With two recent warnings for failing to treat coworkers with respect, the claimant's threatening and demeaning emails to a fellow employee constituted deliberate misconduct in wilful disregard of the employer's interest. The fact that the claimant believed the employee threw away a prized hat did not mitigate her conduct.

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Issue ID: 0020 7853 72

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 affirm.

The claimant was discharged from her position with the employer on January 13, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 2, 2017. 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 April 19, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had 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 obtain more evidence pertaining to the claimant's state of mind and reasons for being discharged. Both parties attended the remand hearing. 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 is ineligible for benefits due to engaging in inappropriate behavior toward a coworker, 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 for the employer, a grocery store chain, from August 13, 1990 to January 13, 2017, most recently as a Food Service Specialist.

2. The employer had a policy that prohibited threatening, intimidating [sic], vulgarity and harassment, which, per procedure, called for immediate termination.

3. The purpose of the policy was to ensure that a safe and comfortable work environment existed.

4. The claimant knew the policy.

5. The employer had a disciplinary procedure consisting of three levels of "reminders," a decision-making leave, a suspension, and then termination. The employer utilized a rolling twelve-month period. The disciplinary procedure categorized offenses by level of seriousness and the appropriate disciplinary measure to be taken.

6. On April 11, 2016, the claimant received a written warning for inappropriate language used when speaking to or about an employee.

7. On August 5, 2016, the claimant received a written warning for her treatment of an employee (not the employee with whom the claimant did not get along) in front of a customer, who complained.

8. In September of 2016, the claimant took a transfer from one store as a Deli Manager to another store in her most recent position. The claimant transferred due to an issue she was having with a subordinate employee. Initially, the claimant requested a transfer as a Deli Manager, but no positions were available and she was given the option of staying as Deli Manager at current location or take a demotion into an available position at another store. The claimant took the demotion and transfer.

9. On December 29, 2016 at approximately 8:00 p.m., the claimant learned via text message from a former colleague that the employee, with whom the claimant had issues, discarded a prized hat of the claimant. The claimant prized the hat due to the many pins she collected over the many years she was with the employer.

10. The claimant was angered by the information provided by the former colleague.

11. At approximately 9:00 p.m., the claimant messaged the employee with whom she had issues. The claimant stated, "I found out what you did…. Karmas

coming for you. I promise," to which the employee responded, "I have no idea what you're talking about, but I'd appreciate it if you just left me alone. I have no reason to talk to [you] and you shouldn't be talking to me. Thank you, have a good night!"

12. The claimant continued messaging the employee again stating that karma is coming, that she can expect a visit from loss prevention, that the employee lies so much and does not recognize what is the truth any more, that she runs her big mouth, and so on. The employee gave responses but primarily asked to be left alone.

13. The claimant persisted in confronting the employee despite being asked to be left alone three [sic] times because she is the type of person who needs to have the last word and because she was angry.

14. On or about December 30, 2016, the claimant contacted her previous Store Director to announce that she intended to visit the store and see her old colleagues. The claimant also divulged that she sent angry messages to the particular employee. The claimant divulged the information because she knew the employee [would] report her and she wanted to give her side of the story before the employee. The claimant expressed her desire to get loss prevention involved, but the Store Director stated that he thought it was not something that loss prevention would take up and that she could simply go to employee services and get replacement pins.

15. The claimant did not file an official complaint with the employer regarding the alleged incident involving her hat. The claimant did not report the incident due to the Store Director's comment that he did not think that it was something that loss prevention would take up.

16. On January 6, 2017, the claimant visited the store. The claimant and [sic] spoke with some of her former colleagues. Upon entering the store, the employee with whom she had an issue was approaching her location through the produce section. The claimant proceeded up an aisle adjacent to the produce section. Later, the claimant sat in the break room and the employee with whom she had an issue, entered, at which time the claimant turned to see who it was. The claimant turned back around and continued her conversation with her friends.

17. The claimant never spoke to the employee. The claimant tried to avoid the employee.

18. The claimant went to the Store Director's office to visit for a while and as she approached, the employee was exiting at which time the employee made a comment to the claimant. The claimant did not respond and she entered the Store Director's office at which time she questioned him, "Did you hear that?" to which the Store Director said he did.

19. The employee, while with the Store Director just prior to the claimant arriving at the office, complained that the claimant was in the store staring at her in an intimidating way and that she felt threatened after the text messages that she received.

20. Soon after, the employer took a verbal statement from an employee in the produce department, who told the Store Director that he observed the claimant looking at the employee in question.

21. On January 10, 2017, the claimant was informed of the complaint by her then-current Store Director.

22. On January 13, 2017, the employer discharged the claimant from employment.

[CREDIBILITY ASSESSMENT]

The claimant testified on remand that the intended purpose behind her December 2016 text messages was to let the employee know that someone informed her that the employee threw the hat away. The claimant's testimony regarding her intended purpose was not credible due to the nature of the messages. Had the claimant messaged the employee, for example, "Hey! Someone told me that you threw my hat away and I will report it to loss prevention," then the alleged intended purpose would be served and satisfied without saying anymore. The claimant, however, stated, "I found out what you did…. Karmas coming for you. I promise." Such a statement upon initial confrontation an hour after learning of the employee's alleged act is inconsistent with the claimant's stated intended purpose of messaging her. Such testimony was not found to be credible and thus, it was not found as a fact.

