That claimant did not like how her supervisor spoke to her a few times about taking time off from work did not render her decision to refuse to work with the supervisor not deliberate or not in wilful disregard of the employer's interest. Therefore, she is disqualified under § 25(e)(2), because she knew the employer expected her to work with the supervisor, the expectation was reasonable (despite her feeling that the supervisor treated her poorly), and there were no mitigating circumstances.

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Issue ID: 0020 0905 20

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Krista Tibby, 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 November 3, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 27, 2016. 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 March 18, 2017. 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. 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 not subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant, who was upset with her supervisor for questioning her attendance and absences from work, refused to continue to work with the supervisor and was discharged for that refusal.

Findings of Fact

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

1. The claimant worked full time as an advocate in a specialized trauma shelter for the employer, a domestic violence advocacy agency, child trauma advocate and sexual assault agency, from 2016 [sic] until November 3, 2016.

2. The claimant's immediate supervisor was the shelter manager (the Shelter Manager). The Shelter Manager's immediate supervisor was the clinical director (the Clinical Director) and the clinical director's immediate supervisor was the executive director (the Executive Director).

3. The employer maintains a policy prohibiting employees from being insubordinate. Violators of the policies are punished at the Employer's discretion based upon the circumstances of the violation.

4. The employer maintained an expectation that employees be able to work with their supervisors. The employer maintained this expectation to prevent unnecessary drama because its residents were trauma victims who were easily triggered. The claimant was informed of the employer's expectation when she received a copy of the employer's handbook containing the expectation at the time she was hired.

5. The claimant was assigned to work in the employer's specialized trauma center that housed residents that were victims of trauma and had additional issues such as mental health issues and addiction issues.

6. In January 2016, the claimant brought concerns about the Shelter Manager to the Clinical Director because she felt the Shelter Manger caused her anxiety because she felt micromanaged by the Shelter Manager, she felt the Shelter Manager was mean and abusive and yelled at her.

7. In January 2016, the Clinical Director, the Shelter Manager and the claimant met to discuss the claimant's concerns.

8. After the January 2016 meeting, the claimant felt things with the Shelter Manager had improved.

9. On unknown dates in September 2016, the claimant was subpoenaed by a judge in Fall River District [Court] to be a witness in a trial. The claimant contacted the Shelter Manager and notified her each day if the judge needed her or not. The claimant believed the Shelter Manager was upset with her when she called if the judge did not need her because the Shelter Manager did not allow her to work on those days.

10. On October 9, 2016, the claimant and the Shelter Manager discussed the claimant's future need for time off because the claimant's daughter was nine (9) months pregnant and the claimant was her birthing coach. The Shelter Manager told the claimant she needed to coordinate the time off. The claimant told the Shelter Manager she could not coordinate time off for her daughter's labor because she did not know when her daughter would go in to labor.

11. On October 13, 2016, at approximately 5:30am, the claimant's daughter's water broke and she was taken to [Name of] Hospital by ambulance. On the way to the hospital, the claimant called the Shelter Manager and told her she was on her way to the hospital because her daughter was in labor. The Shelter Manager was unhappy with the claimant taking time off and said to the claimant "You are always fucking taking time off".

12. The claimant was scheduled to have jury duty on October 24, 2016. When the claimant reminded the Shelter Manager she had jury scheduled, the Shelter Manager made a comment to the claimant about the claimant always needing time off.

13. The claimant was upset about the comment the Shelter Manager made about her needing time [off] because she felt the Shelter Manager was mistreating her and reverting back to issues she had previously addressed with the Clinical Director.

14. On or about October 26, 2016, the claimant spoke with the Executive Director [and] scheduled a meeting with the Clinical Director and the Executive Director for November 1, 2016.

15. On November 1, 2016, the claimant met with the Executive Director and the Clinical Director. The claimant told the Executive Director about the concerns she had with the Shelter Manager and told her about the previous issues she had which she had addressed with the Clinical Director. The Executive Director told the claimant she was not aware of the concerns she had with the Shelter Manager. The Executive Director setup a meeting with the claimant, the Shelter Manager and the Clinical Director for November 3, 2016.

