0016 3278 64 (Jan. 25, 2016) – Where a claimant has been removed from his position, such that his pay, benefits, and accrual of paid time off stops, his employment is deemed to be severed for purposes of G.L. c. 151A, § 25(e)(2), even if he has filed a grievance so that he may, at some point in the future, be reinstated to his job. *[Appeal to District Court dismissed.]*

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Issue ID: 0016 3278 64
Claimant ID: 10363587

BOARD OF REVIEW 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 stopped working for the employer on March 6, 2015, and filed a claim for unemployment benefits, which is effective April 19, 2015. He subsequently separated from his position with the employer on May 25, 2015. On May 30, 2015, the DUA issued a Notice of Disqualification to the claimant, indicating that he was not entitled to benefits beginning May 17, 2015. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination. She awarded benefits to the claimant, pursuant to the provisions of G.L. c. 151A, § 25(f). We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was indefinitely suspended from work with no indication when he could possibly return to work and, thus, was not disqualified, under G.L. c. 151A, § 25(f). 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 take additional evidence regarding the employer's policies and expectations as well as to re-take some testimony from the claimant regarding what happened at work on March 6, 2015. Only the employer 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 conclusion that the claimant is not disqualified from receiving benefits beginning May 17, 2015, pursuant to G.L. c. 151A, § 25(f), is supported by substantial and credible evidence and is free from error of law, where the claimant was removed from his job on May 25, 2015, for his alleged aggressive and threatening behavior toward a supervisor, he filed a grievance relating to his removal, and that grievance is still ongoing.

Findings of Fact

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

1. The claimant was a full time mail processing clerk for the employer, a mail delivery company, between 06/28/1997 and 05/25/2015.

2. The claimant's direct supervisor was the supervisor of distribution operations.

3. The employer had a policy prohibiting threats and acts of violence in the workplace, including yelling, abusive and/or vulgar language ("the policy").

4. The purpose of the policy was to maintain safety in the workplace.

5. The disciplinary consequence for violating the policy "may include immediate emergency placement in an off-duty status and appropriate disciplinary action, up to and including removal…."

6. The discipline imposed upon employees for violating the policy is determined on a case by case basis depending on the severity of the offense.

7. The policy was posted in multiple locations throughout the employer's facility and routinely mailed to employees.

8. The employer expected employees to maintain professionalism and not make threats in the workplace.

9. The purpose of this expectation was to maintain safety in the workplace.

10. The employer communicated this expectation to the claimant through the policy.

11. At 7:10 a.m. on 03/06/2015, the claimant engaged in an altercation ("the altercation") with a supervisor ("supervisor A"). The claimant approached supervisor A and began to yell at supervisor A about his pay. The claimant was in supervisor A's face and supervisor A asked the claimant to back away. The claimant told supervisor A that he was "old" and a "piece of shit," and stated he was going to "kill" supervisor A. The claimant also indicated he would be making an EEO complaint against supervisor A.

12. The supervisor of transportation operations ("supervisor B") witnessed the altercation.

13. The claimant acted aggressive and used profane language at supervisor A during the altercation.

14. The altercation disrupted operations in the workplace on 03/06/2015, pulling the attention of other employees away from their work.

15. No circumstances mitigated the claimant's conduct regarding the altercation on 03/06/2015.

16. Supervisor A reported the altercation to the labor relations specialist (who was the manager of distribution operations at the time). The labor relations specialist did not witness the altercation.

17. The labor relations specialist contacted the [employer] police for presence during an employee removal. Two [employer] police officers responded and were nearby when the labor relations specialist informed the claimant he had to leave. The claimant left on 03/06/2015 without incident.

18. On 03/06/2015, the labor relations specialist placed the claimant on an emergency off duty status pending the outcome of an investigation into the altercation with supervisor A in violation of the policy.

19. On 03/06/2015, the labor relations specialist placed the claimant on an unpaid suspension.

20. The claimant was not paid after 03/06/2015.

21. The claimant was a union member and filed a grievance with the union. The grievance procedure runs concurrently with the employer's investigation.

22. During the investigation, the labor relations specialist interviewed supervisor A and supervisor B who each submitted a written statement about the events of 03/06/2015.

23. During the investigation, the labor relations specialist interviewed the claimant. The claimant reported that supervisor A was telling other employees his personal business and named three (3) employees with whom the labor relations specialist could speak.

24. During the investigation, the labor relations specialist interviewed those three named employees. Each employee reported that supervisor A did not divulge personal information about the claimant to them and reported not being aware of any ongoing problems between the claimant and supervisor A.

25. On 04/17/2015, the investigation concluded. The labor relations specialist removed the claimant from his off duty status and issued the claimant a notice of removal stating, "You are hereby notified that you will be removed from the rolls of the [employer] on 05/25/2015" for threatening supervisor A and

interacting with supervisor A in aggressive manner during the altercation on 03/06/2015.

