

Where the claimant refused the employer's directive to drill holes in an electrical cabinet and failed to establish mitigating circumstances, held he was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0081 1422 73

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 separated from his position with the employer on September 12, 2023. He filed a claim for unemployment benefits with the DUA effective September 10, 2023, which was denied in a determination issued on October 12, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 24, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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 was not insubordinate in refusing to drill holes in an electrical cabinet because he did not have enough time remaining in his shift to complete the task and did not have the correct equipment, 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 foreman for the employer, a construction business, between December, 2009 and 9/12/2023, when he separated.
2. The claimant's supervisor was the project manager. The claimant's upper-level manager was the president and owner (president).

3. The employer does not have a written insubordination policy.
4. The employer expected the claimant to perform tasks as assigned.
5. The purpose of this expectation was to ensure tasks are completed for the timely completion of projects.
6. At times, the claimant performed tasks as assigned without issue.
7. The claimant works from 7:00 a.m. to 2:30 p.m. Any hours worked after 2:30 p.m. are accounted for by working fewer hours on the Friday of that week. The claimant does not typically do electrical work.
8. In approximately late August 2023, the claimant was instructed to drill holes in an electrical cabinet at job site A. Job site A had power, electricians were present, and there was a vacuum to clean up the metal shavings. The claimant drilled holes in the electrical cabinet at job site A.
9. On 9/12/2023, the claimant and the project manager were working at job site B. The claimant understood his work for the day to consist of setting a pump station on top of a tank. A crane operator was supposed to arrive at 1:00 p.m. and use a crane to set the pump station and, if there was time, to set an electrical cabinet on a concrete pad for conduit to go inside of it.
10. The electrical cabinet was approximately 49" long and 62" tall.
11. The electrical cabinet had to be prepared by opening the door and drilling holes into the bottom of it. If the electrical cabinet was not prepared, the crane operator would not be able to place the electrical cabinet and it would impair the completion of the project.
12. On 9/12/2023 at approximately 12:00 p.m., the project manager asked the claimant to drill holes in the bottom of the electrical cabinet. The claimant said he did not want to do it without the electricians there.
13. The project manager left job site B. The project manager called the president.
14. When the claimant looked at the electrical cabinet, he did not open the door because the electrical cabinet was on conduit on the pallet. The claimant would have had to pull out the electrical cabinet to drill the holes, which the claimant did not think was safe at that time.
15. The claimant thought it would have been safe to drill the holes later in the afternoon once the crane pulled out the electrical cabinet.

16. Job site B did not have power, no electricians were present, and there was not a vacuum to clean up the metal shavings.
17. On 9/12/2023 at 12:28 p.m., the president sent a text message to the claimant, “[Claimant’s first name] I would like holes cut as required and the [electrical] cabinet set place today.” At 12:28 p.m., the claimant replied, “Not going to happen[.]” At 12:29 p.m., the president wrote, “Go home.”
18. When the claimant sent the text message to the president, he did not think he would be disciplined and did not think his text message was a refusal to perform the work assigned.
19. The claimant did not think there would be enough time once the crane operator arrived to set the pump station and set the electrical cabinet. The claimant thought either component would have taken the remainder of the workday.
20. The president spoke to the claimant on the phone, saying “I want you to do what I tell you to do.” The claimant did not have time to discuss the project further with the president before the call ended.
21. At 12:36 p.m., the president wrote, “Now. Do not return to work. Clean all of your personal tools out of the van.”
22. The claimant left job site B without drilling the holes in the electrical cabinet.
23. On 9/12/2023, the president terminated the claimant’s employment for insubordination by not drilling the holes in the electrical cabinet at job site B as instructed.

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. Upon such review, the Board adopts the review examiner’s findings of fact and deems 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 entitled to 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. . . .

“[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 did not present any written rule or policy which it alleged the claimant's violated. *See* Finding of Fact # 3. Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and uniformly enforced rule or policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show the claimant engaged in the misconduct for which he was discharged. As the claimant conceded he refused to drill holes in the electrical cabinet on September 12, 2023, there is no question he engaged in the misconduct for which he was discharged. Findings of Fact ## 12 and 17. Further, as the claimant disregarded the same instruction from both the project manager and the employer's president, it is self-evident that the claimant's refusal to follow the employer's directive was deliberate. *See* Findings of Fact ## 12, 17, and 20.

However, the Supreme Judicial Court 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 review examiner concluded that the claimant did not have the requisite state of mind, because he did not think that he would be disciplined for his text message to the employer's owner. *See* Consolidated Finding # 18. This is a misapplication of the law. The proper inquiry under G.L. c. 151A, § 25(e)(2), is not whether the claimant believed he would be disciplined for his actions, but whether the claimant understood that his actions were contrary to the employer's expectations. As the claimant testified that he received and understood the employer's instruction to drill the required holes in the electrical cabinet on September 12, 2023, we can reasonably infer that he understood that his refusal to follow that instruction was contrary to the employer's expectations. *See* Consolidated Findings ## 12 and 17.

The claimant provided two explanations for his refusal to follow the employer's instructions. We must, therefore, consider whether either explanation constituted mitigating circumstances that prevented the claimant from following the employer's instructions. 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).

First, the claimant testified that he did not comply with the employer's directive because he believed that he would not have enough time remaining in his shift to complete the task as instructed. He explained that the crane operator needed to be present for him to safely drill holes in the cabinet, and the crane operator was not scheduled to arrive until 1:00 p.m. Findings of Fact ## 9, 14, 15, and 19. As his shift ended at 2:30 p.m., the claimant had an hour and a half to complete the task once the crane operator arrived. *See* Findings of Fact ## 7 and 9. Further, while the employer generally limited its employees to working only the hours assigned, the claimant conceded that he was aware that the employer would allow employees to adjust their schedules if they worked beyond their scheduled end time on a given day. Finding of Fact # 7. Given that the employer's president had directed the claimant to complete the task that day, his instructions were unequivocal. Finding of Fact # 17. There is also no evidence suggesting that the employer had directed the claimant not to work past the end of his shift. Thus, there is no indication that circumstances beyond the claimant's control precluded him from working the additional time that may have been necessary to drill the holes as instructed.

Second, the claimant testified that he did not feel comfortable drilling the holes in the cabinet because there were no electricians present at the job site, and because the job site did not have a vacuum for him to clean up metal shavings produced by drilling the hole. *See* Findings of Fact ## 12, and 14 – 16. The claimant did not specify why he believed that an electrician needed to be present, but explained he believed that a vacuum was necessary to clean up after he drilled the holes so that metal shavings did not get into any electrical equipment.¹ However, there was no electrical equipment in the cabinet, there was no power at the worksite, the claimant had previously completed the exact same task without issue, and the cabinet was going to be moved to a different location before any electrical equipment was installed. Findings of Fact ## 8, 9, 11, and 16. Additionally, accepting the claimant's contention that he needed to wait for the crane to arrive to complete the task, he had ample opportunity to acquire a vacuum or other equipment necessary to clean up any resulting metal shavings. *See* Findings of Fact ## 9, 12, 16, and 17. Because there was no indication from the record that drilling the holes in the cabinet would have required an electrician, or otherwise put the claimant, other employees, or the employer's property at risk had the claimant waited for the crane, the claimant has not shown mitigating circumstances for his failure to follow the employer's directives.

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

The review examiner's decision is reversed. The claimant is denied benefits for the week of September 10, 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.

¹ The claimant's uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed into 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 2024



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.

LSW/rh