Claimant failed to meet the employer's expectation that he refrain from making his underage coworkers uncomfortable with unwanted contact on social media. Held he is disqualified due to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2). However, because he separated from a part-time job in the benefit year, he is only subject to a constructive deduction.

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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 filed a claim for unemployment benefits with the DUA, effective June 11, 2023. He was subsequently discharged from his position with the instant part-time, benefit year employer on August 10, 2023. On September 15, 2023, the DUA issued a determination denying benefits to the claimant. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 6, 2023. 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 remanded the case to the review examiner to give the employer an opportunity to testify and provide other evidence. Both parties 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 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, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant contacted an underage employee on social media after being warned not to engage in such conduct.

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 part-time as a back of the house team member for the employer, a fast-food restaurant, from 6/19/2023 until 8/10/2023.

2. The employer's back of house director (Director) supervised the claimant.

3. The employer maintained an expectation that the claimant did not make other employees uncomfortable. The employer maintained the expectation to ensure the safety of its employees. The employer informed the claimant of the expectation at the time he was hired and when it provided him with a warning on 7/26/2023.

4. On 7/25/2023, three female employees, two under the age of 18 and one over the age of 18 (Employee 1), informed the employer's human resources director (HRD) that the claimant followed them on social media, and it made them feel uncomfortable because he was a man in his 30s.

5. Employee 1 previously told the claimant that she did not accept requests from coworkers to follow her on social media.

6. On 7/26/2023, the HRD and the Director met with the claimant and gave him a verbal warning for harassment for following his younger, female coworkers on social media. During the meeting, they told the claimant that the younger female employees had informed them that they felt "uncomfortable" that the claimant followed them on social media. The HRD and the Director told the claimant not to follow his coworkers, especially the minors, on social media. They said that any further infractions would result in termination of employment.

7. On 7/31/2023, a female employee under 18 years of age notified the HRD that the claimant followed her and her girlfriend on social media and it made her uncomfortable, and he commented on a social media account.

8. On 8/10/2023, the HRD met with the claimant and discharged him for harassment when he followed a coworker on social media after [sic] warning.

9. In the 8/10/2023 discharge meeting, the HRD mentioned to the claimant that the [Employer] was not happy with his performance.

10. The claimant was not discharged for performance reasons and would not have been discharged if not for him following a coworker on social media after the 7/26/2023 warning.

11. On 10/6/2023, one of the minor female employees provided the employer with a statement that said, "It first started off as him [the claimant] always looking at me in my direction, no matter where I was I could see him at the corner of

my eye just staring. That didnt (sic) seem that bad to me so I just ignored it. And then he started following me on [social media] and then searched my name up on [social media]. I didn't approve of his requests on both because he's a grown man and I'm a literal child so that was pretty weird to me. And then one day I heard him talking about being single as soon as I walked next to him, which added to my discomfort".

12. On 10/6/2023, Employee 1 provided the employer with a statement that said, "[The claimant] made me feel uncomfortable and crossed my personal boundaries. He found my social media and added me numerous times, even after I told him that I don't accept friend requests from coworkers."

Credibility Assessment:

The claimant testified at the initial hearing that he was discharged for what he believed was alleged poor performance. However, upon review of the initial hearing record, the claimant offered vague testimony and inconsistent testimony, such as that the employer did not say anything about following his coworkers on social media, then admitted that the employer told him that the younger coworkers thought it was strange that a man in his 30s followed them on social media. Further, at the remand hearing, the claimant testified that he followed a coworker after the warning but was unaware that she was a minor. During his testimony at the remand hearing, the claimant further stated that he did not recall that the meeting on 7/26/2023 was a warning, but just a conversation.

The HRD testified that when she discharged the claimant, she had mentioned his poor performance. However, she admitted that had he not followed the minor employee after the 7/26/2023 warning, he would not have been discharged for his poor performance. The HRD further testified that she had given him the 7/26/2023, [sic] and directly told him his job was in jeopardy. She further provided documentary evidence in the form of the documented verbal warning. Although the HRD offered the hearsay testimony of the four female employees about the claimant following them on social media and making them feel uncomfortable, she provided a 10/6/2023 email with two of the employee's [sic] statements as documentary evidence.

Given the totality of the testimony and the vague and conflicting testimony of the claimant, the hearsay testimony together with the documentary evidence of the employer is deemed more credible than that of the claimant.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except to note as follows. Consolidated Finding # 6 states that the employer warned the claimant

not to follow his coworkers, especially minors, on social media. More specifically, the employer warned the claimant not to follow *any* minor employees on social media, but the claimant was only warned not to follow adult employees if the employee told the claimant that they didn't want him to follow them.[1] In adopting the remaining findings, we deem 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. However, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant is eligible for benefits.