16. On November 3, 2016, the claimant met with the Executive Director, the Shelter Manager and the Clinical Director. During the meeting, the Executive Director asked the claimant multiple times if she could work with the Shelter Manager. The claimant told the Executive Director she could not continue to work with the Shelter Manager. The Executive Director told the claimant if she could not continue to work with the Shelter Manager she could not continue to work with the employer because the employer's other locations were completely staffed. The claimant told the Executive Director she did not want to quit her job and asked if she was fired. The Executive Director told the claimant if she could not work with the Shelter Manager, she was fired.

17. On November 3, 2016, the Executive Director discharged the claimant because she refused to continue to work with the Shelter Manager.

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 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 not subject to disqualification. Based on the review examiner's findings of fact, we conclude that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The review examiner found that the claimant did not want to quit her job, and that the employer's executive director discharged her during a meeting on November 3, 2016. 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 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 not carried its burden. We disagree.

As noted in Finding of Fact # 17, the employer discharged the claimant for refusing to work with her supervisor. In this situation, the deliberate misconduct prong of the foregoing statutory provision can be applied in a more straightforward manner and, in fact, was the prong given the most discussion by the review examiner in her decision. Hence, we will focus on that prong. Under G.L. c. 151A, § 25(e)(2), benefits are to be denied to a claimant who "has brought about h[er] own unemployment through intentional disregard of standards of behavior which h[er] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To carry its burden, the employer must show both "deliberate misconduct" and "wilful disregard" of an employer's interest by the claimant. Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 778–779 (1982). In the decision, after concluding that the employer had not established that the claimant engaged in deliberate misconduct, the review examiner ended her analysis and awarded benefits.

We think that the review examiner's conclusion that the claimant did not engage in deliberate misconduct is unsupported by the record or her own findings of fact. We reach this conclusion

by taking apart the phrase "deliberate misconduct" and analyzing each word. We must first decide if the claimant engaged in an act of misconduct. In her conclusion, the review examiner stated the following:

> The employer established an expectation that employees worked with their supervisors. The expectation was reasonable as it prevented unnecessary drama because its residents were trauma victims who were easily triggered. The claimant was admittedly aware of the expectation as she received a copy of the employer's handbook containing the expectation at the time she was hired. . . . There is no dispute that the claimant refused to continue to [work] with the Shelter Manager.

These conclusions are supported by the record and are sufficient for us to conclude that the claimant engaged in misconduct. Working with a supervisor is a straightforward and fundamental requirement of being a productive employee. When she chose not to continue to work with the shelter manager, the claimant was violating this basic tenet of her employment.

We must next consider whether the claimant engaged in that misconduct (refusing to work with her supervisor) deliberately. An action is deliberate if is fully considered and unimpulsive. Unintentional, accidental, or mistaken acts are not deliberate. Here, the claimant's refusal came during a meeting on November 3, 2016. During that meeting, the claimant indicated that she would no longer work with the shelter manager, her supervisor. Even after having it explained to her that this meant that her employment would not continue, the claimant maintained her position that she would not work with the shelter manager. In her conclusion, the review examiner acknowledged that the employer gave the claimant a "choice" of either working with the manager or refusing to do so and being discharged. The claimant chose the latter option. All of these aspects of the situation suggest that the claimant knew exactly what she was doing when she decided to not work with the supervisor anymore. Her refusal was not accidental, impulsive, or hasty. She made a decision, she followed through with that decision, and she was fired because of it. This is sufficient to show that the claimant engaged in deliberate misconduct.

