

Claimant removed construction materials from a client's worksite in violation of the employer's directive not to, even if he had obtained permission from the client. The claimant's belief that the materials were merely trash and his transgression insignificant did not present mitigating circumstances to justify his misconduct. Held the claimant's removal of the construction materials was deliberate misconduct in wilful disregard of the employer's interest and he is not 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: 0079 8508 25

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 was discharged from his position with the employer on April 11, 2023. He filed a claim for unemployment benefits with the DUA, effective April 16, 2023, which was approved in a determination issued on May 17, 2023. 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 June 15, 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 additional testimony regarding the circumstances surrounding the claimant's separation. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest when the claimant removed construction materials from a worksite, 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. The claimant worked as a health and safety professional for the employer, the provider of health and safety consultancy services.
2. The claimant worked on and off for the employer on various projects beginning on December 2, 2019.
3. When he was working for the employer, the claimant worked full-time.
4. The employer's Employee Handbook provides, "Employees shall not have a financial or other personal interest in a transaction between [the employer] and a . . . customer."
5. The Employee Handbook lists the following as a situation "where immediate termination would result": "Refusal or failure to follow directives from a supervisor, manager, or [Employer] officer."
6. The claimant received a copy of the Employee Handbook at the time of hiring.
7. Beginning in July of 2022, the claimant was assigned to a project renovating a building to create lab space for a large pharmaceutical company.
8. The employer's client was a construction management company that oversaw the subcontractors working on the construction project.
9. The construction management company worked for the pharmaceutical company.
10. On at least one occasion, the claimant, with the express permission of the construction management company, hauled construction material away from the site.
11. After that occasion, the employer's owner and president instructed the claimant to not remove construction materials from the job site even if the construction management company granted him permission to do so.
12. The president explained to the claimant that such removal created a bad image for the company.
13. The owner forbade the claimant from removing materials from the job site for multiple reasons, including the following: 1. the receipt of valuable goods might be construed by others as bribery or stealing; 2. the removal of such materials potentially exposes the pharmaceutical company to liability; 3. removal is detrimental to the employer's image and, therefore, jeopardizes the employer's relationships with its clients.

14. The claimant was conscious that the employer's president had instructed him not to remove material from the job site, and he was aware that the president was concerned about the employer's image.
15. The claimant was not mindful, however, of the handbook provisions mentioned above, which he had received some years earlier.
16. On or before April 8, 2023, the claimant again removed construction material from the job site.
17. Principals from the employer's client, the construction management company, had specifically authorized the claimant to remove the materials, which were otherwise going to a landfill, and an employee of the pharmaceutical company had helped secure the materials for the claimant.
18. The claimant knew that his removal of the material was contrary to the instructions he had received from his employer even where the construction management company approved, but he nonetheless thought the removal of the material was justified since it was waste and since the construction management company had specifically authorized him to remove it.
19. The claimant thought his transgression was so insignificant that any violation would be overlooked because of his status as a good and valued employee.
20. The claimant held the president in high regard and did not intend to disrespect the president.
21. The employer likewise held the claimant in high regard and valued him as an employee.
22. The pharmaceutical company complained about the removal of material and asked the employer what it was going to do to correct the situation.
23. The employer investigated the situation.
24. The employer confirmed with the claimant that he had removed construction materials from the job site.
25. On April 11, 2023, the president discharged the claimant for having violated his instructions.

Credibility Assessment:

The key facts above are undisputed. Both parties agree that the employer instructed the claimant not to remove property from the job site even if the construction management company authorized him to do so. Both parties agree that the owner explained that the employer was concerned with its image. In this regard, the

claimant writes, “Owner did not approve of me obtaining this material due to perception regardless of whose permission I obtained.” The fact that the employer’s client authorized the claimant to remove materials from the job site is adequately documented by a letter provided by employees of that company. The claimant’s thought process described above derives directly from the claimant’s testimony.

