Where use of obscene language was a common occurrence and apparently tolerated on the employer's plant floor, the claimant's swearing at his supervisor was not done in wilful disregard of the employer's interest. However, the claimant also swore at the regional HR manager. Because the claimant understood his use of such language was wrong and only had reason to believe the employer tolerated such language on the plant floor, his discharge for swearing at the regional HR manager was 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: 0082 8771 62

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 April 18, 2024. He filed a claim for unemployment benefits with the DUA, effective May 26, 2024, which was approved in a determination issued on June 11, 2024. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on July 23, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated 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 use of profane language was not deliberate misconduct in wilful disregard of the employer's expectations because he was expressing anger and swearing was commonplace at the employer's plant, 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 materials handler for the employer, a paper mill. The claimant began work for the employer on August 1, 2023. He worked full-time and earned $25 per hour.

2. The employer maintains a Fair Treatment of Others Policy that includes examples of offenses against another person. The list includes "Abusive Language."

3. The claimant was aware of the employer's policies.

4. When the claimant was hired, he worked on the main deck. The main deck is where paper comes out of machinery and is separated.

5. The employer asked the claimant if he was interested in working in the fiber area, where production begins. The trainer and the floor supervisor told him he would receive an extra $1 per hour. The claimant agreed.

6. After starting work in the fiber area, the claimant did not receive an extra $1 per hour. He requested to return to work on the main deck. After another worker was hired, the employer returned him to the main deck.

7. It was common for employees to use profane language while at work in the production areas. The claimant's supervisor, the plant manager, used profane language when he was upset. On one occasion, when the plant manager asked two employees to work in the fiber area, they told him to go fuck himself. The employer did not discipline the employees.

8. The plant manager asked the claimant to temporarily return to the fiber area because of a lack of workers. The claimant agreed he would return temporarily. After some time, the claimant asked the plant manager if he could return to the main deck. The plant manager told him they would talk about it.

9. On Tuesday, April 16, 2024, the claimant again asked the plant manager if he could return to the main deck. The plant manager said they would talk about it.

10. The claimant had a good relationship with the administrative assistant and felt he could talk to her. The claimant spoke to his wife, who recommended that he speak with the administrative assistant.

11. The claimant spoke with the administrative assistant in the administrative area. The plant manager overheard the conversation. The plant manager told the claimant he was suspended.

12. The claimant told the plant manager he would return to work in the fiber area. The plant manager told him he was suspended. The claimant told him he was an "ass wipe" and would not put up with his "bullshit." The claimant left the employer.

13. After he left work, the employer's regional HR manager called the claimant and asked him what happened. She told him he was considered to have refused to work in the fiber area. The claimant was upset because he did not think he was treated fairly. The claimant used profane language, told her he quit, and hung up.

14. On Wednesday, April 17, 2024, the claimant called the plant manager and asked him what he was suspending him for. The plant manager said he refused to work. The claimant disagreed, said, "fuck you" and hung up.

15. On April 18, 2024, the employer discharged the claimant for violating the Fair Treatment of Others 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).

The employer maintains a policy prohibiting employees from using abusive language while speaking with other employees. Finding of Fact # 2. However, it failed to provide any evidence that it discharged all other employees who used abusive language under similar circumstances. 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 swore at the employer's plant manager and regional HR manager. *See* Findings of Fact ## 12–15. Since the claimant confirmed he had used obscenities while speaking to both individuals, there is no question he engaged in the misconduct for which he was discharged. Further, as he testified that he used obscene language in order to express his anger with the employer's plant manager, his own testimony confirms that his use of such language was deliberate.[1]

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 confirmed that he was aware of the employer's policy prohibiting use of abusive language. Findings of Fact ## 2 and 3. However, he maintained that he did not think he violated the employer's prohibition on abusive language because he had witnessed other employees swear on the plant floor without consequence. *See* Finding of Fact # 7. If an employer allows employees to bend a work rule without consequence, it is reasonable for a claimant to believe that such conduct is acceptable to the employer. *See* New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 535 (2004) ("[f]ailure to enforce a policy uniformly, whether to the employee's benefit or detriment, still influences the employee's belief regarding the consequences of his actions"). While the claimant understood that this language was not appropriate, swearing was commonplace and seemingly tolerated amongst employees on the plant floor. From this he could reasonably infer that the employer did not object to it.

Although the claimant may have reasonably believed that the employer did not object to the use of obscenities with staff on the plant floor, such an understanding does not excuse his use of obscenities when speaking with the employer's regional HR manager. *See* Finding of Fact # 13. While the employer's witness, its administrative assistant, could not confirm the claimant's testimony about the language used on the plant floor, she confirmed that using such language was not commonplace amongst all employees.[2] The regional HR manager worked from a different

[1] The claimant's testimony in this regard as well as his testimony referenced below, 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).

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

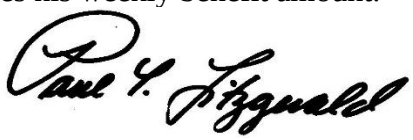
location and, like the employer's administrative assistant, would not have knowledge of what behavior may have been tolerated on the plant floor.

In his testimony, the claimant acknowledged that it was wrong to use obscene language when speaking with the regional HR manager. Thus, tolerating such behavior on the plant floor does not support a conclusion that he reasonably inferred he could interact with other employees in the same way. His termination for use of such language with the regional HR director cannot fairly be characterized as a surprise.

Finally, we consider whether the claimant demonstrated 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 explained that he used obscenities to his express his frustration with the situation. Frustration does not amount to a circumstance beyond his control.

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 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 May 26, 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 - October 28, 2024

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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