The claimant refused to repeat another employee's statement as part of a mediation process. The employer's instruction to the claimant was reasonable as it was not an unlawful request and was part of the employer's efforts to resolve an ongoing workplace conflict between the claimant and another employee. His choice not to repeat the alleged statement does not constitute mitigating circumstances. Held he was discharged for deliberate misconduct within the meaning of G.L. c. 151A, § 25(e)(2).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0082 3913 02

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 February 21, 2024. He filed a claim for unemployment benefits with the DUA, effective February 18, 2024, which was denied in a determination issued on March 26, 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 22, 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. 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's refusal to participate in a mediation process did not constitute deliberate misconduct in wilful disregard of the employer's expectations because he did not intend his refusal to be disrespectful or disruptive, 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 for the instant employer as a Catering Supervisor from July 2023 until his separation on 2/21/2024.

2. The employer has a company policy titled Disrespectful Behavior which states that engaging in any pattern of disruptive behavior or interaction that could interfere with the operation of the workplace or have an adverse impact on the quality of service or education may result in disciplinary action up to and including termination.

3. The claimant was provided the employer's Disrespectful Behavior policy in the employee policy manual at the time of hire.

4. The claimant was never issued any warnings for violation of the Disrespectful Behavior policy.

5. In July 2023, the claimant was working with the Lead Event Supervisor five days a week.

6. The claimant and the Lead Event Supervisor spoke about their personal lives each day and after a few weeks, the Lead Event Supervisor told the claimant that she had good news.

7. The Lead Event Supervisor told the claimant that she checked with the employe[r]'s rules and the employer allows employee[s] to date.

8. The claimant felt uncomfortable with the Lead Event Supervisor telling him that employees could date and kept his distance from the Lead Event Supervisor.

9. The following day, the claimant was loading the catering van with coffee urns needed for an event and the Lead Event Supervisor began removing the coffee urns out of the van and refused to acknowledge the claimant.

10. The claimant asked the Lead Event Supervisor what was wrong, and she yelled at the claimant that she was calling Human Resources without providing a reason why.

11. The claimant was never contacted by Human Resources and continued to work with the Lead Events Supervisor without any further incidents.

12. In November 2023, the Lead Events Supervisor told the Director of Dining that the claimant had yelled at her while working with him in July 2023.

13. As a result, the Director of Dining questioned the claimant, asking if he yelled at the Lead Event Supervisor back in July.

14. The claimant told the Director of Dining that he never yelled at the Director of Dining [sic] and she had yelled at him for an unknown reason.

15. The claimant told the Director of Dining that he did not feel comfortable working with the Lead Event Supervisor because [she] made a romantic comment about employees being allowed to date.

16. The Director of Dining told the Director of Human Resources that he spoke with both employees and no warnings were issued by the employer.

17. On 1/18/2024, the Lead Event Supervisor emailed the Director of Dining which stated that that the claimant had been ignoring her in the workplace.

18. On 1/19/2024, the Director of Dining met with the Lead Event Supervisor with the Director of Dining offering to mediate any issues with the claimant. The Lead Event Supervisor agreed to the mediation with the Director of Dining.

19. The Director of Dining met with the claimant and asked him to participate in medi[ation] with the Lead Event Supervisor to find common ground.

20. The claimant told the Director of Dining that the medi[ation] would not have any impact and that he would prefer to work by himself.

21. The Director of Dining told the Director of Human Resources that the claimant refused to participate in a medi[ation] meeting.

22. The Director of Human Resources decided to schedule a formal medi[ation] session with the claimant and the Lead Event Supervisor.

23. On 2/14/2024, the Director of Human Resources called the claimant into a meeting with the intent to mediate any disagreement so the employees could work together.

24. The Director of Human Resources told the Lead Event Supervisor to speak first with the Lead Event Supervisor [sic] stating that she felt intimidated and scared by the claimant because of being yelled at during the catering incident and that she wanted [sic] working relationship.

25. The Director of Human Resources told the claimant that he would need to repeat the statement of the Lead Event Supervisor as part of the medi[ation] process.

26. The claimant was not comfortable with repeating the statement and explained that her statement was too dangerous to repeat.

