The claimant didn't have the state of mind for deliberate misconduct or a knowing violation when he called an employee at home after work, believing that the employer's directive not to call the employee only applied at work.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric M. P. Walsh, a review examiner of the Department of Unemployment Assistance (DUA), to deny 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 May 27, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 1, 2016. The claimant 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 denied benefits in a decision rendered on August 26, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and thus, was 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 claimant's appeal, we remanded the case to the review examiner to make subsidiary findings from the record regarding the claimant's state of mind. 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 conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests when he contacted his former wife at their mutual work site twice, and, after being directed not to contact her, contacted her at home after 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 assessments are set forth below in their entirety:

1. The claimant worked full-time for the employer, a human services organization, from March 24, 2014 to May 27, 2016 as an IT Technician.

2. The employer had a policy that prohibited "failure to follow instructions of a supervisor."

3. The purpose of the policy was to ensure order and efficiency in the workplace.

4. The employer's policy called for immediate termination.

5. The employer had a code of ethics, which called for professionalism and specifically prohibited discussing personal matters in front of or within earshot of students.

6. The claimant received and knew the policy, which is reviewed annually, the last time being December 2, 2015.

7. The claimant and another employee were married, but separated since 2011. The employer was unaware that the two were married.

8. Just prior to the claimant's last physical day at work (May 19, 2016), and within the month of May, the claimant requested that the employee, with whom he was married, sign divorce papers, which he was pursuing since February. The employee responded, "I'll get to it when I can. I don't care what the lawyer says… if you want to become a citizen fucking DO it!!! Every time I get ready to look at the papers you start bugging me. I'm starting to feel like I should see a lawyer to get an annulment. Please stop b[o]thering me… I am running out of minutes and need to make [s]ome calls."

9. On another occasion, the claimant stated, "Don't worry… the sheriff will bring you a notice to court… I am sick and tired… and now you want some money… no problem… if that's what you want… we can let the judge decide… and me who was so compassionate… great job… keep fucking it up… you got ways to ask for money you…"

10. On another occasion, the employee responded, "More lies and threats. You know full well nothing is keeping you from moving on but you… you need to stop harassing me. You are the reason for this." The claimant replied, "Ok… at least I told you my plans… so there… like I said… I am going to fill out my part for divorce and go [file] it. I can't wait much longer."

11. On another occasion, the claimant texted the employee, "… you can't fuc[k]ing sign 6 pieces of paper for me… that's miserable… you can take 40hrs a week for pay… but not sign [f]ucking 6 pages… shame… no… not even shame."

12. On May 18, 2016, the claimant was in the building where the employee worked as a Teacher. The claimant sought the employee out and went to the doorway of the classroom in which she was working. The claimant asked the employee to leave the classroom and speak with him. She said that she could not leave the classroom, that she was working and that work was not the place for them to talk. The employee also said that she did not want to talk to him. The claimant continued to ask the employee to speak to him for a few minutes and eventually left. Moments later, the claimant returned and opened the classroom door and insisted that the employee step out into the hallway to speak with him. The employee declined and asked him to leave. The claimant then threated to keep coming back until she does speak with him. The employee threatened to call a supervisor and when she did, the claimant left.

13. The employee wrote a statement at 2:00 p.m. that same day conveying what occurred and explained that she felt afraid of him.

14. On May 19, 2016, the claimant, again, was in the employee's building for work-related purposes. When he exited the building, he observed the employee outside with children. The claimant approached the employee to speak with her. The employee had her back turned to him as he approached and when she turned to see the claimant, she immediately called for help over a two-way radio. The employee stated to the claimant, "You stay away from me! Get Back!" The claimant commented, "Come on! You're acting crazy! What's wrong?" Two employees, one of which was a Supervisor, at that time intervened and the claimant was directed to leave, which he questioned. The Supervisor again directed the claimant to leave, with which he complied.

15. The employee filed a complaint with the employer and the employer investigated the claimant's behavior.

16. Later that day, the claimant was interviewed by human resources and was directed to not make contact with the employee involved. The employer suspended the claimant for investigatory purposes.

17. At 6:39 p.m., while not at work, the claimant attempted to call the employee, which the employee ignored.

18. The claimant believed that the directive to not contact the employee only applied at work.

19. On May 20, 2016, the employee informed the employer of the attempted contact.

20. On May 27, 2016, the employer discharged the claimant from employment for the overall conduct with the employee, the level of unprofessionalism, and the failure to follow direct instructions during the investigation

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 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 should be disqualified.

The claimant was terminated from his employment, and thus, 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not entitled to unemployment benefits. For the employer to carry its burden, it must first show that the claimant engaged in conduct that violated an employer's reasonable expectation or written, uniformly enforced rule or policy. If so, the employer must further establish that the claimant's conduct was done with the required intentional state of mind. *See* Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 779 (1982). ("The critical factual issue in determining whether an employee's discharge resulted from his willful or intentional misconduct is the employee's state of mind at the time of his misconduct.") Under the knowing policy violation portion of G.L. c. 151A, § 25(e)(2), "knowing" means that at the time of the act, the employee was ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996). Under the deliberate misconduct standard, the claimant must have intentionally violated a reasonable expectation of the employer and done so in wilful disregard of the employer's legitimate business interest. *See* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine if the conduct was deliberate and wilful, we take into account "the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