The claimant initially testified that she was not aware that she was doing something that the employer would deem inappropriate at the time she sent the text messages. The claimant, however, then testified that she called the Store Director the next day because she knew that the employee [would] complain about her text messages and she wanted to tell her side of the story first. The claimant's actions and testimony were inconsistent and thus, her testimony regarding her alleged unawareness of doing something inappropriate was not found as fact.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment and deems them to be supported by substantial and credible evidence.

As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was terminated from her job, 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 . . . .

"[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 Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The consolidated findings explore two instances in which the claimant was accused of misconduct. They are the December 29, 2016, text message exchange with the other employee and the claimant's visit to her old store on January 6, 2017, where the other employee still worked. In his original decision, the review examiner concludes that what happened during the January 6, 2017 visit is of no consequence after the claimant sent threatening or intimidating text messages to the other employee a week earlier. He concludes that it was the text messages that caused the employee to feel uncomfortable when the claimant appeared in her store on January 6, 2017. We agree that these two events are interconnected and because they happened so closely in time, they cannot be separated for purposes of understanding the events that caused the claimant to be fired.[1]

The record indicates that the employer fired the claimant for repeated acts of inappropriate behavior, the type of violation listed in the employer's progressive discipline policy that may trigger immediate termination. *See* Exhibits 9 and 13. In order to disqualify a claimant under G.L. c. 151A, § 25(e)(2), the employer must show more than mere misconduct. Because the record lacks any substantial evidence demonstrating that the employer uniformly disciplined employees who engaged in similar misconduct, it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively under G.L. c. 151A, § 25(e)(2), the employer may show deliberate misconduct in wilful disregard of the employer's interest. In order to determine whether an employee's actions

[1] At the remand hearing, the store director explained that the claimant was discharged for harassment, including the text messages that she sent and then coming into the store after that, but mainly the text messaging. This testimony is part of the unchallenged evidence presented during the hearing and placed in the record. It is thus properly referred to in our decision today. *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).

constitute such deliberate misconduct, 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). For this reason, we remanded the case for additional evidence and findings about the claimant's state of mind when she engaged in the misconduct that got her fired.

The words in the claimant's text messages to this employee speak for themselves. The statement, "I found out what you did . . . karmas [sic] coming for you. I promise" essentially communicates that something will happen to the employee because of what she did. It is a threat. Even after the employee asked the claimant to leave her alone, the claimant repeated the warning that karma is coming, called the employee a liar, and accused her of running her big mouth. *See* Consolidated Findings ## 11 – 12 and Exhibit 8. The plain meaning of the words show an intent to alarm and demean the other employee. Just four and eight months earlier, the claimant had been given written warnings for "failure to treat co-workers with dignity and respect." *See* Consolidated Findings ## 6 and 7; Exhibits 5 and 6. And, knowing that the employee would report her, the claimant informed her old store manager about the text exchange the following day. Consolidated Finding # 14. Together, these facts demonstrate that the claimant was aware that her text messages were not appropriate, that she had not treated the employee with dignity and respect.

We consider that the relationship between the claimant and this employee was poor to begin with, as the claimant had accepted a demotion and transfer to another store to get away from her. *See* Consolidated Findings ## 8 and 9. Understandably, the claimant was angry when another coworker reported that the employee threw away the claimant's prized hat. *See* Consolidated Finding # 9. However, the alleged offense did not warrant, and certainly did not mitigate, the claimant's misconduct. Because she had already been disciplined for failing to treat co-workers respectfully, the claimant could reasonably be expected to know that she had to be especially careful about how she interacted with fellow employees. Instead of merely communicating what she heard about the employee throwing away the hat or saying that it made her angry, the claimant threatened and demeaned the other employee. The claimant acted without regard to the employer's interest of having a safe and comfortable work environment. *See* Consolidated Finding # 3.

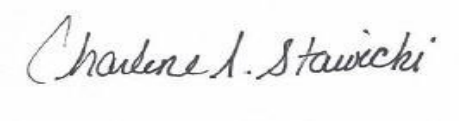
In isolation, the claimant's visit to her old store was not a ground for discharge. The claimant never spoke to the employee during the visit and, in fact, tried to avoid her. Consolidated Finding # 17. In the wake of the earlier text messages, however, the employee's reaction to the claimant's very appearance could reasonably cause her to feel intimidated and threatened. *See* Consolidated Finding # 19. The visit served to highlight the earlier text messages and, apparently, drew the employer's attention to the claimant's repeated acts of inappropriate behavior. Once brought to its attention, we believe the employer's investigation was prompt and its decision to discharge the claimant naturally flowed from her inappropriate text messages.

We, therefore, conclude as a matter of law that the employer has satisfied its burden to show that it terminated the claimant's employment for 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 affirmed. The claimant is denied benefits for the week beginning January 8, 2017, 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 - October 31, 2017

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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.

AB/ jv