from fostering a toxic work environment, as it is unsupported by the evidence. We also reject Findings of Fact ## 6 and 12 insofar as they state the last incident occurred at the end of November, 2022, as the undisputed evidence indicates that the final incident occurred on or about December 7, 2022.[1] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

Where a claimant is discharged from employment, her 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] . . . (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. . . .

[1] The December date is supported by the employer's responses to the DUA's discharge questionnaire, Exhibit 7, as well as its Chief Executive Officer's testimony. While not explicitly incorporated into the review examiner's findings, they are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

"[The] 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 listed several issues with the claimant's behavior over a short period of time. *See* Findings of Fact ## 7–11. Although the claimant's disciplinary history was considered a factor in her termination, the employer's decision to discharge the claimant was the result of the final incident regarding the litigious comments. *See* Finding of Fact # 12. Therefore, our focus is the final incident.

Specifically, Finding of Fact # 3 shows that the claimant was discharged for fostering a toxic work environment. The employer has no written policy about this. *See* Finding of Fact # 3. Moreover, it failed to provide any evidence showing that it discharged all employees for fostering a toxic work environment under similar circumstances. Therefore, the employer has failed to meet its burden to show that the claimant violated a reasonable and *uniformly* enforced policy. Alternatively, the employer may show that the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest.

The employer must first establish that the claimant engaged in misconduct. Here, the claimant was discussing her earnings with other coworkers and noted that, if she was making less than others, she would sue her employer. *See* Finding of Fact # 6. The claimant asserts that that she is well within her legal right to discuss wages and earnings with coworkers as her statements are protected speech. We acknowledge the claimant's argument that the Commonwealth affords employees protection against any condition of employment where an employer requires employees to refrain from discussing or disclosing their wages under the Pay Equity Act. *See* G.L. c. 149, § 105A(c)(1). We are also aware that the Commonwealth has provided employees statutory safeguards making it unlawful for an employer to retaliate against an employee for indicating their intent to file a complaint to enforce their rights under G.L. c. 149, § 105A. *See* G.L. c. 149, § 105A(c)(3). However, our analysis focuses on the claimant's conduct as it relates to eligibility for unemployment benefits pursuant to the Unemployment Insurance Law, G.L. c. 151A.

Here, the employer's Chief Executive Officer (CEO) does not refute that the claimant is entitled to discuss her wages with other coworkers. The employer asserts that the misconduct occurred when the claimant, while in the presence of her co-workers, threatened to sue the employer. Because there is no suggestion that her remarks were inadvertent, we can reasonably infer that she spoke deliberately. The next question is whether they constituted misconduct.

Looking at the circumstances surrounding the claimant's statement, we see only that she had spoken to two coworkers when she made the litigious comment. The record gives us no indication as to when the claimant made the litigious statement, or if she made the statement at work or outside of work, in front of clients, or at a meeting. Without this detail or context, we are not persuaded that the claimant's comment "fostered a toxic work environment." Thus, the employer has failed to meet its burden by showing that claimant engaged in the misconduct for which she was discharged.

Even if we were to assume, *arguendo*, that the claimant's litigious comment was misconduct, the employer falls short of meeting its burden under G.L. c. 151A, § 25(e)(2).

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) (citation omitted).

The employer expected all employees to refrain from fostering a toxic work environment. *See* Finding of Fact # 4. We believe the expectation to be reasonable, as it maintains a comfortable work atmosphere. *See* Finding of Fact # 5. However, the employer has not established that, at the time that the claimant made the statement at issue, she was aware that she was violating this expectation and acting contrary to the employer's interest. Thus, the employer had failed to show that the claimant acted in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant neither knowingly violated a reasonable and uniformly enforced rule or policy of the employer, nor engaged in 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 reversed. The claimant is entitled to receive benefits for the week ending December 17, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 26, 2024

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.

DY/rh