

Although the claimant did use profanity and did pull a box cutter out at work towards a customer, he did so only after the customer swore at him, tossed around employer property, and pulled a pocket knife on the claimant. The claimant's state of mind was mitigated by these circumstances.

**Board of Review
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Issue ID: 0019 8481 31

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Marielle Abou-Mitri, 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 October 7, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 21, 2016. The employer 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 denied benefits in a decision rendered on December 7, 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, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 subject to disqualification, under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner's findings of fact indicate that the claimant attempted to deal with and calm a customer who repeatedly swore and behaved erratically, and the claimant ultimately pulled out a box cutter when the customer wielded a knife.

Findings of Fact

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

1. The claimant worked full time as the receiving, shipping and lumber supervisor for the employer, a hardware store, from September 1, 2015 through October 7, 2016.
2. The claimant's direct supervisor was the Store Manager.
3. The employer has a policy in its employee handbook titled, "Standards of Conduct" which provides, "The following may result in disciplinary action, up to and including discharge:...unauthorized possession, use or sale of weapons...physical harassment...disrespect toward fellow employees, visitors or other members of the public...We emphasize that discharge decisions will be based on an assessment of all relevant factors."
4. The employer has a second policy in its employee handbook titled, "Each Employee's Responsibility" which prohibits, "Unauthorized possession, use or sale of weapons, firearms, or explosives on work premises is forbidden."
5. The employer has a third policy in its employee handbook titled, "Workplace Violence" which provides, "If you receive or overhear any threatening communications from an employee or outside third party, report it to the store manager at once. Do not engage in either physical or verbal confrontation with a potentially violent individual. If you encounter an individual who is threatening immediate harm to an employee or visitor to our premises, contact an emergency agency (such as 911) immediately."
6. The employer has a fourth policy in its employee handbook titled "In An Emergency" which provides, "The store manager on duty should be notified immediately when an emergency occurs. Emergencies include all accidents, medical situations, bomb threats, other threats of violence, and the smell of smoke. If the store manager on duty is unavailable, contact the nearest company official."
7. The claimant signed for receipt of the employee handbook at the time of his hire.
8. The purpose of the employer's policies is to ensure the safe operation of the employer's premises.
9. The consequences of violating the employer's policies depend on the infraction committed. Depending on the infraction, the employer may issue a verbal warning, a written warning, suspension or termination.
10. On October 6, 2016, during the claimant's scheduled shift, the claimant approached an area of the sales floor that was being refinished and was blocked off to customers. The claimant heard his coworker, "Coworker J" telling a customer, "Get the fuck out of here" as the customer was approaching the blocked off area. The customer responded "fuck your

- mother” and began making other derogatory comments towards Coworker J. The claimant approached the customer and explained to the customer that the area was blocked off because it was being refinished. The claimant told the customer to calm down. The customer responded to the claimant by stating, “fuck your mother too.” The claimant walked over to his desk.
11. The claimant then saw the customer walk over to the lumber area. The customer began tossing lumber and continued to scream obscenities. The claimant walked over to the customer and told him he would appreciate it if he stopped tossing the lumber. The customer responded by swearing at the claimant. The claimant then stated, “go fuck yourself.” The customer then continued swearing at the claimant and the claimant continued to respond with obscenities.
 12. The claimant then called Coworker J over to the scene. The customer backed up and reached his hand to his hip. The claimant screamed out for Coworker J to “watch out.” The customer pulled out a pocket knife on the claimant and Coworker J. The claimant then reached into his pocket and pulled out his box cutter on the customer.
 13. Coworker J began pushing the claimant away from the customer. The claimant became upset and began saying that someone needed to call the police. Coworker J pushed the claimant into the time clock room.
 14. The Store Manager went into the time clock room and asked the claimant if he had pulled a knife out on the customer. The claimant stated that he pulled out a razor to defend himself. The claimant was upset that management had not called the police on the customer. The claimant was also upset that the Manager was helping the customer shop around.
 15. The claimant was sent home early by the Owner.
 16. On October 7, 2016, the claimant was discharged by the General Manager and Manager for violation of company police and drawing a box cutter on a customer.
 17. The claimant filed a claim for unemployment benefits effective October 2, 2016.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings of fact 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 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 disqualified, under G.L. c.