Where a claimant is discharged from employment, 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] . . . (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 testified that it has a policy pertaining to harassment and making others feel uncomfortable, and that it has zero tolerance for harassment. Because the employer did not provide more specific information to determine whether the policy was uniformly enforced, we cannot conclude that the claimant violated a reasonable and uniformly enforced rule or policy of the employer. Alternatively, we consider whether the employer has met its burden to show that 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 misconduct for which he was discharged. Following remand, the review examiner accepted as credible the employer's testimony that the claimant contacted an underage employee on social media on July 31, 2023, after the employer instructed him on July 26, 2023, not to follow underage employees on social media. Consolidated Findings ## 6–7. Consistent with the review examiner's reasonable credibility assessment, the consolidated findings confirm that the claimant engaged in the misconduct for which he was discharged. We further believe that the misconduct was deliberate, as the claimant would have had to search for the underage employee's social media profile in order to contact her via that medium.

[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).

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). 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).

The claimant here was aware of the employer's expectation that he refrain from making underage employees uncomfortable by contacting them on social media, as he was warned against such conduct on July 26, 2023. Consolidated Finding # 6. We further believe that the employer's expectation was reasonable, as it was in place to ensure the safety of all employees. Consolidated Finding # 3.

Finally, we consider whether the claimant established mitigating circumstances to excuse his failure to comply with the employer's expectation that he refrain from contacting underage employees on social media. The claimant denied contacting the underage employee on social media on July 31, 2023. Consolidated Finding # 7. 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). In the absence of an acknowledgment that the conduct occurred, a defense of mitigation may not be considered.

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 within the meaning of G.L. c. 151A, § 25(e)(2). However, the claimant's disqualifying separation from the instant part-time benefit year employer does not render him ineligible for his full benefit amount.

When a claimant separates from part-time employment under a disqualifying circumstance under G.L. c. 151A, § 25(e), we must consider whether a constructive deduction, rather than a complete disqualification from receiving unemployment benefits, should be imposed. 430 CMR 4.76 provides, in relevant part, as follows:

> (1) A constructive deduction as calculated under, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than a complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under G.L. c. 151A, § 25(e), in any of the following circumstances:
>
> (a) if the separation is:

> 1. from subsidiary, part-time work during the base period and, at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work; or
>
> 2. if the separation from part-time work occurs during the benefit year; . . .

The DUA's electronic record-keeping system, UI Online, shows that the benefit year under the claimant's 2023-01 claim ran from June 11, 2023, through June 8, 2024. The findings show that the claimant began working for the instant part-time employer on June 19, 2023, and he separated on August 10, 2023. Consolidated Finding # 1. Thus, this was a benefit year separation. Inasmuch as the claimant separated from part-time work during the benefit year, he is subject to a constructive deduction under 430 CMR 4.76(1)(a)(2).

The amount of the constructive deduction each week is determined by the claimant's earnings from the part-time employer. 430 CMR 4.78(1)(c) provides as follows:

> On any separation from part-time work which is obtained after the establishment of a benefit year claim, the average part-time earnings will be computed by dividing the gross wages paid by the number of weeks worked.

Further, 430 CMR 4.78(2) provides:

> The constructive deduction shall be computed by applying the earnings disregard standards provided for in M.G.L. c. 151A, § 29(b) to the average partial earnings as calculated in 430 CMR 4.78(1)(a) through (c).

The DUA's other electronic record-keeping system, EMT, shows that the claimant's total gross wages for the employer were $3,811.36, and he worked for approximately eight weeks. Consolidated Finding # 1. Thus, his average weekly wage was $476.42. Finally, UI Online shows that the claimant's weekly benefit amount was $541.00, and his earnings disregard was $180.33. Accordingly, $476.42, minus the earnings disregard of $180.33, shall be deducted from the claimant's weekly benefit amount. Therefore, the claimant is subject to a constructive deduction in the amount of $244.91 from his weekly benefit amount.

We, therefore, conclude as a matter of law that the claimant is disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(2), based upon his separation from the employer. We further conclude that the claimant is subject to a constructive deduction rather than a disqualification of his total weekly benefit amount pursuant to 430 CMR 4.76(1)(a)(2).

The review examiner's decision under G.L. c. 151A, § 25(e)(2), that the claimant's separation was qualifying is reversed. However, the claimant is not disqualified from his full benefit amount; he is subject only to a constructive deduction in the amount of $244.91 for the week beginning August 6, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 2024

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.

SVL/rh