The employer’s witnesses asserted that the employer had issued at least one warning in addition to the one mentioned in the findings of fact above. The claimant, on the other hand, testified that he remembered only one warning. The claimant’s testimony was highly credible. He spoke with clarity as to what he remembered and what he did not, and he acknowledged in his testimony facts that were against his interest as if the truth could not be avoided. Thus, the claimant’s testimony that he remembered only one warning is accepted. The claimant testified that he does not remember having received a copy of the Employee Handbook and that he was not mindful of its provisions in connection with the events discussed below. His testimony in this regard, while considered truthful as to what he remembered, is not considered accurate as to what happened since the employer provided a receipt of handbook signed by the claimant on December 2, 2019.

If the claimant had been conscious of other warnings at the time he removed material from the job site, the claimant likely would have remembered them during the hearing as well. After all, his discharge came soon after he had removed materials from the site, and, upon learning that he was being discharged from his employment, his consciousness of prior warnings would have been highly significant to him. One remembers what is significant. Because the claimant testified to not remembering any additional warnings, he most likely was not conscious of any additional warnings at the time of discharge.

In order to have engaged in deliberate misconduct, the claimant had to have been conscious of wrongdoing. Because the claimant was conscious at the time of removal of only one of the warnings, any additional warnings are irrelevant and are, therefore, not included in the findings of fact above. Furthermore, regardless of the number of warnings, the key fact in this regard is that the claimant was aware that the employer had instructed him not to remove material from the site even if the construction management company authorized him to do so.

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 believe that the review examiner’s consolidated findings of fact support the conclusion that the claimant is not eligible for benefits.

Because the claimant was terminated 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

“[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).

Although the employer maintained two policies regarding its code of conduct which prohibited any appearance of conflicts of interest and insubordination, it did not provide any evidence showing that all similarly situated employees, who violated the same policies, were terminated. *See Consolidated Findings ## 4, 5, and 6.* Thus, the employer has failed 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.

In order to meet its burden, the employer is required to show that the claimant's actions were not only misconduct but that they were deliberate. The findings establish that the employer's president expressly prohibited the claimant from removing materials from worksites, regardless of any third-party permission to remove such materials. Despite this prohibition, the claimant actively removed items from a worksite on or before April 8, 2023. By doing so, he engaged in misconduct. *See Consolidated Findings ## 10, 11, and 16.* The record also reflects that the claimant's actions were deliberate because, at the time, he rationalized and contemplated the consequences of his behavior. *See Consolidated Findings ## 18 and 19.*

We next consider whether the claimant's misconduct was done 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). 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 question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. *Id.* at 95.

The claimant does not dispute that he was aware of the employer's expectation that prohibited employees from removing construction materials from worksites. *See Consolidate Finding # 14.*

We believe that expectation to be reasonable considering the employer's stated need to protect its image, avoid liability, and to prevent any appearance of impropriety. *See Consolidate Findings ## 12-14.*

Nonetheless, the claimant will not be disqualified if the violation of the employer's reasonable expectation was attributed to mitigating circumstances. 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).*

On remand, the claimant argues that his misconduct was justified, because he had the approval to remove the items from the site by the construction management company, and that the items were trash. *See Consolidate Findings ## 17 and 18.* As noted above, however, the employer expressly prohibited the claimant from removing any construction materials from the worksites even if he had permission to do so from the client. *See Consolidated Finding #11.* Furthermore, we reject the notion that classifying the materials as trash justifies the claimant's misconduct. The employer had prohibited the claimant from removing *any* construction materials from a worksite. Nothing in the record indicates the employer made an exception for materials destined for the trash or the landfill. Accordingly, the claimant has not demonstrated circumstances beyond his control that caused him to disobey the employer's expectation that he not remove construction materials from worksites.

We, therefore, conclude as a matter of law that the claimant 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 affirmed. The claimant is denied benefits for the week beginning April 16, 2023, 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 - December 22, 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.

DY/rh