Claimant, who had prior discipline for walking off the job over a work assignment that he did not like, was ineligible for benefits after being fired for confronting his supervisor over the day's assignment in an aggressive and threatening manner. The claimant failed to show that he was under extreme stress or acted without conscious awareness that his act would result in discipline.

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Issue ID: 0021 2558 09

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 his position with the employer on February 7, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 17, 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 August 11, 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, thus, he 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 further evidence pertaining to the claimant's state of mind and the circumstances leading up to his discharge. Both parties attended the remand hearing, which was delayed due, in part, to a postponement request by the claimant's counsel and, in part, because the review examiner was unavailable. 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 original conclusion that the claimant's aggressive behavior toward his supervisor was deliberate misconduct in wilful disregard of the employer's interest 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 employer is a distributor. The claimant worked as a full-time helper for the employer. He worked for the employer from 7/01/13 to 2/03/17.

2. The employer created a document titled "Work Rules." The document read, "When in the judgement of a supervisor, an employee has committed a serious rule infraction or serious act of misconduct, that employee may be suspended without pay pending investigation to determine the degree of penalty to be assessed (assuming the investigation results in a determination the employee did engage in such conduct), and disciplinary action may follow, up to and including termination of employment." The document featured a list of rules. The list included, "15. Insubordination, disobedience, failure or refusal to follow the written or verbal instructions of a supervisor or to carry out work assignments is strictly forbidden." The list included, "41. Verbal abuse, threatening, attempting or inflicting bodily harm to a fellow employee, supervisor, customer, supplier, customer's employee, or a member of the general public is prohibited."

3. The employer did not follow a prescribed progressive disciplinary procedure. The employer issued discipline at its discretion.

4. The employer did not allow the claimant to antagonize or menace other workers. Throughout his entire employment, the claimant knew that he must not antagonize or menace other workers.

5. The employer gave a suspension notice to the claimant on 8/18/15. The employer gave this discipline to the claimant because the claimant walked off the job on 8/17/15. The claimant walked off the job on 8/17/17 because he was dissatisfied with his work assignment for that day. The suspension notice read, "This notice will serve as a 3 day unpaid Suspension (August 19 thru 21th) for violating Work rule #1 which states: "Employee must be at their work places…and remain such [sic] work places and at work until their work assignments are complete."

6. The employer gave a documented verbal warning to the claimant on 8/10/16. On 8/04/16, the claimant and a driver had the employer's IPAD with them on a delivery run. The IPAD was damaged. The employer disciplined the claimant because the IPAD was damaged. The documented verbal warning read, "[The claimant] is being issued a verbal warning for his actions. Any future conduct of this nature will result in future disciplinary action up to and including suspension and or termination of employment."

7. The employer gave a written warning to the claimant on 9/02/16. The employer gave this discipline to the claimant because the claimant decided to skip scheduled delivery stops on 8/26/16. The written warning read, "[The claimant] is being issued a written warning for his actions. Any future conduct of this nature will result in future disciplinary action up to and including suspension and or termination of employment."

8. The employer's operations supervisor (Supervisor 1) supervised the claimant. Supervisor 1 became the claimant's supervisor in October 2015.

9. The claimant's pay increased each year. The employer paid the claimant $44,441.45 gross in 2014. The employer paid the claimant $45,094.37 gross in 2015. The employer paid the claimant $46,277.45 gross for 2016. The claimant's pay did not decrease after Supervisor 1 became his supervisor.

10. The employer's drivers transported and delivered loads. The employer's helpers assisted the drivers with the load deliveries.

11. Each shift, the employer assigned the claimant and the other helpers to work either in the warehouse or with a driver.

12. The employer paid the helpers on an hourly rate when they worked in the warehouse. The employer paid the claimant $13.00 per hour when he worked in the warehouse.

13. The employer paid the claimant and the other helpers on commission when they worked with a driver. The daily commission pay was based on how many items the driver and the helper delivered on their route.

14. The claimant earned more money on days when he worked with a driver. The commission pay was more than the hourly pay that the employer paid him when he worked in the warehouse.

15. The employer's drivers belonged to a labor union. The drivers bid on the employer's loads. The bids were based on seniority. The larger loads were potentially more lucrative because they contained more items for delivery.