27. The claimant felt threatened by the statement made by the Lead Event Supervisor since he did not yell at her.

28. The claimant did not want to repeat a statement stating that he yelled at her when he had never yelled at her. The claimant did not want to repeat her lie.

29. The Director of Human Resources explained to the claimant that he was required to repeat what she said regardless of how he felt. The claimant again told the Director of Human Resources that he was not comfortable repeating the statement from the Lead Event Supervisor.

30. The Director of Human Resources never told the claimant that he could be terminated for refusing to repeat the statement made by the Lead Event Supervisor.

31. The claimant was unaware that refusing to repeat the statement would result in his termination.

32. The Director of Human Resources ended the meeting and sent both employees back to work.

33. The Director of Human Resources made the decision to terminate the claimant's employment for violating the Disrespectful Behavior policy for refusing to repeat the Lead Event Supervisor's statement.

34. On 2/21/2024, the Director of Human Resources issued the claimant a termination notice informing the claimant that he was terminated for being unwilling to engage in any constructive resolution with a co-worker [sic] was considered violation of the Disrespectful Behavior policy.

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).

While the employer maintains a policy prohibiting employees from engaging in disrespectful or disruptive behavior that could impact workplace operations, it did not provide any evidence showing that it discharged all other employees who similarly declined to engage in the employer's conflict mediation process as the claimant was instructed to do here. *See* Consolidated Finding # 2. Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* 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.

In this case, the employer discharged the claimant because he refused to repeat statements made by another employee as part of a mediation process. Consolidated Finding # 34. As the claimant confirmed that he had refused that request during the mediation meeting on February 14, 2024, there is no question that he engaged in the misconduct for which he was discharged. Further, because he refused that instruction twice, it is self-evident that his refusal was deliberate. Consolidated Findings ## 25 and 29.

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 review examiner awarded the claimant benefits because he concluded that the claimant did not intend to be disrespectful or disruptive and was, therefore, not aware his actions were failing to meet the employer's expectations. His conclusion in this regard represents an incomplete understanding of the information contained in the applicable policy and misrepresents the claimant's testimony about his understanding of the employer's expectations.

The policy at issue, which was admitted into evidence as Exhibit 6, contains examples of disrespectful behavior the employer prohibits as well as respectful behavior the employer condones. Among the behaviors identified in the latter category are "[u]sing conflict-management skills, together with courteous verbal communication, to manage disagreements among

colleagues", and "abiding by applicable rules, regulations, policies, and bylaws".[1] Consistent with this policy, the Director of Human Resources articulated a specific expectation that the claimant engage in the formal mediation process at the meeting held on February 14, 2024. Findings of Fact ## 25 and 29. While the claimant may have felt uncomfortable with repeating the statement made by the Lead Event Supervisor as part of this mediation process, his discomfort does not alter his understanding that the Director of Human Resources and Director of Dining expected him to engage in the mediation process in a manner that required that he repeat the statement. *See* Findings of Fact ## 25–29. Therefore, he necessarily understood that refusal to do so was contrary to the employer's expectations.

The Director of Human Resources instructed the claimant to engage in the mediation process in an effort to resolve an issue impacting the claimant's ability to work with the Lead Event Supervisor. Findings of Fact ## 10, 12, 17–19, and 23. Inasmuch as the employer was not instructing the claimant to engage in any unlawful act, compelling him to admit to misconduct, or otherwise requiring him to accept the accuracy of the Lead Event Supervisor's statements, the record does not substantiate the claimant's assertion that it would have been dangerous for him to repeat those statements. *See* Findings of Fact ## 23–29. We, therefore, believe the employer's expectation was reasonable, as it served to address a workplace conflict and promote a productive working environment.

Finally, we consider whether the claimant has presented mitigating circumstances for his behavior. 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). The claimant conceded that he chose to refuse the Director of Human Resources' instructions. In so choosing, it is evident that the claimant was aware of the employer's expectation to provide the requested information. His personal decision not to supply said information was not a circumstance beyond his control. Thus, the claimant has not established mitigating circumstances for his misconduct. *See* Finding of Fact # 28.

We, therefore, conclude as a matter of law 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).

The review examiner's decision is reversed. The claimant is denied benefits for the week of February 18, 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.

[1] Exhibit 6, while not explicitly incorporated into the review examiner's findings, 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 2024

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Chairman 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.

LSW