

Following remand, the consolidated findings and credibility assessment establish that the claimant did not physically abuse a coworker, as he was reacting to the coworker punching him repeatedly until they were separated by another employee.

**Board of Review
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Issue ID: 0022 3407 36

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Allison E. Williams, 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 July 10, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 4, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 22, 2017. 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 remanded the case to the review examiner to afford the claimant the opportunity to provide testimony and evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 was discharged for alleged physical abuse of a coworker is supported by substantial and credible evidence and is free from error of law, where, after remand, the consolidated findings of fact and credibility assessment establish that the coworker was the aggressor in the incident which led to the claimant's separation.

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 as a Machine Operator and Packer for the employer, a manufacturing company, from 10/1/11 until 7/10/17 when he became separated.
2. The claimant was hired to work full time.
3. The claimant was discharged for physical abuse of a fellow employee. The employer has a written policy, which addresses this behavior. Under [sic] policy in the handbook, if an employee engages in physical abuse discipline [sic] action will be imposed up to and including termination.
4. The purpose of the policy is to maintain a fair and productive working environment and protect the company from abusive conduct.
5. The claimant was made aware of the employer's expectations in this regard through the employee handbook which he received. The claimant received a copy of the handbook through the intranet on 6/6/17.
6. The employer's policy is not uniformly enforced since termination is left to the discretion of the employer.
7. The employer expects employees to refrain from physical abuse of fellow employees.
8. On 7/6/17, a fellow employee approached the claimant and said "come on". The claimant asked him what he was talking about. The coworker asked the claimant why he said to another coworker that he did not own a BMW. The claimant told the fellow coworker that another coworker had asked him if the fellow coworker owned a BMW and the claimant told her that he had never seen the fellow coworker with a car. As the fellow coworker came towards the claimant, the claimant pushed him away from him because he was in the claimant's space. The fellow coworker punched the claimant and as he tried to move away he fell back on to a pallet that was on a forklift. Another employee had heard the two arguing and came over with his forklift to break up the fight. As the claimant was down on the pallet the fellow coworker continued to punch him until the two were separated.
9. Both the claimant and fellow employee were placed on paid suspension pending an investigation.
10. The Human Resource Manager interviewed both the claimant and the fellow employee on 7/7/17. The investigation determined that both the claimant and the fellow employee had engaged in physical abuse of each other.
11. On 7/10/17, the claimant was called back in to meet with Human Resources and his Manager. The claimant was informed at that time that his employment was being terminated for engaging in physical abuse of a fellow employee.

12. The fellow employee was also terminated for physical abuse of the claimant.

Credibility Assessment:

The claimant's testimony of the event that led to his discharge is deemed more credible than the Human Resource Manager's testimony since she had no personal knowledge to offer and did not witness the event. The claimant provided consistent testimony at the remand hearing as to the final incident that led to his discharge.

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. As discussed more fully below, we conclude that the claimant is not disqualified from receiving 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

"[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).

In the present case, the review examiner initially concluded that the employer had met its burden, finding that the claimant was discharged for engaging in physical abuse of a coworker. After remanding the case to afford the claimant an opportunity to present testimony, the consolidated findings now show that it was the claimant's coworker who was the aggressor, approached the claimant, entering into the claimant's space, and, as the claimant pushed the coworker in an effort to get away from him, the coworker punched the claimant. The coworker continued to punch the claimant even after the claimant fell down onto a pallet when he tried to move away from the coworker, until they were separated by another employee.

At the outset, we note that the review examiner's findings and credibility assessment must be reasonable and supported by substantial evidence. "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Lycurgus v. Dir. of Division of Employment Security,

391 Mass. 623, 627–628 (1984), *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted); G.L. c. 30A, § 1(6).

In making her consolidated findings, the review examiner credited the claimant’s testimony and provided a credibility assessment setting forth her reasons for accepting the claimant’s testimony over that of the employer. The review examiner found the claimant’s testimony regarding the event that led to his discharge to be more credible than that of the Human Resource Manager’s testimony, as she had no personal knowledge to offer and did not witness the incident. Moreover, the review examiner found that the claimant provided consistent testimony at the remand hearing as to the final incident which led to his discharge. Such credibility assessments are within the scope of the review examiner’s fact finding role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). We see no reason to disturb this review examiner’s credibility assessment, which is supported by the record before us.