16. The claimant and the other helpers preferred to work with experienced drivers. Typically, the claimant and the other helpers earned more commission when they worked with experienced drivers because the inexperienced drivers worked less efficiently.

17. Supervisor 1 made the daily work assignments for the helpers. Typically, Supervisor 1 made daily helper assignments on a rotating basis. He could modify the rotation based on what he determined was best for the

employer. Prior supervisors also generally made assignments on a rotating basis.

18. Supervisor 1 was not obligated to assign the claimant to any particular loads. Supervisor 1 was not bound by any seniority lists when he assigned the claimant and the other helpers to loads. Supervisor 1 was not bound by the claimant's preferences when he assigned the claimant to loads.

19. Supervisor 1 never harassed the claimant. Supervisor 1 never endeavored to disadvantage the claimant. Supervisor 1 did not purposely assign the claimant to less desirable loads more often than he assigned other helpers to less desirable loads.

20. Prior to 2/03/17, the claimant never complained to the employer that Supervisor 1 treated him unfairly.

21. In the week 1/29/17 to 2/04/17, the claimant worked with Driver X on 2/02/17 and 2/03/17. Driver X was a newer and less experienced driver. In the week 1/29/17 to 2/03/17, other helpers were assigned to work with Driver X on the other days. It is unknown whether the employer assigned the claimant to work in the warehouse in that week.

22. On 2/03/17, Supervisor 1 assigned the claimant to work with Driver X for a second day in a row because he believed the claimant was a good match for Driver X that day. He believed that the claimant was a good match for Driver X that day because the claimant was very familiar with the planned delivery route for that day.

23. The claimant was dissatisfied with his assignment on 2/03/17. The claimant did not want to work with Driver X again because Driver X was newer and less efficient. He believed that he could make more commission if he worked with a more experienced driver.

24. On 2/03/17, after the claimant received the load assignment, he became upset and confronted Supervisor 1. The claimant's demeanor was aggressive and angry. He spoke with a raised voice. He told Supervisor 1 that the assignment was unfair. He indicated that Supervisor [1] purposely disadvantaged him. Supervisor 1 told the claimant that the helpers were being rotated and that he thought the claimant fit best with Driver X on that day. He told the claimant that the claimant had to accept the assignment. The claimant then placed his face very close to Supervisor 1's face. He yelled at Supervisor 1. He exclaimed, "fuck you" with his face close to Supervisor 1's face. The claimant initiated this close contact. The claimant perpetuated the entire interaction. The claimant's demeanor was aggressive and angry for the entire interaction. Supervisor 1 spoke with a raised voice in reaction to the claimant's demeanor. He stepped back when the claimant moved close to him. He told the claimant to step

back. Supervisor 1 did not make any physically threatening gestures. Supervisor 1 was worried. Supervisor 1 felt threatened by the claimant. Another worker moved the claimant away from Supervisor 1. The employer ordered the claimant to leave. The claimant then left the employer's premises. Several other workers witnessed this incident.

25. The employer discharged the claimant because he menaced Supervisor 1 on 2/03/17.

26. The employer gave a discharge letter to the claimant. The employer's operations manager wrote the letter. The letter was dated 2/07/17. The letter read, "I write to inform you that your employment with [the employer] is hereby terminated effective immediately for your conduct on the morning of Friday February 3rd, 2017, which was witnessed by many fellow employees. Your actions were clear insubordination toward your direct supervisor and furthermore, were delivered in a manner that was threatening to that individual. This is a direct violation of [the employer's] standards of conduct as defined in Work Rules #15 and #41."

CREDIBILITY ASSESSMENT:

In the hearing held on 7/20/17, both Supervisor 1 and the claimant testified about what happened on 2/03/17. Their accounts differed. This requires resolution. Given the totality of the testimony and evidence presented, the employer's witnesses' testimony in its entirety is accepted as more credible than the claimant's testimony in its entirety because the employer submitted several written statements from other workers that corroborated Supervisor 1's testimony.

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

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 . . . .

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

The findings show that the employer fired the claimant for yelling at his supervisor on February 3, 2017, after being assigned to work with the same inexperienced driver for two consecutive days. In the original decision, the review examiner disqualified the claimant because he concluded that the claimant knew that the employer expected him not to antagonize or menace another worker, yet did so anyway without a mitigating reason. On appeal, the claimant argued that he did not act deliberately, instead that he acted out of emotion and did not know he was doing anything wrong. We remanded to find out the nature of the claimant's disciplinary history[1] and to learn more about the reasons behind the claimant's outburst.

