

The claimant was fired for threatening a customer. Because the review examiner has found, after remand, that the claimant did not engage in threatening behavior, the employer did not meet his burden to show its discharge was due to misconduct. Therefore, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0024 9017 81

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 reverse.

The claimant was discharged from his position with the employer on February 21, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 5, 2018. 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 June 29, 2018. 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, 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 more information about the claimant's job duties and to allow the claimant to provide testimony and other 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 decision, which originally concluded that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest by behaving in a threatening manner toward a customer, is supported by substantial and credible evidence and is free from error of law, where, after remand, the consolidated findings provide that the claimant had not mistreated the customer, as alleged.

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 full time as a customer service representative (CSR)/driver for the instant employer, a wellness pet food delivery company, from 03/12/11 until 02/21/18.

2. The employer maintains a **BEHAVIOR GUIDELINES** policy that states in part:

The guiding principles state that "We will act and relate to our customers, suppliers, the general public and other [Employer]'s employees at all times in a way that positively impacts those relationships and influences our ability to maintain and grow our business."

Customer fulfillment employees are expected at all times to conduct themselves in a positive manner so as to promote the best interests of [Employer]. Such conduct includes:

Managing all relationships with respect

3. The employer maintains this policy to maintain business relationships and ensure customer satisfaction.
4. The claimant was given the policy at the time of hire.
5. All employees are subject to the policy.
6. Disciplinary action imposed for violating the policy is at the discretion of the employer based on the nature and severity of the incident.
7. The employer expects employees to maintain courteous and respectful relationships with customers.
8. The purpose of the expectation is to ensure customer satisfaction.
9. The claimant was given the employer's policies at the time of hire.
10. As a CSR driver, the claimant's job duties are to deliver stock and place it [sic] stack it neatly on the floor wherever the customer prefers.
11. The claimant had not done anything additional for customers in the past and had never been told that he had to do anything else.
12. On 09/12/16, the claimant applied the parking break while making a delivery and subsequently the brake let go and the vehicle rolled away in the parking lot and struck another vehicle.

13. On 10/12/16, the claimant was given a Formal Coaching/Performance Enhancement Process (PEP) pertaining to safety because of the accident.
14. On 05/22/17, the claimant struck another vehicle while exiting from a parking space.
15. On 06/06/17, the claimant was given a Written Performance Reminder/PEP pertaining to safety because of the accident.
16. On 06/08/17, the claimant was making a delivery to a customer and the customer requested that the claimant take a significant number of bags of pet food to be returned.
17. The claimant was having a bad day due to personal issues with his son. The claimant threw his hands up in the air out of frustration. The claimant did not swear at the customer.
18. The claimant apologized to the customer that day and several other times in the following weeks.
19. On 06/08/17, a customer made a complaint to the employer that the claimant was unprofessional and used profanity when being asked to take the returned product during a delivery.
20. On 07/13/17, the claimant was issued a Final Performance Agreement/PEP after the company received the customer complaint.
21. The claimant does not recall seeing the first page that was labeled "Final Performance agreement" and was told that he was being "put in the process."
22. On 01/09/18, the claimant made a delivery for an elderly customer and he was asked to stack the product on the shelf during a delivery.
23. The claimant told the customer "we don't do that."
24. The customer was not happy and said "I'm gonna call the company and get you fired" and the claimant said that she could call the employer if she wants but that they don't stack product on the shelf. The customer asked the claimant if that was his final answer.
25. The customer walked away and the claimant turned his hand truck around to try and exit the room which was very small and saw the customer standing in the doorway and she would not move.
26. The other employee who works for the customer said, "he's trying to get by" and the customer moved out of the way.