26. The claimant was not paid for any services he performed for the employer after the notice of removal on 05/25/2015.

27. As of 05/25/2015, the claimant did not continue to accrue paid time off, vacation or sick time. As of 05/25/2015, the employer did not continue to pay its share of the claimant's health insurance. As of 05/25/2015, the employer did not pay for, or pay any portion of, the claimant's benefits.

28. No documentation was presented regarding whether the claimant continued to receive benefits from the employer after 05/25/2015.

29. Given the ongoing status of the claimant's grievance, the employer stopped giving the claimant benefits as of 05/25/2015.

30. As of 08/18/2015 (the date of the original hearing), the claimant continued to receive paychecks from the employer listing his pay as $0.00. The claimant continued to receive bills from the employer to pay his own health insurance.

31. In every case in which the employer issues a notice of removal, the employer continues to send checks with pay noted as $0.00 if an employee has filed a grievance with the union as an administrative matter. Such checks would be issued until final settlement of the case either by 1) an arbitration result, or 2) withdrawal of the grievance.

32. If the claimant had not filed a grievance, he would not have continued to receive pay checks listing his pay as $0.00 in the mail.

33. If the claimant had not filed a grievance, his separation date would have been 05/25/2015.

34. If the arbitration result is in the employer's favor, the claimant's separation date will retroactively be 05/25/2015.

35. As of 12/22/2015 (the date of the remand hearing), the claimant's second day of arbitration is scheduled for 01/14/2016.

36. The claimant's right to return to work depends on the outcome of the union's appeal process.

Claimant's Original Testimony Regarding 03/06/2015:

During the original hearing, the claimant testified about the altercation with supervisor A on 03/06/2015. The claimant did not attend or participate in the

remand hearing. As such, the review examiner was unable to reconstruct the claimant's original testimony regarding 03/06/2015 at the remand hearing.

Credibility Assessment:

The employer's testimony and evidence in this case is deemed more credible than that of the claimant. At the original hearing, the claimant denied making threats to supervisor A, including to "kill" him. While the labor relations specialist offered hearsay testimony about the altercation on 03/06/2015, his hearsay testimony was supported by consistent written statements of supervisor A (involved in the altercation) and supervisor B (witness to the altercation). Supervisors A and B both reported 1) that the claimant was yelling at supervisor A, 2) that the claimant was in supervisor A's face, 3) that the claimant called supervisor A "old," 4) that the claimant called supervisor A a "piece of shit," 4) that the claimant made reference to the EEO and 4) that the claimant stated he was going to "kill" supervisor A. Moreover, the labor relations specialist provided direct testimony about his interview with the claimant and presented written statements after interviewing the three named employees supporting that supervisor A did not divulge personal information about the claimant to them and that they were not aware of any ongoing problems between the claimant and supervisor A, as the claimant asserted. Considering the labor relations specialist's hearsay testimony supported by related documentation, the claimant's denial about threatening supervisor A is not credible. The claimant presented no credible evidence relating to the altercation with supervisor A on 03/06/2015 or to mitigate his intent in this case.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact except for Finding # 15, which is a conclusion of law relative to mitigation and not a finding of fact. In adopting the remaining findings we deem them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's conclusion that G.L. c. 151A, § 25(f), applies in this matter. Rather, G.L. c. 151A, § 25(e)(2), applies; and, based on the consolidated findings of fact, we conclude that the claimant is subject to disqualification under that statutory provision.

As noted above, the agency and the review examiner resolved this matter under different sections of law. In her decision, the review examiner concluded that G.L. c. 151A, § 25(e)(2), did not apply; because the claimant had an ongoing grievance relating to the removal from his job, he continued to receive a check in the mail in the amount of "$0.00," and the claimant would be out of work pending the outcome of the union's appeal process. The review examiner's reasoning suggests that, until the grievance was concluded (however long that could take), the claimant has not permanently separated from his job for purposes of G.L. c. 151A.

We decline to adopt the review examiner's legal reasoning. When the claimant was notified on May 25, 2015, that he was going to be removed from his job, he was effectively discharged from his employment. He stopped working, stopped receiving any money, and stopped accruing any benefits. Following a removal from the job, a grievance process is not considered to be a part of a person's employment. The grievance process is in place for a claimant to contest his removal, so that he may get his position back. If the review examiner's reasoning were to be adopted, then the permanent separation date would depend on whether or not an employee files a grievance. If a grievance is filed, the separation date would be when the grievance is ultimately resolved. If a grievance is not filed, then the separation date would be when the claimant is given his notice of removal. The separation date would also depend on the scheduling and timeframes associated with arbitration proceedings included in the grievance process. Making the separation date dependent on the claimant's actions and the resolution of an arbitration process is not a feasible or logical way to apply G.L. c. 151A. Rather, the employer's action in removing the claimant from his job severed the claimant's employment. As of May 25, 2015, there was no ongoing employment relationship between the claimant and the employer.[1] So, G.L. c. 151A, § 25(f), does not apply. Therefore, we think that the agency was correct in initially applying G.L. c. 151A, § 25(e)(2), in this matter.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not entitled to receive unemployment benefits. Although the review examiner did not apply this provision, the agency initially concluded that the employer had carried its burden. We agree with the agency's determination.