The findings show that helpers typically made more money working with experienced drivers, who drove more lucrative delivery loads and worked more efficiently than new drivers. *See* Consolidated Findings ## 15 and 16. There is no dispute that on February 3, 2017, the claimant was dissatisfied and frustrated at being assigned to work with an inexperienced driver two days in a row and wanted to communicate to his supervisor that he felt the assignment was unfair. *See* Consolidated Findings ## 23 and 24. He dealt with that frustration by confronting his supervisor, then became angry and aggressive, raised his voice, placed his face very close to the supervisor's face, yelled, "fuck you" at the supervisor, and refused to step back to the point where the supervisor felt threatened. *See* Consolidated Finding # 24. The question is not whether the employer made the correct decision to discharge the claimant for that behavior, but whether the claimant is entitled to unemployment benefits.

Although the employer's policy prohibited threatening behavior as well as refusing to follow a supervisor's instructions, Consolidated finding # 3 indicates that the employer used discretion with imposing discipline for policy violations. For this reason, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

In order to determine whether an employee's actions constitute 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). A person's knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

[1] During the original hearing, the review examiner declined the employer's offer to present evidence of the claimant's prior disciplinary record.

In his appeal, the claimant argues that because his actions were unintentional, he may not be disqualified under G.L. c. 151A, § 25(e)(2). As support, he cites the Still case for the proposition that the claimant is entitled to benefits because he was not "consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." 423 Mass. at 813. He also cites Encore Images, Inc. v. Dir. of Division of Unemployment Assistance, No. 09-P-320, 920 N.E.2d 88 (Mass. App. Ct. Jan. 26, 2010), *summary decision pursuant to rule 1:28* (claimant, who used a vulgarity in confrontation with her supervisor, was eligible for benefits because her act was unintentional). We do not agree that the circumstances of this case fall under the rule articulated in these cases.

In Still, the Supreme Judicial Court stated:

> [I]f 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 had been warned of the consequences, this might indicate . . . that the latest violation was intentional.

423 Mass. at 815. In Encore Images, we note that in concluding that the claimant unintentionally lost her temper, the Appeals Court observed that nothing in the record demonstrated that the claimant knew beforehand what the consequences of her actions would be. In contrast, the Appeals Court, in Gupta v. Deputy Dir. of Division of Employment Security, declined to award benefits to a claimant who was fired for responding to a caller's ethnic slur with "hold on you idiot," because he had previously been warned about being rude to customers whom he perceived to be insulting. 62 Mass. App. Ct. 579, 586–588 (2004). Here, the claimant had been previously disciplined for an inappropriate response to a work assignment that he did not like. In August, 2015, the claimant received a three-day suspension when he walked off the job because he was dissatisfied with that day's assignment. *See* Consolidated Finding # 5 and Remand Exhibit # 5, p. 11.[2]

We also see nothing in the record to suggest that the claimant was under extreme stress at the time of the incident. His supervisor told him that helpers were being rotated and that he was assigned to be with Driver X because the supervisor felt the claimant was the best fit that day. *See* Consolidated Finding # 24. In fact, other helpers had been assigned to work with Driver X earlier in the week. *See* Consolidated Finding # 21. The review examiner further found that the supervisor had not harassed the claimant[3] or purposely assigned less desirable loads to the claimant more often than to others. *See* Consolidated Finding # 19. Moreover, there was no evidence to suggest that over the long term, the supervisor's assignments caused the claimant to lose money. Rather, payroll records showed three consecutive years of increases in gross

[2] He also received a written warning in September 2016, for deciding to skip scheduled delivery stops without notifying the employer. *See* Consolidated Finding # 7 and Remand Exhibit # 5, p. 13.

[3] In making this finding, the review examiner evidently found the employer's testimony to be more credible than the claimant's. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31-32 (1980).

income, including after this particular supervisor was in charge of making the claimant's assignments. *See* Consolidated Finding # 9.

In sum, we agree with the review examiner's original conclusion that the claimant's aggressive confrontation with his supervisor on February 3, 2017, was intentional. We, therefore, conclude as a matter of law that the employer has satisfied its burden to show that it discharged the claimant 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 February 5, 2017, 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 - March 28, 2018

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/rh