

**The claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when he yelled at his managers for questioning him about his cell phone use and unauthorized extended break time. Being upset is not a mitigating reason for his disrespectful behavior. He is ineligible for benefits pursuant to 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 4206 70**

### Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on February 27, 2024. He filed a claim for unemployment benefits with the DUA, effective March 3, 2024, which was approved in a determination issued on March 27, 2024. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 11, 2024. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to give the claimant an opportunity to testify and present other evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest when he was disrespectful to his managers, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. The claimant worked as a part-time, front-end assistant for the employer, a retail store, between November 17, 2022, and February 27, 2024, when he separated.

2. The claimant worked between twenty (20) and twenty-five (25) hours per week, earning \$17.50 per hour.
3. The claimant's supervisor was the front-end manager ("supervisor").
4. The employer maintains a policy that prohibits failing to interact with others in a respectful, courteous and professional manner. The exact contents and language of the policy are unknown.
5. The employer also maintains a conduct and discipline policy, which prohibits excessive policy violations, such as having "four counseling notices within a 6-month period even if unrelated."
6. At his time of hire, the claimant was given a handbook with the policies.
7. A violation of the policies results in disciplinary actions up to and including termination.
8. The employer maintains an expectation that its employees refrain from being rude or disrespectful to the supervisors and managers.
9. The employer also maintains an expectation that its employees refrain from excessive policy violations.
10. The claimant was aware of the expectations, having received the policies.
11. On September 29, 2023, the claimant was issued a written warning for being tardy.
12. On January 3, 2024, the claimant was issued a written warning for unprofessionalism.
13. On February 2, 2024, the claimant was issued another written warning for undertaking an act that jeopardizes the order of business.
14. On February 13, 2024, while the claimant was attempting to synchronize his telephone to his car's alarm system, one of the employer's managers (Manager A) told him to get off his phone. Manager A did not yell at the claimant. The claimant yelled at manager A in a disrespectful manner for telling him to get off his phone.
15. On February 13, 2024, the claimant was sitting in his car during his break. The claimant took an extended break without the employer's consent.
16. On February 13, 2024, one of the employer's supervisors in training (supervisor A) and the night manager (manager B) approached the claimant, who was still sitting in his car, about the extended break. The claimant became angry and upset that two management staff members had approached him at the same

time. The claimant yelled at supervisor A and manager B and asked why two of them were coming to get him.

17. The claimant was not issued any disciplinary consequences regarding the extended break.
18. On February 13, 2024, the claimant was sent to the assistant general manager's (AM) office by manager B.
19. While in the AM's office, the claimant, who was upset about being spoken to previously about his break, began yelling and speaking in a loud and disrespectful manner to manager B and the AM.
20. On February 13, 2024, after leaving the office, the claimant was speaking on his cell phone to his aunt, who is Jamaican. The claimant was speaking in Jamaican dialect during the phone call. The claimant was not using any profanity.
21. On February 13, 2024, the claimant did not use any profanity while speaking on his cell phone in the presence of the employer's front-manager.
22. On February 15, 2024, the employer suspended the claimant for being disrespectful to the supervisors and the managers on February 13, 2024. The claimant was also issued a written warning.
23. On February 27, 2024, the claimant was discharged from his employment by the general manager for excessive policy violations for having four (4) counseling notices within a 6-month period.
24. The claimant applied for unemployment benefits and established a claim effective March 3, 2024.
25. After initially being determined eligible for benefits on May 11, 2024, a review examiner issued a decision finding the claimant ineligible for benefits based on the separation from this employer.
26. The claimant appealed the May 11, 2024, decision to the Board of Review. In his appeal, the claimant wrote, in part, that a manager "yelled at me from across the Membership Desk to get off my phone. In the same manner, I yelled back from my station at the exit door, that I was just resetting the security alarm on my car." Additionally, he wrote, in part: "They proceeded to tell me that I was being written up for disrespecting [the manager] by yelling at him in the front of the store. I raised my voice in frustration...."

Credibility Assessment:

During the remand hearing, the claimant initially alleged that he did not yell at supervisor A and manager B, when they approached his car regarding his excessive break. The claimant also testified during the remand hearing that he did not yell at the manager when he was told to put away his phone. The claimant asserted that he got off the phone and he did not yell or talk back to the manager.

However, the claimant's initial testimony is inconsistent with his later testimony and with other evidence. Later, in regard to the extended break, he testified that he yelled at them because he was overwhelmed that both had approached him instead of just one. Additionally, in his appeal to the Board of Review, regarding the phone incident, the claimant stated that he yelled at the manager in response to the manager yelling at him. He also stated that he raised his voice in frustration during the following meeting.

Conversely, during the first hearing, the employer's witness testified that on several occasions the claimant yelled at and was disrespectful to the supervisors and managers on February 13, 2024. The employer presented firsthand testimony, that the claimant was disrespectful and yelling while in the office because he was upset with manager B and supervisor A for speaking to him about his extended break. This testimony is consistent with what the claimant eventually admitted to at the remand hearing.

In that the employer has provided consistent, detailed testimony as to what happened in the final incidents, it is concluded that the employer's evidence and testimony is [sic] more credible than [sic] the testimony offered by the claimant. Therefore, findings that the claimant yelled and was disrespectful were made according to the testimony given by the employer. The findings of fact indicate that the employer was acting reasonably in questioning or speaking with the claimant about the extended break, being on his cell phone, and yelling at his supervisors.

### 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 consolidated 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 consolidated findings of fact and deems 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.

Because the claimant was discharged from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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 review examiner found that the employer has a policy prohibiting disrespectful and unprofessional conduct in the workplace. Consolidated Finding # 4. Because the employer did not provide evidence pertaining to the discipline issued to others for violations of the policy, we cannot conclude that the claimant violated a reasonable and *uniformly enforced* rule or policy of the employer. Alternatively, we consider whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must demonstrate that the claimant engaged in the misconduct or policy violation for which he was discharged. In this case, the employer discharged the claimant for being disrespectful to his managers on February 13, 2024. Consolidated Finding # 22–23. Specifically, the claimant yelled at a manager who asked him to put his cell phone away while working, he yelled at two managers who went to find him when he went over his allotted break time, and he yelled at management when questioned about the incident with his break time. Consolidated Findings ## 14–16, and 18–19. Inasmuch as the employer expected employees to refrain from disrespectful and unprofessional behavior in the workplace, and the claimant yelled at his managers on February 13<sup>th</sup>, we agree that the claimant engaged in misconduct. We further believe that the misconduct was deliberate, as the claimant testified that he yelled when he was upset at his managers. Consolidated Findings ## 16 and 19.

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 claimant here was aware of the employer's expectation that he refrain from disrespectful and unprofessional conduct in the workplace, as he had received a handbook with the employer's policies and expectations when he was hired. Consolidated Finding # 6. We believe that the employer's expectation was reasonable, as it was in place to ensure a professional work environment for all employees. Consolidated Finding # 4.

Finally, we consider whether the claimant has demonstrated 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). The claimant yelled at his managers because he was upset that he was being

questioned about his cell phone use and his break time, and because two managers instead of just one approached him about going over his break time. In our view, the employer acted reasonably both in questioning the claimant on these matters and in the manner in which it approached the claimant. Though he may have been upset, the claimant has not demonstrated that these circumstances rendered him unable to avoid yelling. Thus, the claimant has not shown mitigating circumstances for his behavior.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning February 25, 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.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 20, 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](http://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.

SVL/rh