When the claimant talked on his cell phone on work time in the employer's restroom, he engaged in deliberate misconduct in wilful disregard of the employer's interest. The review examiner reasonably rejected the claimant's unsupported testimony that he answered the phone spontaneously, because it was from his pharmacist and he urgently needed medication. The claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0083 0098 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 was discharged from his position with the employer on June 19, 2024. He filed a claim for unemployment benefits with the DUA, effective June 16, 2024, which was denied in a determination issued on July 12, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, where the employer participated only in the initial hearing session, the review examiner overturned the agency's determination and awarded benefits in a decision rendered on September 13, 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, nor had he knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 remanded the case to the review examiner to afford the employer an opportunity to conduct cross-examination and to consider further evidence from both parties. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 did not act deliberately in wilful disregard of the employer's cell phone use policy because he reacted spontaneously in answering his cell phone during work hours, 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 full-time for the employer, a manufacturing facility, as a production operator, beginning October 25, 2021. The claimant worked 5:00 a.m. to 3:30 p.m. The claimant was paid $22.13 per hour.

2. The employer's RULES OF PERSONAL CONDUCT AND ATTENDANCE states, in part:

   Section B: Any of the following actions committed by an employee are considered to be serious acts of misconduct. The first offense may result in progressive discipline. The next offense, not necessarily of the same violation, may result in suspension pending investigation and subject to discharge. A combination of violations of any of the Rules in Section B may result in skipping one or more of the progressive discipline steps and lead to immediate discharge.

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   19. Use of cell phones in the plant is prohibited, unless authorized for company business or during authorized break and lunch periods. Cell phone cameras and other photographic equipment are only permitted with Company approval.

   PERSONAL USE OF MOBILE & ELECTRONIC DEVICES

   Employees are required to limit their personal and electronic device usage to lunch and break periods. Usage during work hours and in work areas is a distraction and a safety violation subject to disciplinary action.

   Section E. DISCIPLINE

   It is [Employer's] policy to administer progressive discipline in a fair and consistent manner. It is our sincere hope and intent that the administration of discipline will result in the correction of problems and/or the elimination of potential problems.

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3. Discipline imposed for violation of the policy is left to the discretion of the employer.

4. On October 25, 2021, the claimant received and signed for the RULES OF PERSONAL CONDUCT AND ATTENDANCE.

5. It was the employer's expectation that employees do not use cell phones in the plant unless authorized for company business or during authorized break and lunch periods.

6. The claimant did not need to be told the employer expected him not to use his cell phone in the plant unless authorized for company business or during authorized break and lunch periods.

7. On February 1, 2024, the claimant was issued a PERFORMANCE /CONDUCT DISCIPLINARY ACTION REPORT - Final Warning/Suspension for violation of Rules of Personal Conduct.

8. The February 1, 2024, PERFORMANCE /CONDUCT DISCIPLINARY ACTION REPORT - Final Warning/Suspension further stated:

   "Additional Remarks: Any future violations of the work rules will result in termination in accordance with [EMPLOYER] Rules of Personal Conduct, up to and including discharge. This document will become part of your personnel record."

9. On April 3, 2024, the claimant was issued a PERFORMANCE /CONDUCT DISCIPLINARY ACTION REPORT – Final Warning/Suspension for violation of Rules of Personal Conduct.

10. The PERFORMANCE /CONDUCT DISCIPLINARY ACTION REPORT - Final Warning/Suspension placed the claimant on a 3-day suspension, April 5, 2024, April 8, 2024, and April 9, 2024.

11. The April 3, 2024, PERFORMANCE /CONDUCT DISCIPLINARY ACTION REPORT - Final Warning/Suspension further stated:

    "Additional Remarks: Any future violations of the work rules will result in termination in accordance with [EMPLOYER] Rules of Personal Conduct. This document will become part of your personnel record."

12. The claimant understood from the April 3, 2024, PERFORMANCE /CONDUCT DISCIPLINARY ACTION REPORT - Final Warning/Suspension [sic] a future Rules of Personal Conduct violation would result in termination.