27. The customer asked if she had to sign for the product and the claimant informed her that she didn't have to but if she wanted to, he would go get the Ipad so she could sign for the product. The customer refused and the claimant signed for the delivery.
28. The claimant tried to get in touch with his immediate boss but that person was unavailable. The claimant asked the most senior driver about stacking bags and was told that they do not stack bags to his knowledge.
29. On 01/16/18, the claimant delivered to the same customer and the customer again asked him to stock the product.
30. The claimant again told the customer that they don't do that and the customer threatened to call the company again. The claimant was polite and told the customer to have a nice day.
31. The claimant asked the customer to sign for the delivery and the claimant left the premises.
32. Following the interaction, the customer called the corporate office to file a complaint against the claimant. The customer was threatening to no longer do business with the employer based on the 2 interactions with the claimant.
33. On 01/16/18, the Area Manager (AM) was made aware of the customer complaint. The AM contacted the customer to get a statement from her.
34. On 01/17/18, the AM interviewed the claimant about the complaints. The claimant indicated that he never had to rotate product previously and that he didn't act threatening, but rather the customer was in his way and wouldn't let him walk by and the employee of the customer had to tell the customer that he was trying to get by.
35. The claimant explained to the AM that if they wanted him to stack the product that he would do that and didn't have a problem with it.
36. The AM handed the information over to Human Resources (HR), Employee Relations, and the Legal Department.
37. The claimant continued to work for the employer and made additional deliveries to the same customer without incident.
38. The decision was made to terminate the claimant based on the "threatening" interaction with the customer.
39. On 02/21/18, the claimant last worked for the employer.

40. On 02/22/18, the claimant was notified that he was terminated for acting threatening towards a customer.

Credibility Assessment:

At the initial hearing, which the claimant did not participate in, the employer testified that the claimant's "threatening behavior" towards the customer was why the employer decided to terminate the claimant. The employer testified to a "Field Guide Booklet" that explains the expectation of rotating and stocking product but the document was not submitted into evidence. Further, the employer's testimony regarding the 2 interactions with the customer and that the claimant did not deliver to the customer after that directly conflicts with the claimant's testimony.

At the remand hearing, the claimant testified that he was never told that he had to rotate or stock product for customers in the past. The claimant testified that he was never "threatening" towards the customer but just that he turned to leave the small room and was within close proximity to the customer. The claimant's recollection of the events that took place with the customer on both occasions were very detailed and his testimony was very specific.

Based on the testimony and evidence presented, the claimant's direct testimony is accepted over the employer's hearsay 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. In Consolidated Finding # 34, we believe the review examiner meant to say that the claimant never had to "stack," as opposed to "rotate," product previously, as the former is supported by the testimony at the hearing. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, based upon the consolidated findings after remand, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits, as outlined below.

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).

We agree with the portion of the review examiner's decision, which concluded that the employer failed to show a knowing violation of a uniformly enforced policy. This is because the employer maintains the right to exercise discretion in the discipline imposed for violating its policies. *See* Consolidated Finding # 6. Therefore, the policy on its face shows that it is not uniformly enforced.

At issue is whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. As a threshold matter, the employer must prove that the claimant engaged in misconduct. Based upon testimony only from the employer at the initial hearing, the review examiner found that on January 16, 2018, the claimant took a threatening step toward a customer, got uncomfortably close to her, and argued to the point where she felt alarmed by his conduct.¹ The employer's witness had no first-hand knowledge of what transpired between the customer and the claimant. He relied exclusively upon what the customer told him. After remand, the consolidated findings describe the claimant's interactions with the customer on both January 9 and 16, 2018, very differently. There is no threatening behavior, and although he disagreed with her about whether he should stack the product, he acted appropriately, even polite. *See* Consolidated Findings ## 22–31.

In changing her findings, the review examiner credited the claimant's specific, detailed direct testimony over the employer's hearsay testimony. Such assessments are within the scope of the fact finder's 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 believe the review examiner's assessment is reasonable in relation to the evidence presented.

Since the employer fired the claimant for a threatening interaction with the customer, and the review examiner has now found that the claimant did not interact with that customer in a threatening manner, the employer has not met its burden to show that its discharge was due to misconduct. *See* Consolidated Findings ## 38 and 40.

We, therefore, conclude as a matter of law that the claimant's separation was not due 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 under G.L. c. 151A, § 25(e)(2).

¹ *See* Finding of Fact # 21 in the original hearing decision, entered into evidence as Remand Exhibit 1.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning February 11, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 29, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
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.

AB/rh