The claimant's separation ultimately resulted from an incident which took place on March 6, 2015. Specifically, the claimant allegedly yelled at a supervisor and made a threat to kill him. As noted in the review examiner's credibility assessment, the claimant denied making specific threats against the supervisor. The employer offered several written accounts and some oral testimony as to what occurred on March 6. In the end, the review examiner found the

[1] We find little significance to the fact that the claimant continued to receive a check from the employer in the amount of "0.00" even after May 25, 2015. During the remand hearing, the employer's witness indicated that the employer did this for administrative reasons (presumably in case the claimant was to be reinstated). This contact between the parties does not mean, however, that the claimant was still employed, for purposes of G.L. c. 151A, § 25(e)(2).

employer's evidence to be more persuasive and credible. We do not think that this was unreasonable, based on the testimony given and the documentation in the record.[2]

Thus, we have adopted the review examiner's finding that the claimant engaged in threatening, aggressive, and inappropriate behavior on March 6, 2015. *See* Finding of Fact # 11. Indeed, such behavior was contrary to the employer's written policies regarding threats in the workplace. During the initial hearing, when asked if he had seen the employer's written policy regarding workplace violence, the claimant testified that "it is posted everywhere." He also was aware of expectations that he was supposed to be professional in the workplace. Based on this testimony from the claimant, the review examiner was warranted in finding that the employer had communicated its policy and expectations regarding workplace conduct to the claimant. *See* Finding of Fact # 10. From this finding, and from the claimant's own testimony, we infer that the claimant was aware of these expectations. We further conclude that the claimant's conduct on March 6, 2015, was contrary to the employer's expectations and so constituted misconduct under the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2). Indeed, we cannot think of a better example of a threat, and, thus, a better example of a violation of an expectation prohibiting threats, than a statement that the claimant was going to kill the supervisor. *See* Findings of Fact # 3, # 8, and # 11.

A conclusion that the claimant engaged in prohibited behavior is not the end of our analysis, however. Under G.L. c. 151A, § 25(e)(2), the employer must also show that the misconduct was knowing, or deliberate and in wilful disregard of the employer's interest. *See* Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996); Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 779 (1982). The "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). "In ascertaining the employee's state of mind from all the facts and circumstances in the case . . . a reviewing tribunal must focus on 'the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors.'" Gupta v. Deputy Dir. of Department of Employment and Training, 62 Mass. App. Ct. 579, 585 (2004), *quoting* Torres, 387 Mass. at 780.

As noted above, there are sufficient findings of fact to conclude that the claimant was aware of the employer's expectations that he not use threats or vulgar language at work. These employer expectations were reasonable, as a matter of law, because they are a sensible and rational means of ensuring that employees maintain proper decorum at work and that all employees can work in a safe environment. Finally, there are no findings of fact which could support a conclusion that claimant's act of threatening his supervisor was somehow mitigated.[3] Consequently there are no

[2] The testimony given by the claimant during the hearing was at times muffled and difficult to understand. This was one reason why the Board remanded the case. However, portions of the claimant's testimony can be pieced together to get a general sense of what he said happened on March 6, 2015. The claimant testified that the pay in his check was wrong, that his supervisor called him an asshole, that the claimant lost his temper, and that he said a lot of things during the conversation. He denied threatening the supervisor, remembered that he called the supervisor an "old man," but did not know the rest of what he said. Given his uncertainty about what he said and the documentation in the record supporting the employer's view that the claimant did threaten the supervisor, there is sufficient evidence to support the review examiner's finding that the claimant did make a threat on March 6, 2015.

[3] As referenced above, in Finding of Fact # 15, the review examiner explicitly concluded there were no circumstances which mitigated the claimant's conduct. The record before us amply supports this conclusion.

findings upon which the Board could conclude that the claimant's conduct was somehow unintentional, accidental, or inadvertent.[4]

We, therefore, conclude as a matter of law that the review examiner's initial decision was not supported by substantial and credible evidence and that it was based on error of law, because: (1) G.L. c. 151A, § 25(e)(2), applies in this matter, not G.L. c. 151A, § 25(f); and (2) the employer has carried its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, thus subjecting him to disqualification.

The review examiner's decision is reversed. The claimant is denied benefits, pursuant to G.L. c. 151A, § 25(e)(2), for the week beginning May 17, 2015, 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 - January 25, 2016

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

SF/rh

[4] Some of the claimant's testimony referred to the supervisor calling him an "asshole." The suggestion from the claimant is that, perhaps, he was provoked into his conduct. The review examiner did not find that this had happened and did not find that the claimant was provoked.