13. The claimant has 10-minute breaks beginning at 9:00 a.m. and 2:00 p.m.

14. The claimant's lunch break is from 11:30 a.m. to 12 noon.

15. On one occasion, the claimant, during work hours at his workstation, was speaking with his supervisor (Supervisor A) about his newborn great-grandson and used his cell phone to show him photos of his great-grandson.

16. Supervisor A used his cell phone to show the claimant photos of his wife and daughter.

17. The claimant was not disciplined for use of his cell phone during work hours when speaking with Supervisor A.

18. On June 18, 2024, at about 1:30 p.m., not during a lunch break or other break period, the claimant went to the restroom.

19. While in the restroom, the claimant's cell phone rang.

20. The claimant answered the call.

21. The claimant was talking on his cell phone when Supervisor A entered the restroom and observed the claimant on his cell phone.

22. Supervisor A reported to Human Resources that the claimant was talking on his cell phone in the restroom with his arm on the windowsill and that he heard the claimant say: "Drive safe, brother."

23. Human Resources later met with the claimant and Supervisor A.

24. The claimant told Human Services and Supervisor A that when he was in the restroom, he had received a phone call from his pharmacist telling him that his blood pressure medication, which he had run out of, was ready for pickup, and that all he said was "Hello, thank you, goodbye."

25. On June 19, 2024, the claimant was terminated for using his cell phone in the plant outside of his designated break periods in violation of the employer's policy.

26. The claimant had not been previously warned about unauthorized cell phone use.

27. The claimant's pharmacy, [Name], is located on [Street A] in [City A], Massachusetts.

28. The claimant's cell phone is on his wife's cell phone plan with Verizon.

29. The claimant's cell phone number is ABC-ABC-ABCD.

30. The phone call made to the claimant on June 18, 2024, which he received in the employer's restroom was made to the claimant's cell phone's number: ABC-ABC-ABCD.

Credibility Assessment:

> The testimony conflicted about who the claimant was speaking to on June 18, 2024, at about 1:30 p.m., in the restroom, his pharmacist or someone else, when Supervisor A observed him on his cell phone. The claimant testified he was speaking with his pharmacist and all he said was: "Hello, thank you, goodbye. Supervisor A testified he heard the claimant say: "Drive safe, brother." The November 20, 2024, remand hearing was specifically continued to have the claimant obtain his wife's cell phone record for June 18, 2024, to establish the phone number of the call he received at about 1:30 p.m. in the restroom on June 18, 2024, was from his pharmacist's phone number. The claimant did not submit the cell phone record for June 18, 2024. The claimant testified he understood from the prior hearing he was to obtain his pharmacist's phone records, rather than his wife's cell phone records. It is unreasonable to believe the claimant understood he was to obtain his pharmacy's phone records rather than his cell phone records to establish he received a call from his pharmacist at about 1:30 p.m. on June 18, 2024. The claimant's testimony he understood he was to obtain his pharmacy's phone records rather than his own cell phone records is not deemed credible. It is further concluded the claimant's testimony that the phone call he received in the restroom on June 18, 2024, at about 1:30 p.m., was from his pharmacist is not deemed credible.

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. However, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant is eligible for benefits.

Because the employer discharged the claimant, his qualification 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).

In this case, the employer discharged the claimant for using his cell phone during work hours outside of a designated break period in violation of the employer's policy, which prohibits such use unless authorized for company business. *See* Consolidated Findings ## 19 and 25. Specifically, on June 18, 2024, the claimant was observed talking on his cell phone in the restroom at about 1:30 p.m., which was not during his lunch or other break period. *See* Consolidated Findings ## 18–21. Inasmuch as there is no dispute that the claimant was talking on his phone at this time, and he has not asserted that it was related to any company business, there is no question that the claimant engaged in the misconduct for which he was fired, violating the cell phone usage policy.

