Board of Review
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Issue ID: 334-FHJD-RKDT

*** CORRECTED DECISION ***

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 November 30, 2023. He filed a claim for unemployment benefits with the DUA, effective November 26, 2023, which was denied in a determination issued on December 20, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 14, 2025. 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. Only the claimant responded.

Due to an administrative error, the Board did not have the opportunity to review the claimant's submission of written arguments until after a decision had been issued. We have now received and reviewed the claimant's submission and issue this decision commensurate with our assessment of all materials submitted by both parties. 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 have the requisite state of mind for deliberate misconduct in wilful disregard of the employer's interests because his use of obscene and offensive language was a result of his frustration after being spoken to about not being in uniform, 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 full-time detail associate for the employer, a car dealership, between October 2020 and November 30, 2023, when he separated.

2. The claimant worked Mondays through Fridays between 7:00 a.m. - 4:00 p.m., earning $23.50 per hour.

3. The claimant's direct supervisor was the inventory manager (manager).

4. The employer maintains a "Treating Associates with Respect Policy" (policy) which states that the employer will not tolerate disrespectful conduct, discrimination, retaliation or harassment in the workplace.

5. At his time of hire, the claimant received the policy.

6. A violation of the policy can result in warnings and termination.

7. The employer expects employees to refrain from using obscene and discriminatory language while at work.

8. The claimant was aware, as a matter of common sense, that the employer expected him to refrain from using obscene and discriminatory language while at work.

9. On or about November 10, 2023, while at work, the claimant was spoken to by other associates about his uniform and it was pointed out that he was wearing sweatpants.

10. On November 10, 2023, the claimant became frustrated and "caught a short temper and lashed out" because he believed he was being picked on about his uniform.

11. On November 10, 2023, in expressing his frustration for being spoken to about his uniform, the claimant said to his coworker, who was his friend, "I wonder if niggas (N-word) and fags (F-word) looking at my pants and worrying about the wrong things." Other associates heard the claimant's statement to his friend.

12. On an unknown date, another associate reported the claimant's use of the N-word and F-word on November 10, 2023, to the employer.

13. On November 30, 2023, the employer discharged the claimant for using obscene and discriminatory language while at work on November 10, 2023.

14. The claimant had previously heard other employees use the N-word and the F-word while at work, but not in the presence of the managers.

15. After the claimant filed for unemployment, the employer completed a fact-finding questionnaire for the Department of Unemployment Assistance (DUA).

> In the questionnaire, the employer stated "Specifically, it was reported that he was frustrated at being called out for wearing sweatpants."

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 disrespectful or discriminatory behavior in the workplace. Finding of Fact # 4. However, it retains discretion as to what disciplinary action may be imposed for violation of this policy. Finding of Fact # 6. Absent evidence that the employer discharged all other similarly situated employees who used obscene language in the workplace, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* rule or policy under G.L. c. 151A, § 25(e)(2).

We next consider whether the employer has shown the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectation. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged.

The employer discharged the claimant for using obscene and discriminatory language while at work on November 10, 2023. Finding of Fact # 13. As the claimant confirmed he used obscene and discriminatory language while speaking with a coworker on that day, his own testimony confirms that he engaged in the misconduct for which he was discharged. Finding of Fact # 11. Further, we can reasonably infer that the claimant chose to use such language in a conversation with a co-worker as a way to vent his frustration after concluding that other associates were picking

on him by making comments about his clothing. In our view, his decision to express his frustration in such a manner was self-evidently deliberate. *See* Findings of Fact ## 10 and 11.

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).

Implicit in Finding of Fact # 8 is that the review examiner rejected as not credible the claimant's testimony that he was unaware of the employer's expectation that he refrain from using obscene and discriminatory language at work. 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). Inasmuch as the claimant also provided testimony indicating that he understood that using such language was unacceptable in a professional environment, we believe that the review examiner's assessment is reasonable in relation to the evidence presented.[1]

We also believe that a policy that prohibits obscene and discriminatory language is a reasonable measure to avoid disharmony in the workplace.

However, the review examiner concluded that the claimant did not have the requisite state of mind to act in wilful disregard of the employer's interest because his frustration with the other associates' comments constituted mitigating circumstances for his behavior. *See* Findings of Fact ## 13 and 16. Such is a misapplication of G.L. c. 151A, § 25(e)(2). When assessing a claimant's state of mind, the determinative issue is whether a claimant engaged in "conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). An analysis of mitigating circumstances focuses on 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).

Although the claimant may have been upset by the other associates' comments about his choice of clothing, he has not demonstrated that these circumstances compelled him to use obscene or discriminatory language in order to articulate his frustration. Thus, the claimant has not shown mitigating circumstances for his behavior.

[1] While not explicitly incorporated into the review examiner's findings, the claimant's testimony in this regard 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).

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to 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 November 26, 2023, 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 31, 2025

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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