This does not end our analysis, however, because, as noted above, we must also address whether the claimant's actions were done in wilful disregard of the employer's interest. The review examiner did not address this provision of the statute. When analyzing this portion of the statute, the critical issue to assess is the claimant's state of mind at the time of the misconduct. *See* Torres, 387 Mass. at 779. To evaluate the claimant's state of mind, we review the claimant's knowledge of the employer's expectations, the reasonableness of the expectations, and the presence of any mitigating factors. *See* Garfield, 377 Mass. at 97.

As noted above, the review examiner concluded that the claimant knew about the employer's expectation that she work with her supervisor. Indeed, the expectation was reiterated to her in the November 3rd meeting. We also think that the expectation was reasonable. The review examiner's discussion appears to suggest that the claimant had good or understandable reasons for refusing to work with the shelter manager. The review examiner concluded that the claimant's "refusal was based on what she felt was her belief that the Shelter Manager treated her negatively . . . ." This is, perhaps, what the review examiner took to be the claimant's state of mind. However, the circumstances surrounding the refusal and the relationship between the claimant and her supervisor go toward whether the employer could reasonably expect that the

claimant continue to work with her. The findings indicate a series of events in which the claimant needed to take time off from work and the supervisor was upset or frustrated with that. The supervisor's comments, which may have been rude or impolite at times, were not so bad as to make it unbearable for the claimant to continue working with her. The review examiner's findings do not indicate that the supervisor was harassing the claimant, discriminating against her, or treating her unreasonably. Thus, we think the employer's expectation in this situation was entirely reasonable, and the claimant needed to abide by it.

It follows that the record does not contain sufficient evidence for this Board to conclude that a mitigating circumstance prevented the claimant from adhering to the employer's reasonable expectation. A mitigating circumstance serves to render an action not wilful. It actually must affect a person's state of mind such that the person's disregard of the employer's interest is unintentional. Here, based on her history with the supervisor/shelter manager, the claimant may have had understandable reasons for not wanting to work with her. Her refusal to work with someone who made borderline rude remarks about her absences from work may have been logical for her. However, that would not serve to make her conduct something other than wilful or deliberate. As to a claimant's state of mind in relation to G.L. c. 151A, § 25(e)(2), the Supreme Judicial Court has stated the following:

> [M]itigating circumstances alone will not negate a showing of intent or thereby excuse a "knowing violation." These circumstances may, however, serve as some indication of an employee's state of mind, and may aid the factfinder in determining whether a "knowing violation" has occurred: they may, in some cases, offer support for a conclusion that the employee's act was essentially spontaneous and unplanned. For example, an employee who violates an employer's policy by using abusive language, with conscious awareness of the act, and its probable consequences, has committed a "knowing" violation, regardless of circumstances or prior work history. However, if the act occurred in response to provocation, or while the employee was under extreme stress, and the employee had never committed such an act previously, a factfinder might reasonably conclude that the employee had in fact acted unintentionally. Conversely, if the employee had used abusive language previously, and been warned of the consequences, this might indicate to the factfinder that the latest violation was intentional.

Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 815 (1996).

Although the Court was speaking there specifically about the "knowing violation" prong of the statute, its discussion about "mitigating circumstances" is relevant for this case. The mere existence of a circumstance relating to the misconduct, or that the claimant had a reason to engage in the misconduct, does not mean that such circumstance or reason is mitigating. It will be mitigating only if it actually affects the claimant's knowledge or intent. Thus, here, the fact that the claimant disagreed with how her supervisor dealt with her time off, or felt that the supervisor did not treat her properly, or felt that the supervisor was unfair, does not mitigate her refusal to work with the shelter manager. In the end, she still knew the employer's expectations, the expectations were reasonable, and she chose, under no compulsion, not to work with the

supervisor anymore. Such an action was contrary to the employer's expectation and interest and subjects her to disqualification, under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits, pursuant to G.L. c. 151A, § 25(e)(2), is not free from error of law or supported by substantial and credible evidence, because the claimant's choice to not work any longer with her supervisor was done deliberately and in wilful disregard of the employer's reasonable expectation that she work with her supervisor.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning October 30, 2016, 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 – April 28, 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