The consolidated findings show that discipline for violating this policy is left to the employer's discretion. Consolidated Finding # 3. Moreover, on at least one occasion, the claimant shared photographs from his cell phone with his supervisor, while not on break, without consequence. *See* Consolidated Findings ## 15–17. In light of these findings, the employer has failed to meet its burden to prove a knowing violation of a reasonable and *uniformly enforced* policy. Alternatively, the employer may establish that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

In his original decision, the review examiner concluded that the claimant did not deliberately violate the policy on June 18, 2024. He reached this conclusion because he found that the claimant acted spontaneously in answering his phone. Notably, after remand, the review examiner did not include this finding in his consolidated findings.[1] Implicit in this revision is that the review examiner no longer believed that the claimant acted spontaneously.

Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence."" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

Although it does not specifically state why the review examiner no longer believed the claimant's assertion that he spontaneously answered the ringing phone, the credibility assessment does explain why the review examiner rejected the rest of the claimant's testimony about what happened in the restroom on June 18, 2024. Ultimately, the credibility of the claimant's version of events rested on whether he produced substantial evidence to show that he was merely answering a call about much needed medication from his pharmacist. Despite continuing the hearing in order to afford the claimant an opportunity to obtain corroborating cell phone records, the claimant did not

[1] Compare Consolidated Findings ## 19 and 20 with the original hearing decision, Remand Exh. 4, Finding of Fact # 14.

present any new evidence. Absence such evidence, the review examiner reasonably assigned more weight to the testimony of the employer's eyewitness, who heard the claimant say during the call, "Drive safe, brother."

Given the removal of the "spontaneous" finding, and the absence of any suggestion that the claimant otherwise answered the phone by accident, we are satisfied that he acted deliberately when he answered and talked on his cell phone in the restroom on June 18, 2024.

However, showing deliberate misconduct is not enough. The employer must also prove that the claimant acted in wilful disregard of its 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) (citation omitted). 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 employer's cell phone use policy explicitly states that its underlying purpose is a safety measure to avoid distractions while working. *See* Consolidated Finding # 19. Inasmuch as the employer is a manufacturing facility, this is a reasonable expectation. Consolidated Finding # 6 implies that the claimant was aware that he was expected not to use his cell phone during work unless on break or authorized for company business. The record supports this.

This is so even though the claimant asserted that everyone uses their cell phone in the restroom, insinuating that he should not be fired for this infraction, especially when he had not been disciplined before when sharing family photos with his supervisor. In effect, he is arguing that he was led to believe that using his cell phone in the restroom was allowed. *See* Gold Medal Bakery, Inc. v. Comm'r of Division of Unemployment Assistance, 74 Mass. App. Ct. 1105 (2009), *summary decision pursuant to rule 1:28* (holding that the employer's excusing of past misconduct had led the claimant to "reasonably [believe] that [further misconduct] . . . would be excused as it had been before, and that [he] did not possess the requisite state of mind" to be disqualified for deliberate misconduct in wilful disregard of the employer's interest). *See also* New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 533–535 (2004) (holding that where the employer had overlooked the claimant's prior absences, and then discharged the claimant for excessive absences, the employer led the claimant "to believe that he would not lose his job for failing to adhere to the attendance policy's . . . requirements.").

We are unpersuaded that the claimant believed that talking on his cell phone on June 18, 2024, was condoned. He presented no evidence to corroborate his testimony that his coworkers all used their cell phones in the restroom. Additionally, even though he was not disciplined for sharing family photographs with his supervisor on that one occasion, he told the review examiner that he did not need to be told that using a cell phone during work time was not allowed. *See* Consolidated Findings ## 6 and 16–17.

Alternatively, the claimant tried to convince the review examiner that there were mitigating circumstances for violating the policy that day. He asserted that the only reason that he violated the policy was because he urgently needed medication from his pharmacy and answered the call spontaneously without thinking. As discussed above, these excuses have been rejected as not credible.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant 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 June 16, 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 - March 7, 2025

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.

AB/rh