While the claimant was making a delivery, several cans of beer fell out of a case, punctured, and sprayed beer on the customer's cellar floor. To stop the spraying, he opened the cans and poured the contents on the floor, then left without notifying anyone. Although the fallen cans were an accident, the Board held the rest of his behavior demonstrated deliberate misconduct in wilful disregard of the employer's interest and he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0081 0701 15

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 was discharged from his position with the employer on September 5, 2023. He filed a claim for unemployment benefits with the DUA, effective August 27, 2023, which was approved in a determination issued on October 3, 2023. The employer 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 awarded benefits in a decision rendered on February 6, 2024. 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, he 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. 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 had exercised poor judgment rather than wilful disregard of the employer's interest when he poured a damaged can of beer on a customer's floor during a delivery, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant worked full time as a delivery driver for the employer, a beer distributor, from April 21, 2017, until September 5, 2023.

2. The employer has a policy prohibiting "Intentional or negligent conduct resulting in abuse, destruction, or damage to the property of the Company, fellow employees, or customers, or injury to any person. Failure to report lost, damaged, or stolen Company property immediately."

3. The purpose of the policy is to ensure the employer's job schedule of deliveries is performed completely and timely each day.

4. The employer notified the claimant of its policy when he was hired and throughout the course of his employment.

5. The employer utilizes a progressive disciplinary scheme consisting of verbal and written warnings for most policy violations. The employer applies a zero-tolerance policy to intentional waste, abuse, destruction, and damage caused by an employee.

6. The employer has terminated other employees for first instances of both intentional and unintentional damage and waste.

7. The employer has an expectation that employees will reach out to managers or store owners promptly when damage or waste occurs.

8. The employer communicated its expectation to the claimant through its policy and through its day-to-day procedures.

9. The claimant received written warnings for various reasons during 2018, 2019, 2020, and 2021. The claimant did not receive any written warnings in 2022. The claimant received one written warning in 2023 for going over his accrued paid time off (PTO).

10. The claimant was aware of the employer's procedure for documenting damaged products on a tablet, notifying the employer, and returning all damaged products to the employer.

11. On September 1, 2023, the claimant was assigned to deliver beer to a restaurant. The restaurant's manner of delivery was to have delivery drivers go down a set of concrete stairs into the restaurant's basement. The stairs were old, steep, and the treads were very shallow. Because of the condition of the stairs, the restaurant provided a heavy wooden ramp for delivery drivers to slide products down the stairs rather than carrying or using a two-wheeler. One person alone could not use the ramp due to the steepness of the stairs.

12. At the time the claimant made the delivery to the restaurant, the only restaurant employee present was the cook. The claimant had had issues interacting with the cook in the past.

13. The restaurant has a surveillance camera that shows the stairway and cellar area at the bottom of the basement stairs and recorded the claimant's delivery to the restaurant.

14. The claimant was working alone to deliver the beer to the restaurant. The claimant used a two-wheeled hand truck to move cases of beer in cans down the restaurant's staircase into the basement.

15. While bringing a stack of cases of beer down the stairs, the stack tipped, causing at least one case of beer to break free of its packaging and approximately 8 or 9 cans of beer to fall down the staircase, break open, and spill beer onto the restaurant's cellar floor. Some cans landed at the bottom of the stairs and others rolled away. At least six cans were punctured and spraying beer onto the cellar floor.

16. The claimant continued bringing the remaining cases of beer down the stairs on the two-wheeler, running over the leaking cans on the floor at the base of the stairs and moving the cases to a spot in the basement. The claimant did not damage any intact cans when going over the cans with the two-wheeler.

17. The claimant unloaded the intact cases, then returned to the broken cans. The claimant tossed the cardboard tray the beer cans had been packaged in away from him in the basement. Then he picked up the damaged cans, some of which were still spilling beer, and placed them in an empty cardboard box that was in the cellar.

18. One can of beer was unopened but punctured and spraying beer. The claimant opened the can and poured the remaining beer from the can onto the cellar floor.

19. The claimant had been taught by other drivers to open a punctured can to control the spraying of its contents.

20. The claimant did not attempt to pick up the spilled beer from any of the cans. The claimant removed all damaged cans from the cellar and took them with him when he left the restaurant.

21. While the incident was ongoing, the claimant took pictures of the stairs and the damaged cans on the cellar floor spilling beer.

22. The same day, at 12:53 p.m., the claimant sent the pictures to his immediate supervisor and the human resources (HR) manager via text message. The claimant's text message read, in part, "… Doing [the restaurant] out here in [City A] solo is dangerous on its own & owners wont let us use main stairs, I

could've just went down hard right now & I know this top has been brought up MANY times. Just saying I think management, salespersons etc should take a different perspective. Thank you. Enjoy your weekend."

23. The employer became aware that the claimant had poured beer onto the restaurant's cellar floor when the restaurant's owner (the owner) reached out to the employer's sales manager. The owner provided a copy of the video recording of the claimant's actions during the delivery to the sales manager.

24. On September 5, 2023, at the end of the day, the shipping manager and HR held a meeting with the claimant and told the claimant he was terminated for damaging company products and waste, particularly the claimant's act of pouring a beer on the floor. The claimant was also told that he should have cleaned up the beer that had spilled on the restaurant's cellar floor.

25. On September 6, 2023, the DUA sent a request for additional information to the employer. A question on the fact-finding questionnaire asked, "Was the claimant fired (discharged) for disobeying (violating) a company rule or policy?", to which the employer responded, "Yes." The next question on the questionnaire reads, "If yes: What rule or policy did s/he disobey (violate)?", to which the employer responded, "Violations of the company standards of conduct #5 & 21. #5 Intentional conduct resulting in abuse, destruction of company property. Failure to report damaged company property. #21 Intentional waste of company material." The next question asks, "Why do you (the employer) have that rule or policy?", and the employer responded, "To ensure company property is handled properly." The next question reads, "What happens to an employee who disobeys (violates) that rule? For example, would s/he be warned, suspended, or fired (discharged)?", and the employer replied, "Warning, Suspension, Termination."