151A, § 25(e)(2). Based on the claimant's actions as recounted in the findings, we conclude that the act of pulling the box cutter, even if a violation of the employer's policies, was mitigated by the circumstances of the interaction between the claimant and the customer.

Because the claimant was terminated from his employment, 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 eligible to receive unemployment benefits. The review examiner concluded that the employer had carried its burden. We disagree.

As to whether the claimant engaged in an act of misconduct or whether he violated one of the employer's written policies, we agree with the review examiner that such conduct was shown on this record. The review examiner concluded the following:

The employer established that it had an expectation that employees not engage in verbal altercations with customers and refrain from using any weapons while at work. The claimant was aware of the employer's expectation through receipt of the policy. The claimant also had a common sense awareness of the employer's expectation. . . . [T]he claimant violated the employer's reasonable expectation when he engaged in a verbal altercation with a customer that escalated to the claimant pulling out a box cutter on the customer. . . ."

We agree with these conclusions. In isolation, the act of pulling out a box cutter and engaging in a back-and-forth dispute with the customer, including the use of profanities, constituted conduct that violated the employer's expectations.

However, we part ways with the review examiner on the issue of the claimant's ultimate state of mind with regard to whether he was acting "in wilful disregard of the employer's interest." 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). Here, the findings of fact indicate that the claimant, at several points during the customer's time in the employer's store, tried to calm down the customer or defuse the situation. For example, in Finding of Fact # 10, the review examiner found that the claimant attempted to explain that a certain area was inaccessible due to the refinishing of a floor. The claimant did not swear or curse at the customer, but the customer told the claimant, "fuck your mother too" nonetheless. The customer was then tossing lumber and screaming obscenities in the lumber

area. The review examiner found that the claimant told the customer to stop doing that; however, the customer responded by swearing at the claimant. The review examiner found that the claimant and customer then got into a verbal altercation with the use of obscenities. *See* Finding of Fact # 11. When the claimant asked for a co-worker to come over to him, the customer pulled out his pocket knife.

Based on these findings, we conclude that the claimant was not the aggressor in this situation. The customer was the first one to swear and the first one to pull out a weapon. He was also acting belligerent and inconsiderate in the store. Findings of Fact ## 10 through 12 suggest that the claimant was trying to calm him down. The claimant's reaction towards the end, which included the use of profanity, does not seem to be done with deliberation and intent. After being consistently sworn at by the customer, the claimant's instinctive reaction was to swear back, even if doing that was technically improper.¹

As to the pulling of the box cutter, it also appears that the claimant did that in direct response to the customer pulling his pocket knife. Had the claimant been the first one to pull a weapon, we could have agreed with the review examiner's conclusion that "[t]he claimant's actions escalated the situation." However, after being berated by the customer with profanities, after witnessing the customer ignore him with regard to tossing the lumber, and after witnessing the customer pull a knife on him and his co-worker, we conclude that pulling the box cutter was not done with the state of mind that is necessary for disqualification, under G.L. c. 151A, § 25(e)(2). *See Still v. Comm'r of Department of Employment and Training*, 423 Mass. 805, 813–815 (1996). It was done in response to an out-of-control customer in the store, not as the claimant's first course of action.

In her conclusion, the review examiner made note of the video showing that the co-worker had to push the claimant away from the situation and of the fact that the claimant approached the customer several times. However, in light of the findings of fact, neither of these pieces of evidence points toward a conclusion that the claimant was acting in wilful disregard of the employer's interests. Rather, as noted above, the findings suggest that the claimant was attempting to calm down the customer and deal with someone who, as the review examiner noted, was "irrational." Simply because the claimant erred by trying to do so, it does not mean that he was deliberately acting against the employer's interests. The video is also of minimal weight, where the actual altercation was not depicted.²

We, therefore, conclude as a matter of law that the review examiner's conclusion to deny benefits, under G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the findings of fact lead to a conclusion that when the claimant pulled out his box cutter, he was not acting with the state of mind necessary to disqualify him under the statute.

¹ Nothing about the testimony or the findings indicates that the claimant screamed out this profanity, which could indicate that he was trying to draw attention to himself and the customer.

² In deciding whether the claimant acted with wilful disregard of the employer's interest, we are mindful that we must interpret that term in accordance with the Legislature's mandate that we interpret the provisions of G.L. c. 151A liberally. Given the context the situation, we cannot conclude that the claimant's actions were done in wilful disregard of the employer's interests.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 2, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – January 23, 2017



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, 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