The claimant was discharged for yelling at his immediate supervisor, refusing to stop when his supervisor instructed him to do so, and directing profanity towards his supervisor as he left the workplace. Though he was frustrated by the perceived lack of assistance from his supervisor, his frustration alone is not a mitigating circumstance. Held he engaged in deliberate misconduct in wilful disregard of the employer's expectation pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0082 2251 06

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 February 20, 2024. He filed a claim for unemployment benefits with the DUA, effective February 11, 2024, which was denied in a determination issued on April 3, 2024. 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 June 25, 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, 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest because he did not fully understand that acting insubordinately and directing profane language towards a supervisor would lead to his 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 full-time for the employer, a rehabilitation and nursing center, as a food service director, beginning November 12, 2023. The claimant worked 7:00 a.m. to 3:00 p.m. The claimant was paid $67,500.00 annually.

2. The employee handbook contains an insubordination policy, which states:

   "Insubordination - deliberate refusal to comply with instructions issued by an authorized supervisor or disrespect, or the use of abusive or insulting language toward a supervisor."

3. The policy is a measure to ensure a comfortable and non-hostile work environment.

4. All employees are subject to the policy.

5. Discipline imposed for violation of the policy is left to the discretion of the employer based upon the behavior exhibited.

6. The claimant was issued the employee handbook at the time of hire.

7. It was the employer's expectation employees do not refuse to comply with instructions issued by an authorized supervisor or disrespect, or use abusive or insulting language toward, a supervisor.

8. The claimant did not need to be told the employer expected him not to refuse to comply with instructions issued by an authorized supervisor or disrespect, or use abusive or insulting language toward a supervisor.

9. The claimant, when speaking with employees, "swore and dropped an F-bomb."

10. On December 22, 2023, the claimant was issued an employee performance improvement notification - verbal warning for the use of improper language with employees.

11. The December 22, 2023, employee performance improvement notification - verbal warning stated: "Next Level of disciplinary action that will be taken if problem continues: Written Warning."

12. The December 22, 2023, employee performance improvement notification - verbal warning did not cite the next level of disciplinary action that will be taken if the problem continues would be a "three day suspension without pay" or "termination."

13. Kitchen staff consists of: a. a morning cook (MC) who starts at 5:00 a.m. and performs the duties on [sic] a dietary aide until 11:00 a.m., at which times he

resumes cook duties; b. a dietary aide (DA 1) who works 7:00 a.m. to 2:00 p.m., and c. the claimant.

14. On February 15, 2024, DA 1 called out.

15. The claimant, in his position, was to fill in for DA in his absence or call another dietary aide into work.

16. Another dietary aide (DA 2), who was not scheduled, arrived at 7:02 a.m. and worked the 7:00 a.m. to 2:00 p.m. shift.

17. At about 10:00 a.m., the claimant asked the Administrator, who was in the kitchen, to have another manager, the activity director, help him.

18. The claimant had completed a $3,000.00 food delivery which he had to store and wanted help with kitchen duties for about half an hour: "I can't do supervisory work in addition to cooking and dietary."

19. The Administrator denied the claimant's request because the activity director had his own work to do.

20. The Administrator told the claimant he was at "par level staffing", which was the claimant and two dietary aides (MC who performed dietary aide duties until 11:00 a.m. and DA 2).

21. As the Administrator was leaving the kitchen, the claimant said to a dietary aide: "Why is he being such an asshole, all I wanted was a little help."

22. The Administrator heard the claimant say "asshole."

23. The Administrator re-entered the kitchen and asked the claimant to go to the service hall, where the Administered [sic] intended to speak with him about his language and "par level staffing."

24. The claimant was frustrated, and before the Administrator could speak to the claimant in the service hall where the time-clock is located, he started yelling about being understaffed and needing help: "I'm not a magician. I can't do everyone's job and my own without help"; "[Administrator] gave me an attitude" and I was giving the [Administrator] attitude back."

25. The Human Resources Lead, who was punching-in, witnessed the exchange between the claimant and the Administrator.

26. The Administrator instructed the claimant to stop yelling, which he did not do.

27. The claimant had his hands raised.

28. The Administrator was nervous the claimant would get physical.

29. The Administrator told the claimant to punch out and go home.

30. The claimant, after punching [out], was leaving the premises when he called the Administrator a "fucking asshole."

31. The Administrator heard the claimant call him a "fucking asshole."

32. The employer obtained witness statements, in which one witness (Witness 1) stated: "I was walking into the building through the service hall, when I heard yelling. I then saw [Claimant], the food service director, screaming at our administrator [Name]. I saw him punch out say F*** you, you F****** A**Hole! Slam the door open and leave."

33. The Administrator submitted the statements to the Regional Vice President of Operations and its legal counsel for a disciplinary action determination.

34. On February 20, 2024, the claimant was terminated for insubordination and insulting language in the workplace on February 15, 2024.

