The claimant delivered food without notifying the customer, as he had been directed by the employer. Nothing in the record suggests mitigating circumstances caused him to do this. Held the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2), and he is ineligible for benefits.

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Issue ID: 0081 4223 34-03

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 October 15, 2023. He filed a claim for unemployment benefits with the DUA, effective October 22, 2023, which was approved in a determination issued on November 6, 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 affirmed the agency's initial determination and awarded benefits in a decision rendered on December 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). 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 employer's appeal.

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 because he did not know that his failure to inform a customer that food had been delivered would result in termination, 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 Delivery Driver for the employer, a pizza restaurant, from May 10, 2023, until becoming separated from employment on October 15, 2013 [sic].

2. The employer did not have any written policies. The employer did not have a progressive disciplinary process.

3. The claimant was not provided with a written job description from the employer.

4. The claimant was responsible for making the food deliveries for the employer's business.

5. The employer allows customers to place their order on-line. The customer can then leave feedback on the order/delivery.

6. The claimant was informed on [sic] how to make the delivery and how to use the employer's delivery app.

7. The customer's food delivery could be left outside if there was an instruction on the receipt or the delivery app to do so.

8. The claimant had been instructed by the Owner that he needed to make sure he had contact with the customer if he was leaving the food. (The Owner had a Spanish speaking employee assist in speaking with the claimant.)

9. The claimant could call the customer on the driver [sic] phone through the app or by phone, as each order that was placed contained a telephone number.

10. The claimant had been verbally warned by the Owner for various incidents related to the performance of his position.

11. There were approximately four incidents where customers complained that the claimant delivered the food, leaving it without contacting the customer. There was also a customer complaint that the claimant had gotten into a fight with the customer when he would not come out to the claimant's car to get the food, and that the claimant had gone into the customer's place of business and threatened him.

12. The claimant was working for the employer making food deliveries on October 14, 2023.

13. On October 14, 2023, one of the customers left a message for the food to be placed inside a specific door.

14. On October 14, 2023, at 9:30 p.m., the employer received a complaint from that customer that the food was left in the wrong area, and when they located the food, it was cold.

15. Upon receiving that complaint, the Owner understood that the claimant had not contacted the customer after leaving the food.

16. The Owner decided to discharge the claimant at that time. The Owner did not speak to the claimant about the complaint before making the decision to discharge him.

17. On October 15, 2023, the claimant was notified by text message from the Owner that he was being discharged. The Owner indicated that the employer had received another complaint from a customer, he has had too many chances, and they no longer needed him. The claimant responded that he understood and thanked the employer.

18. The claimant filed his claim for unemployment benefits on October 30, 2023. The effective date of the claim is October 22, 2023.

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. . . .

"[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 has no written rules or policies. Therefore, it could not carry its burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

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 that the claimant engaged in the misconduct for which he was discharged.

The employer testified that, when employees leave food outside and do not contact the customers to let them know that the delivery has been made, the food would get cold and the customers would often call and complain or leave negative feedback on the delivery app.[1] The final incident that led to the claimant's termination was when the claimant left food outside without calling the customer on October 14, 2023. *See* Finding of Fact # 17. Thus, the employer has shown that the claimant engaged in misconduct by failing to contact the customer regarding the delivery of their order.

The claimant, on approximately four occasions, left food outside without contacting the customer, and the customers reached out to the employer to complain. *See* Finding of Fact # 11. Absent evidence that in this final instance he forgot or made a mistake, and we see none, we can reasonably infer that he was deliberately doing so again on October 14, 2023.

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 employer testified that the claimant knew that he needed to contact his customers when he dropped off orders because he was informed how to make deliveries during his training period. *See* Finding of Fact # 6. The employer's witness had told him that he needed to ensure that he had contact with the customers, informing them that he was dropping off food and leaving it outside. *See* Finding of Fact # 8. Thus, we are satisfied that the claimant was aware of the employer's expectation.

The expectation to notify customers when food has been delivered is reasonable as a matter of common sense, as it ensures that they know to retrieve the food before it gets cold.

Finally, we consider whether the record shows any 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). Here, the claimant did not participate in the hearing to provide evidence. The employer testified that the claimant did not provide any explanation for his failure to notify customers of a delivery. As such, the record includes no mitigating circumstances for the misconduct.

[1] While not explicitly incorporated into the review examiner's findings, this testimony and the testimony referred to below are part of the unchallenged evidence introduced at the hearing and placed in the record. They are 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).

The review examiner concluded that, because the employer failed to give the claimant a final warning to put him on notice that his job was in jeopardy, the employer did not meet its burden to show that the claimant was aware that his behavior on October 14, 2023, would lead to his discharge. However, to meet its burden under G.L. c. 151A, § 25(e)(2), the employer need not prove that the claimant knew he would be discharged for his misconduct. It need only prove that the claimant knew that he was not complying with the employer's expectation.

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 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 ending October 22, 2023, and for the subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 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.

MM/rh