

The employer established that when the claimant threw gloves at his supervisor during an argument, it was deliberate and in wilful disregard of the employer's interest to prohibit workplace violence.

**Board of Review
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Issue ID: 0025 5670 86

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 on different grounds.

The claimant was discharged from his position with the employer on May 16, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 7, 2018. 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 December 19, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant 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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant knowingly violated a uniformly enforced policy when he threw gloves at his supervisor, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a plater for the instant employer, a gun manufacturer, and he was employed from 11/13/06 until his separation on 5/16/18.
2. The company policies state in part:

WORKPLACE VIOLENCE POLICY

PURPOSE

Nothing is more important to (Company name) than the safety and security of its employees, customers, guests and vendors. Threats, threatening or intimidating behavior, or acts of violence against employees, customers, guests and vendors by anyone on (Company name) property will not be tolerated. Violations of policy can lead to disciplinary action up to and including termination, arrest and prosecution.

POLICY

*On this basis, (Company name) shall maintain at all times a **ZERO TOLERANCE** policy against any form of threats or violence at the workplace. Any form of threat or violence is **STRICTLY PROHIBITED**. Violations of this policy include, but are not limited to:*

- Participation in, provoking or otherwise contributing to any threat or violent act at the workplace*
- Abuse, assault, battery, oral or written threats, intimidation, and harassment.*

INVESTIGATION REPORTS OF VIOLENCE

The Company will thoroughly investigate all reported acts of violence or threats of violence against people, property, or products and take action appropriate to protect employees or contractors/vendors, with respect to such acts.

HARASSMENT POLICY

It is the policy of (Company name) to provide a work environment free from harassment. UNLAWFUL HARASSMENT may take many forms, including:

- VERBAL CONDUCT such as epithets, derogatory comments, slurs or unwanted sexual advances, invitations, or comments;
- VISUAL CONDUCT such as derogatory posters, cartoons, drawings or gestures;
- PHYSICAL CONDUCT such as assault, blocking normal movement, or interference with work directed at you because of your sex or other protected basis;
- THREATS AND DEMANDS to submit to sexual requests in order to keep your job or avoid some other loss, and offers of job benefits in return for sexual favors; and
- RETALIATION for having reported the harassment

3. The claimant signed for receipt of the company work place violence policy and the harassment policy.
4. The company will always terminate for any act of workplace violence or harassment.
5. On 5/8/18, the human resource representative was informed that on 5/7/18 the claimant swore at his supervisor and threw a pair of gloves at the supervisor.
6. The claimant worked rotating shifts and he did not report to work after the 5/7/18 incident until his shift on 5/10/18.
7. On 5/10/18, the human resource representative met with the claimant. [H]e did not deny that an incident occurred on 5/7/18, and that he yelled at the supervisor and called him a “piece of shit”. The claimant did not recall throwing gloves at the supervisor.
8. On 5/10/18, the claimant was suspended until an investigation could be completed.
9. The human resource representative took a statement from the claimant’s supervisor and witnesses to the incident.
10. The supervisor indicated that the claimant was unhappy about a work process that he was going to have to complete on his shift. The claimant informed his supervisor that he had all his work scheduled for his shift and he would not be able to complete this process that he was assigned.
11. The supervisor reported to his supervisor that the claimant did not think he could complete the process and the supervisor said he was going to speak to the claimant. The claimant’s supervisor and the other supervisor met with the claimant and the supervisor’s supervisor informed the claimant that he would have to complete the process. Later in the day on 5/7/18, the claimant yelled at the supervisor and called him a “Piece of shit”, and he threw a fist full of latex gloves at the supervisor.
12. A witness to the incident reported:

On 5/7/18, as I was working in my area, I heard loud voices. I turned to my right and saw (supervisor name) and (claimant name) arguing. I couldn’t hear what they were saying exactly, because my area is noisy. But I could tell that they were annoyed with each other and disagreeing about something.

The [sic] I saw (claimant name) throw his work gloves at (supervisor name). The gloves hit (supervisor name) on his side. (Claimant name) and (supervisor name) walked away from each other. (Claimant name) walked in the direction of the plating room, and (supervisor name) walked down the

aisle leading to assembly. I thought they might laugh it off late, but they didn't.