35. The claimant did his job to the best of his ability.

36. The claimant did not expect to be terminated.

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 as follows. Finding of Fact # 24 conflates the words the claimant used during the hearing with what he said during the final incident with the administrator and appears to have erroneously attributed them to the final incident. Specifically, we refer to the portion of Finding of Fact # 24 that states, "[administrator] gave me an attitude and I was giving [administrator] an attitude back," which is merely the claimant's recounting of events during the hearing, and not his statement to the administrator or anyone else on February 15, 2024.[1] In addition, Finding of Fact # 36 is inconsistent with Findings of Fact ## 2 and 6–8, which demonstrate that the claimant was aware that he could face discipline, up to and including termination for his conduct on February 15, 2024. 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 is entitled to benefits.

[1] Similar language appears in the claimant's fact-finding statements, which have been entered into the record as Exhibits 1 and 3. *See also* Exhibits 11–14, which are the witness statements taken by the employer during its investigation. 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).

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 findings indicate that, in most situations, the employer retains discretion over issuing discipline for insubordination policy offenses. *See* Finding of Fact # 5. Although the employer's human resources representative referred to this category of offenses during the hearing, she testified that an employee "can" be discharged, as opposed to "will" be discharged, for such offenses.[2] As the employer did not provide any evidence that all other employees who committed the same offenses as the claimant were discharged, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. We, therefore, consider only 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 claimant conceded that, on February 15, 2024, he was "loud" in the hallway while speaking with the Administrator. *See* Findings of Fact ## 24 and 26. The claimant denied calling the Administrator a "fucking asshole." However, the employer presented two contemporaneously written witness statements, and the same two witnesses who wrote the statements attended the hearing and testified that they heard the claimant refer to the Administrator as a "fucking asshole." *See* Finding of Fact # 30 and Exhibits 13–14. The review examiner made an implicit credibility assessment accepting the employer's testimony and finding that the claimant did call the Administrator a "fucking asshole" as he was leaving the workplace after punching out. *See* Findings of Fact ## 30–31. We believe that this assessment is reasonable in relation to the evidence presented. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Therefore, the record supports a conclusion that the claimant engaged in the misconduct for which he was discharged. As nothing in the record suggests that the claimant's conduct on February 15, 2024, was inadvertent or accidental, we can infer that the claimant acted deliberately.

[2] The employer's testimony is also part of the unchallenged evidence introduced at the hearing and placed into the record.

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). 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).

Here, it is undisputed that the claimant received a copy of the employer's employee handbook, which contained the insubordination provision. Finding of Fact # 6. It is also undisputed that, approximately one month later, the claimant received a written warning regarding the improper use of language with employees, and that he received this warning specifically for using profanity in the workplace that was heard by other employees as well as residents of the facility. Finding of Fact # 10. During the hearing, the claimant interrupted the review examiner in the middle of a question to state that he did not need to be told the employer expected him not to refuse to comply with instructions issued by an authorized supervisor or disrespect, or use abusive or insulting language, toward a supervisor. *See* Finding of Fact # 8.

Notwithstanding this information, the review examiner concluded that the claimant did not have the requisite state of mind for deliberate misconduct in wilful disregard of the employer's interest, because the employer did not explicitly inform the claimant that these offenses would lead to his termination. Such analysis misapplies G.L. c. 151A, § 25(e)(2). This provision does not require that an employer show a claimant understood that he would be fired for engaging in misconduct. Rather, the employer must show that the claimant was made aware of its expectations not to engage in this misconduct through rules, policies, warnings, instructions, and so forth. *See* Garfield. 377 Mass. at 98. Therefore, a claimant will not be entitled to benefits if he is discharged for deliberately acting in a way that he knows is contrary to the employer's expectations.

As discussed above, the claimant understood that he was not allowed to engage in insubordinate conduct, especially towards a supervisor. *See* Findings of Fact ## 2, 6–8, and 10. Although this information is not in the findings, it is undisputed that the Administrator was the claimant's immediate supervisor. Therefore, the claimant's testimony confirms that he understood that yelling at the Administrator in the hallway and directing profanity towards him was contrary to the employer's expectations.

The purpose of these expectations is to ensure that employees enjoy a comfortable and non-hostile work environment. Finding of Fact # 3. Accordingly, we believe that the employer's expectations in this regard are facially reasonable.

Finally, we must consider whether the record contained sufficient evidence to conclude that mitigating circumstances prevented the claimant from adhering to the employer's expectations. 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).

With respect to his yelling at the administrator in the hallway, the claimant testified that was frustrated by the perceived lack of assistance from the administrator. Finding of Fact # 24. However, the Board has previously noted that mere frustration will not be sufficient to excuse misconduct. *See* Board of Review Decision 0070 6159 61 (May 27, 2022). The claimant alleged nothing else that could reasonably be construed as a mitigating circumstance, as the employer effectively rebutted the claimant's contention that he was short-staffed. *See* Findings of Fact ## 16, 18, and 20.

Moreover, the claimant denied directing profanity at the administrator. This precludes him from availing himself of the defense of mitigation, at least, with respect to his use of profanity and insulting language towards his supervisor. *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). Without mitigating circumstances, it is reasonable to infer that the claimant willfully disregarded the employer's interest.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant knowingly violated a reasonably and uniformly enforced policy and engaged in 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 beginning February 11, 2024, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 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.

JMO/rh