Here, the employer alleged that the claimant violated two of the employer's policies: (1) the employer's code of ethics, which called for professionalism and prohibited discussing "personal matters" in front of or within earshot of students; and (2) the policy requiring employees to follow instructions of a supervisor. The record reflects that the claimant and his wife both worked for the employer but were separated at the time of the events giving rise to this case. Until these events, the employer was not aware of their relationship. In connection with his citizenship application, the claimant had been trying to obtain his wife's signature on divorce

papers, beginning in about February, 2016. These efforts had resulted in some acrimonious e-mails between the two. On May 18, 2016, the claimant had been directed to perform some work in the building where his wife worked as a teacher. He stopped by her classroom, asked her to step out of the room, and tried to converse with her about the divorce papers. She told him she did not want to speak with him. After he tried to insist, the wife called a supervisor and the claimant left the building. The next day, May 19, the claimant was again performing duties in the vicinity of the wife's workplace. He saw her outside with some children and tried to get her attention. She used her cell phone to call a supervisor, who approached the complaint and directed him to leave. After some discussion, the claimant complied. On that same day, the wife filed a complaint about the claimant's approaching her at work. The employer initiated an investigation, including an interview with the claimant on that same day, May 19. The claimant was suspended from work until the investigation was completed, and directed not to contact is wife. That evening, after work hours, the claimant tried to call his wife at home. The next day, May 20, the wife reported the claimant's attempted phone call to the employer. On May 27, 2016, the employer discharged the claimant. There is no evidence in the record that the wife had ever called the police, sought a restraining order against the claimant, or been threatened by the claimant.

These findings are sufficient to establish that the employer maintained reasonable policies and expectations that the claimant would not persistently try to engage his wife in discussions of personal affairs in the presence of students, and that the claimant would comply with a directive not to contact her and that the claimant violated those expectations. However, as reflected in the cases cited above, that is only the beginning of the inquiry in discharge cases. The pivotal issue is whether the claimant understood that he was violating the employer's policies and expectations when he engaged in these behaviors; otherwise, his conduct cannot be said to have been in "knowing violation" or "deliberate in wilful disregard of the employer's interests." The record, especially after remand, is not sufficient to support a conclusion that the claimant acted with the requisite understanding and intent.

As to claimant's conduct in approaching his wife at work on two successive days, the record suggests that these infractions might not have resulted in the claimant's termination if he had not contacted his wife at home during the investigation, in seeming defiance of the employer's directive not to contact her. We note that the employer's testimony at the hearing indicated that the dispositive factor in its decision to discharge was the claimant's attempting to contact his wife after being directed not to do so.[1] Even assuming that the contacts at work factored into the employer's discharge decision, we are not persuaded that the claimant understood at the time he made those contacts that he was violating any employer policy or expectation. The policy requiring "professionalism" is vague on its face as to what conduct is prohibited. Although the policy specifically prohibited discussing personal matters in front of or within the hearing of students, the claimant made efforts in both his contacts on school premises to discuss his issues outside of the students' hearing. There is no evidence that, prior to May 18, the claimant had any specific idea that it would be improper to ask to speak with his wife outside her classroom. It

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

appears on this record that the claimant happened to be assigned some work at her work location on that date and spontaneously decided to try to persuade her to work more quickly on the divorce papers. After some protest, he left when she told him she would contact a supervisor. There is no evidence that the supervisor directed the claimant to keep away from his wife after this first incident. Indeed, the fact that the claimant engaged in similar conduct quite openly the very next day suggests that he had not received an instruction prohibiting it. On the next day, May 19, the claimant was again assigned work in the vicinity of his wife's workplace and again tried to draw her away from the children so he could speak with her. There is again no indication that the claimant's language or volume were disruptive; however, the wife immediately began strenuously demanding that he stop speaking with her and immediately called a supervisor to the scene. That supervisor directed the claimant to leave, and again, after initially questioning the directive, the claimant complied. While it was reasonable for the employer to believe that the claimant's approaches to his wife while she was working were "unprofessional" or otherwise violated its policies, there is no reliable evidence that the claimant had that understanding at the time that he openly engaged in this conduct. Accordingly, we conclude that these two efforts by the claimant to discuss the divorce papers issue with his wife at her work place, which were not accompanied by any otherwise offensive behavior, were not done with a knowing or deliberate intention to violate the employer's rules or expectations.

The claimant's attempt to contact his wife on the evening of May 20 is a different matter. The claimant had received a specific directive not to contact his wife. However, the claimant maintained during the hearing that he thought the directive prohibited him from trying to contact his wife at work, which was the specific issue that the wife had complained about and that the employer was addressing. As the claimant notes in his appeal, there is a significant question about whether the employer could legitimately prohibit the claimant from contacting his wife outside of work about their divorce, which is obviously a matter of mutual concern. The claimant argues that such a directive would be unreasonably broad and exceed the employer's legitimate interests. We remanded this case for the review examiner to render a finding about whether or not the claimant understood that the employer was directing him not to contact his wife outside of work. The review examiner returned a consolidated finding (# 18) explicitly accepting the claimant's testimony that he did not understand the directive to apply outside of work. Such a finding is within the purview of the review examiner, and it is reasonable based on the evidence before him. Since the claimant did not think that what he was doing was wrong, we cannot conclude that his conduct was a "knowing violation" or "deliberate misconduct," as those terms are used in G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interests or in a knowing violation of the employer's rules or policies, within the meaning of G.L. c. 151A, § 25(e)(2), when he contacted his wife twice at work and once at home to discuss their divorce papers.

The review examiner's decision is reversed. The claimant is entitled to receive benefits from May 27, 2016, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 20, 2017

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.

SPE/rh