[Credibility Assessment:[1]]

The employer provided the DUA with a copy of the video recording of the incident from the restaurant. During the hearing, the claimant testified that when he poured the beer from the punctured can onto the floor of the cellar, he did so believing there was a drain present. This testimony is not credible because the video does not show the claimant pouring the beer into a drain, nor does it show the claimant looking for a drain. Therefore, it is concluded the claimant poured the beer directly onto the cellar floor.

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

[1] We have copied and pasted here the portion of the review examiner's decision that includes her credibility assessment.

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. Inasmuch as Finding of Fact # 2 sets forth the policy at issue, we reject Finding of Fact # 3 as a statement of the policy's purpose, as it has nothing to do with the stated policy. 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, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant was discharged from his 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 fired the claimant for damaging company products and waste, and particularly for pouring beer on the floor rather than cleaning it up after it spilled on a customer's floor. *See* Finding of Fact # 24. There is no dispute that, during a delivery on September 1, 2023, a stack of beer cases tipped, causing eight or nine cans to fall down the stairs and at least six cans to puncture and spray beer onto the cellar floor. *See* Finding of Fact # 15. Nor is there any dispute that the claimant then finished delivering the rest of the intact cases, returned to the damaged cans where one punctured can was still spraying beer, opened that can, and poured the remaining beer onto the cellar floor. *See* Findings of Fact ## 17 and 18. Further, there is no question that the claimant left without cleaning up the spilled beer or notifying the customer. *See* Findings of Fact ## 15–23. These facts show that the claimant engaged in the misconduct for which he was fired.

Although Finding of Fact # 6 states that the employer has terminated other employees for first instances of both intentional and unintentional damage, neither the wording of this finding or the manner in which the review examiner questioned the employer during the hearing reveal whether the employer had discharged some or all others for similar behavior. As a result, we cannot conclude that the employer fired the claimant for a knowing violation of a reasonable and *uniformly enforced* policy or rule. Alternatively, we consider whether it has shown deliberate misconduct in wilful disregard of the employer's interest.

As for whether the misconduct was deliberate, nothing in the record indicates that the claimant tipped the stack of cases on purpose. It appears to have been an accident. However, the act of opening the spraying can and pouring its remaining contents on the floor was deliberate. In

explaining that other drivers had taught him to open a punctured can to control the spraying, he admits that he did this deliberately. *See* Finding of Fact # 19. The testimony noted in the credibility assessment further indicates that he deliberately poured the can's remaining beer on the floor, as he asserted that he did so because he believed that there was a drain. Further, the credibility assessment notes that the claimant chose not to report the spillage to the restaurant, because he had had a negative experience with the cook, who was the only person on the premises at the time. *See* Finding of Fact # 12.

However, showing deliberate misconduct is not enough. The employer must also prove that the claimant acted 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). 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).

We consider only the portion of the claimant's misconduct, which the employer has shown to be deliberate — pouring beer on the floor and leaving without telling the customer. Finding of Fact # 2 provides that, pursuant to its policy, employees are prohibited from engaging in intentional or negligent conduct that results in damage to a customer's property. The employer further expects that employees will reach out to managers or store owners promptly when damage occurs. *See* Finding of Fact # 7. It is self-evident that the purpose of these expectations is to minimize damage and maintain goodwill with customers. We believe this to be a reasonable way of running a business. Further, the review examiner found that the claimant was aware of the policy and expectations. *See* Findings of Fact ## 8 and 10. The question is whether there were mitigating circumstances for his behavior.

As for leaving the spilled beer on the floor, the claimant essentially argued that he did not think it was harmful to the customer, because he believed that there was a drain in the floor, which would collect the spill. However, the review examiner rejected this belief as not credible. 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). We believe that this portion of his assessment is reasonable in relation to the evidence presented, as she notes that the video evidence reveals that the claimant never looked to see if there was a drain.

But even if he did believe that a drain was there to catch the spill, we see no mitigating reason for him not to have immediately alerted the customer or the employer. The most obvious course of action would have been to alert the cook. In Finding of Fact # 12 and in her credibility assessment, the review examiner refers generally to negative interactions with the cook in the past. At the hearing, the claimant elaborated somewhat, testifying that he had had a prior altercation with the cook, in which the cook did not acknowledge anything the claimant had to say, that he had asked to cook if he could deliver through the main stairs, which are safer, but the cook did not care about the claimant's safety and apparently said no.[2] This explains why the claimant did not want to interact with the cook, but it hardly presents a circumstance which prevented him from simply telling the cook about the spill. It does not amount to mitigating circumstances.

We also disagree with the review examiner's characterization of the claimant's failure to do anything about the spill as merely exercising poor judgment, as meant under the Supreme Judicial Court's decision in Garfield. 344 Mass. at 97 ("When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits."). In Garfield, the claimant store manager rearranged a schedule without directly notifying his district manager, as expected. The Court stated that his course of action evinced an intent to achieve the same end of store coverage, noting it was, at worst, a good faith error of judgment. Id. Here, the claimant did nothing about the spill. He did not tell the customer and did not try to clean it up himself. Rather than a good faith lack of judgment, his actions evince a wilful disregard of the employer's interest to minimize damage and maintain goodwill.

We, therefore, conclude as a matter of law that the employer has met its burden to show it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning September 3, 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 - September 27, 2024

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

[2] Although this portion of the claimant's testimony is not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

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.

AB/rh