In order to deny benefits for deliberate misconduct in wilful disregard of the employer’s interest, it must be shown that the claimant acted with “intentional disregard of [the] standards of behavior which his employer has a right to expect.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Thus, “the critical issue in determining whether disqualification is warranted is the claimant’s state of mind in performing the acts that cause his discharge.” *Id.* The Massachusetts Supreme Judicial Court has noted that a person’s knowledge and intent is a matter of fact, which may not be susceptible of proof by direct evidence and may be determined based on the facts and circumstances developed in an evidentiary proceeding. *See, e.g., Starks v. Dir. of Division of Employment Security*, 391 Mass. 640, 643 (1984) *citing* Commonwealth v. Holiday, 349 Mass. 126, 128 (1965). In analyzing the instant claimant’s state of mind, we will therefore look to the facts and circumstances as developed by the review examiner in the record before us.

In deciding this matter, we are mindful of prior appellate court and Board decisions awarding benefits to claimants who were discharged for engaging in spontaneous or excited conduct. The seminal case in this regard is Still, *supra*. In Still, the claimant at issue was a senior nurse’s aide who, during the course of working a double shift, was repeatedly subjected to abusive remarks from a male patient for whom she was caring. In order to avoid contact with this patient, the claimant changed assignments. At some point, she needed to provide care for the abusive patient’s roommate. When the claimant entered the abusive patient’s room to provide this care, he insulted the claimant in a racially tinged manner. In response, the claimant swore at the abusive patient. The employer in Still had a policy prohibiting rude or uncivil behavior towards patients. The claimant was aware of this policy, had received training relative to the same, and was ultimately discharged for violating this policy. The Massachusetts Supreme Judicial held that the review examiner’s findings established that the claimant had been provoked into her outburst by the patient’s abusive language towards her. Since the claimant’s outburst was a spontaneous emotional reaction, her state of mind did not establish that her discharge was attributable to a knowing violation of the employer reasonable policy. *Id.* at 814–816.

This Board has consistently acknowledged and applied the holding in Still. *See, e.g.,* Board of Review Decision 0002 1139 55 (November 20, 2013) (the claimant both violated employer’s policy and engaged in intentional misconduct by physically assaulting a resident of employer’s

facility and no surrounding circumstances mitigated the willfulness of the claimant's conduct); Board of Review Decision 0011 0921 86 (August 18, 2014) (the claimant's conduct in pushing a co-worker who had pushed and struck the claimant derived from an instinct to defend herself from an attacker and therefore did not constitute deliberate misconduct); Board of Review Decision 0011 5216 27 (August 19, 2014) (the claimant's conduct in fighting with a co-worker was provoked by both the co-worker's actions and months of ongoing irritation in the workplace and therefore did not constitute deliberate and wilful misconduct).¹

The facts and circumstances in this instant matter indicate that the claimant's actions in pushing the co-worker was the type of "spontaneous emotional reaction" found in Still and the Board decisions awarding benefits based on Still. The record before us establishes that the co-worker approached the claimant in an aggressive manner and in so doing invaded what could be designated the claimant's "personal space". The claimant appears to have responded to this invasion by spontaneously pushing the co-worker away. Thus, the claimant's action occurred in response to provocation and it is reasonable to conclude that the claimant acted unintentionally. See Still, 423 Mass. at 815.

We, therefore, conclude as a matter of law that the claimant did not engage in either a knowing policy violation or deliberate and wilful misconduct within the meaning of G.L. c. 151A, § 25(e)(2).

¹ Board of Review Decisions 0002 1139 55, 0011 0921 86, and 0011 5216 27 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 9, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 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.

SPE/rh