

Claimant complained to the senior store manager that her coworkers would make inappropriate comments about her age and body. When the comments continued, she swore and yelled at her supervisor. Though disruptive to the workplace, her behavior was a reasonable response to the coworkers ongoing inappropriate remarks. Held the claimant demonstrated mitigating circumstances for her misconduct and she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0080 1790 66

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 April 19, 2023. She filed a claim for unemployment benefits with the DUA, effective April 9, 2023, which was denied in a determination issued on May 19, 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 June 10, 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 that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest, because the claimant raised her voice and used profanity while speaking with her supervisor, 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 employer is a retail store. The claimant worked as a part-time retail associate for the employer. The employer employed the claimant from 2/6/2023 to 4/19/2023.

2. The employer's senior store manager ([X]) supervised the claimant.
3. The employer has a human resources department. The employer's director of people operations ([X]) interacted with the claimant.
4. The employer maintained an expectation (the "expectation") that all employees, including the claimant, would refrain from yelling and using profanity towards coworkers and supervisors. The purpose of the expectation is to ensure the employer provided a safe environment for employees and customers. Violations of the expectation could result in termination.
5. The claimant was aware of the employer's expectation through training upon hire and common sense.
6. Prior to 4/19/2023, the claimant received inappropriate comments about her body type, her hair, and her age, from several of her coworkers. The claimant reported the incidents to [X] and to the employer's district manager ("[Y]"). [X] took steps to rectify the incidents each time the claimant reported them to him. [X] repeatedly spoke to the claimant's coworkers and directed them to refrain from directing inappropriate comments at the claimant.
7. On 4/19/2023, the claimant received several inappropriate comments about her body type, her hair, and her age from at least two of her coworkers. The claimant became visibly upset by the comments and started yelling and swearing in the employer's store as she went to [X]'s office to report the incident.
8. On 4/19/2023, the claimant entered [X]'s office as she raised her voice and said profanities. [X] asked the claimant to settle herself to and talk about what happened and the claimant continued to yell and use profanities including the word "fuck." [X] directed the claimant to stop yelling and using profanities. [X] warned the claimant to either stop yelling and using profanities or leave her keys and no longer remain employed by the employer. The claimant continued to raise her voice and use profanities such as "are you fucking kidding me?" [X] then told the claimant to leave her keys and leave the store before he called the police to have her removed for trespassing.
9. Prior to the claimant's interaction with [X] on 4/19/2023, the claimant did not report any issues [sic] [X] or anybody in the employer's human resources department.
10. The employer discharged the claimant for raising her voice and directing profanities at her supervisor.

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 to note as follows. Findings of Fact ## 2, 3, and 6–9 are confusing, as the review examiner labeled the senior store manager and the director of people operations with the same initials. However, based upon the parties' undisputed testimony, it is evident that Findings of Fact ## 6–8 refer to the senior store manager. Similarly, the record shows that in Finding of Fact # 9, the first initial refers to the senior store owner and the second initial refers to the director of people operations.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's actions amounted to deliberate misconduct in wilful disregard of the employer's interest.

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).

The employer asserts that it discharged the claimant for violating a company policy, when she began swearing and yelling at work. *See* Exhibit 3.² Since the employer failed to provide any evidence indicating that other employees who exhibited the same type of behavior received the same discipline, it failed to meet its burden to prove that the claimant knowingly violated a *uniformly enforced* policy. Alternatively, we consider whether the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest.

The findings show the claimant was aware that the employer expected all employees to refrain from yelling and using profanity while speaking with colleagues and customers. *See* Findings of Fact ## 4 and 5. However, on April 19, 2023, in response to a discussion with her coworkers, the claimant began yelling and swearing in the store, raised her voice, and used profanity while speaking with her supervisor. *See* Findings of Fact ## 7 and 10. We can reasonably infer from the findings that claimant's actions were intentional, as the senior store manager repeatedly asked her to lower her voice and refrain from using profane language, yet the claimant continued to do

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 Exhibit 3, the employer's completed DUA fact-finding questionnaire, is also part of the unchallenged evidence introduced at the hearing.

so. *See* Finding of Fact # 8. Since the claimant continued to yell and use profane language, knowing that her employer expected all employees to refrain from raising their voice or swearing in the office, the claimant's actions constitute deliberate misconduct. We next address whether the claimant's misconduct was in wilful disregard to 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.

Here, the review examiner found that the employer had an expectation that all employees refrain from swearing and yelling at customers or coworkers and that the claimant was aware of this expectation. *See* Finding of Fact # 4. As the purpose of the expectation was to maintain a safe environment for all employees and customers, we believe that expectation to be reasonable. *See* Finding of Fact # 4. However, we do not agree that the employer has met its burden of showing that the claimant's actions were in wilful disregard of the employer's interest, as the claimant presented 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 April 19, 2023, the claimant was upset due to the ongoing inappropriate comments from her coworkers about her age and body, which lead her to yell and swear in the store and at the senior store manager. *See* Findings of Fact ## 7 and 8. However, this was not an isolated incident. Prior to April 19th, sometime during the claimant's short tenure with this employer, she had received inappropriate comments about her age and body from several of her coworkers. *See* Finding of Fact # 6. The claimant had reported the prior incidences to the senior store manager, who made attempts to rectify the situation, but the inappropriate comments continued. While we agree that the claimant's actions were no doubt disruptive to the work environment, it is apparent that the claimant did not have any control over the coworker's actions and was frustrated. We believe that the claimant's outburst was a reasonable reaction to the continued inappropriate comments from her coworkers. Her behavior was not done in wilful disregard of the employer's interest but due to these mitigating circumstances.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, nor did she knowingly violate a reasonable and uniformly enforced rule or policy of the employer 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 April 16, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 12, 2023



Charlene A. Stawicki, Esq.
Member



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.

DY/rh