13. Upon completion of the investigation on 5/16/18, the claimant was informed that he was terminated due to workplace violence toward his supervisor.

[Credibility Assessment:]¹

The examiner considered the claimant's testimony that he did not remember throwing the gloves. He did not testify that this did not happen, but that he did not recall this happening. Under these circumstances, the examiner relied on the testimony of the claimant's supervisor and the witness who both observed the claimant throwing the gloves. In addition, the examiner considered the claimant's testimony about another individual that threw a metal bar at a supervisor and that individual continues to work, however the claimant did not witness this incident himself, he heard about it from others. The employer witness gave credible testimony that an incident was investigated, but there was no evidence that a piece of metal was thrown and although there was information that the worker body slammed another and that would have been a violent act, the employer did not have enough evidence to establish that it was a body slam, and for this reason that individual was issued a warning for his actions.

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 original 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits, but we do so under a different provision of law.

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

¹ The review examiner's credibility assessment, which we have included here, was incorporated into the Conclusions and Reasoning section of her decision.

“[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 employer fired the claimant for throwing a pair of gloves at his supervisor during an argument, in violation of its workplace violence policy. *See* Findings of Fact ## 5, 11, 12, and 13. In light of the fact that the claimant could not remember throwing the gloves, and the employer presented direct evidence from the supervisor, as well as a written statement from another witness to the incident, stating that he had, the review examiner concluded that, indeed, the claimant had thrown gloves at his supervisor on May 7, 2018. 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 her credibility assessment is reasonable in relation to the evidence presented.

The review examiner concluded that the claimant’s conduct was a knowing violation of the employer’s reasonable and uniformly enforced workplace violence policy. Since the claimant received the policy, it is reasonable to infer that he was familiar with its terms and would recognize that throwing anything at his supervisor is an act of violence. However, to be disqualified under this portion of G.L. c. 151A, § 25(e)(2), the employer had to demonstrate that its policy was uniformly enforced. Finding of Fact # 4 states that the employer *will* always terminate its employees for an act of workplace violence. This is not substantial evidence that it actually has done so. Moreover, the employer’s disciplinary policy expressly grants the employer discretion as to the level of discipline to impose based upon the circumstances of the incident in question.² Thus, on its face, the policy indicates that it is not uniformly enforced. 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).

Alternatively, the claimant may be disqualified under the separate provision of G.L. c. 151A, § 25(e)(2), for deliberate misconduct in wilful disregard of the employer’s interest. 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). The findings provide that, when the claimant threw gloves at his supervisor, it was done deliberately in anger and not by accident. *See* Findings of Fact ## 11 and 12.

During the hearing and on appeal, the claimant has not contested that throwing gloves at his supervisor would violate the policy, but insists that he should not have been fired for it or denied benefits for two reasons. First, he argues that the behavior was all part of his regular practice of joking and swearing with his supervisor, and since they shook hands at the end of the day, it

² *See* pages 1 and 2 of the employer’s corrective action/disciplinary policy, entered in evidence as Exhibit 4. While not explicitly incorporated into the review examiner’s findings, these pages are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

apparently left no ill will. The question before us is not whether the employer was justified in terminating the claimant for this incident, but whether the claimant is entitled to unemployment benefits. If the employer shows that this was deliberate misconduct and it was done without regard to the employer's interest in prohibiting workplace violence, it makes no difference whether the supervisor shook the claimant's hand at the end of the day. He is disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2).

The claimant also argued that another worker who shoulder-checked his supervisor and threw a metal bar in the workplace was not terminated for his violent behavior. Based upon this assertion, the review examiner correctly continued the hearing to get more facts, because, if true, the claimant might be confused about the employer's expectation. It would suggest that the employer was more tolerant of violent behavior than its policy indicates. In her decision, the review examiner accepted the employer's explanation that, after an investigation, there was insufficient evidence of a metal bar being thrown or that the individual intended to body slam another. Thus, in the record before us, there is insufficient evidence to support the claimant's assertion that the employer tolerated the type of conduct.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning May 16, 2018, 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 – February 27, 2019



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.

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