Held that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when she told a coworker that a patient's son "sounded out of it and stoned." She is disqualified pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 352-MNJ5-HVM7

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 was discharged from her position with the employer on May 5, 2025. She filed a claim for unemployment benefits with the DUA, effective June 8, 2025, which was denied in a determination issued on July 22, 2025. 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 September 2, 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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, because the claimant had a good faith lapse in judgment when she told a coworker that a patient's son "sounded out of it and stoned," 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 full-time as a dispatcher for the employer, an ambulance service. The claimant began working with the employer on September 20, 2021, until May 5, 2025, when she separated.

2. The claimant's immediate supervisor was the dispatch supervisor (supervisor).

3. The employer maintains a Code of Conduct (policy) which prohibits discourteous conduct at the workplace. The contents and provisions of the policy are unknown.

4. A violation of the policy results in disciplinary action up to and including termination.

5. At her time of hire, the claimant signed an acknowledgment that she received the policy.

6. The employer expects employees to refrain from being unprofessional or discourteous to its customers.

7. The claimant was aware, as a matter of common sense, of this expectation.

8. A violation of the policy results in disciplinary action up to and including termination.

9. On May 5, 2025, the claimant was scheduled for and worked her scheduled shift.

10. On May 5, 2025, while at work, the claimant answered a call from the son (the son) of one of the employer's patients, who informed her that his mother had been injured while being transported by the employer's employees.

11. During the phone call, the claimant had difficulty understanding the son because he was speaking in circles and making long pauses. The claimant became frustrated with his communication during the conversation.

12. On May 5, 2025, after the claimant discovered that the son was making a complaint, she transferred the call to the supervisor who was in the room with her.

13. After the claimant got off the call, her coworker (coworker A), who was present in the room, asked her what was that about. The claimant, who was frustrated by her conversation with the son, told coworker A that the son "sounded out of it and stoned."

14. On May 5, 2025, the son, who was still on the phone with the supervisor, overheard the claimant tell coworker A that he "sounded out of it and stoned."

15. On May 5, 2025, when the claimant answered coworker A, she did not realize that the son could hear her.

16. On May 5, 2025, after overhearing what the claimant had said to coworker A about him, the son complained to the supervisor about the claimant.

17. On May 5, 2025, the claimant did not intend to be unprofessional or discourteous to the son, when she made the statement to coworker A. The claimant did not intend for son [sic] to hear the statement that she had made to coworker A.

18. On May 5, 2025, the claimant was discharged by the supervisor for saying that the son sounded out of it and stoned.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Finding of Fact # 6 insofar as it states that the employer expects employees to refrain from being unprofessional or discourteous *to its customers*. The employer's testimony shows that the employer expected employees to behave professionally *at all times*, not only when interacting with customers.[1] In adopting the remaining findings, we deem 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 terminated from her employment, her 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).

In this case, the claimant was discharged for saying that a patient's son "sounded out of it and stoned." Finding of Fact # 18. The employer alleged that this violated its Code of Conduct, which

[1] While not explicitly incorporated into the review examiner's findings, this testimony and the testimony referred to below are part of the unchallenged evidence introduced at the hearing and placed in the record. They are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); and Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

prohibits discourteous conduct in the workplace. *See* Finding of Fact # 3. However, employees who violate the Code of Conduct receive disciplinary action up to and including termination. *See* Finding of Fact # 4. Since the employer evidently maintains discretion over the disciplinary action it imposes for violations of the Code of Conduct, it has not met its burden to show that the claimant was discharged for violating a *uniformly enforced* rule or policy within the meaning of G.L. c. 151A, § 25(e)(2).

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

The claimant confirmed in her testimony that she told her coworker that the patient's son to whom she had been speaking on the phone "sounded out of it and stoned." *See* Findings of Fact ## 13 and 18. This comment may reasonably be considered discourteous, unprofessional, and, thus, a violation of the employer's expectation that employees refrain from being discourteous or unprofessional. *See* Finding of Fact # 6. Therefore, the claimant engaged in the misconduct for which she was discharged.

Next, the employer must show that the claimant's misconduct was deliberate. The evidence indicates that the claimant was frustrated by her conversation with the patient's son. *See* Findings of Fact ## 11 and 13. However, the claimant testified that she was "very nice" to the patient's son on the phone. She did not make the statement that led to her discharge until after she had transferred the call to her supervisor and began talking to her coworker. *See* Findings of Fact ## 12 and 13. Since the claimant was evidently able to control her behavior while speaking directly to the patient's son, we are not persuaded that the claimant made the statement that led to her discharge spontaneously or inadvertently. In this regard, the evidence shows her misconduct was deliberate.

However, deliberate misconduct is not enough. The employer must also show that the claimant acted 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). 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).

The claimant testified that dispatchers in the office vent to each other and speak ill of patients and facilities "all the time" and "every day." However, the claimant was also aware, as a matter of common sense, that the employer expected employees to refrain from being unprofessional or discourteous. *See* Findings of Fact ## 6 and 7. We believe that an expectation that employees behave courteously and professionally is innately reasonable.

Finally, we consider whether the claimant has presented mitigating circumstances for her 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).

In this case, the patient's son was communicating in a way that made it difficult for the claimant to understand him. *See* Finding of Fact # 11. Although the claimant may not have been able to control the behavior of the patient's son, we see no evidence that, once she turned the call over to her supervisor, she was unable to control what she said to the coworker. Thus, she has not shown she had mitigating circumstances for her behavior.

We disagree with the review examiner's conclusion that the claimant had a good faith lapse in judgment when she made the statement to her coworker, as meant by the Supreme Judicial Court's decision in Garfield. 344 Mass. at 97 ("When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits."). In Garfield, the claimant store manager rearranged a schedule without directly notifying his district manager, as he was expected to. The Court stated that his course of action evidenced an intent to achieve the same end of store coverage, noting it was, at worst, a good-faith error of judgment. Id.

Here, the claimant was in no way attempting to further the employer's interest when she told her coworker that a patient's son sounded out of it and stoned. Rather than a good-faith lapse in judgment, her actions show a wilful disregard of the employer's interest in maintaining a courteous and professional workplace.

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 ending June 14, 2025, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 19, 2025

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

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.

REB/rh