After the claimant cleared a yard, a coworker messed it up and refused to clean the mess. The claimant instigated an argument that got out of hand, and then quit because he did not like the vice president's response. Because the employer's response was reasonable, the claimant did not show good cause attributable to the employer, and he is disqualified from receiving benefits under G.L. c. 151A, § 25(e)(1).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0026 8920 73

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his position with the employer on August 24, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 15, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 29, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged and that he had neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, he was not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the employer had discharged the claimant without demonstrating deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of its rule or policy, 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 assessment are set forth below in their entirety:

1. The claimant worked full-time as a driver / sales person for the instant employer, a power equipment company, from 05/01/12 until 08/24/18.

2. In April of 2018, the claimant had complained to the Vice President (VP) about how another employee was treating him.

3. The employee got in the claimant's face and told him not to talk to "his employee" that way after the claimant made a general suggestion to the technician about work.

4. The claimant and employee had worked together for over 4 years and only recently did the other employee begin acting differently towards the claimant.

5. On or about 08/22/18, the employer received a phone call that they were going to be getting a shipment of 56 snow blowers on 08/27/18.

6. On the employer's property, there is a fenced in yard filled with equipment that no longer worked.

7. The claimant took it upon himself to clean out the area for the new equipment. The claimant spent several hours in the 90-degree heat to clear the area and prepare the grounds.

8. The claimant took his lunch and did a delivery in the afternoon and got back to work at approximately 3:30 p.m. The claimant noticed that an employee had driven a bobcat in the area and made a "mess" of the area that he had just cleaned which was frustrating to him.

9. The claimant asked the other employees which one made the "mess" and the employee who the claimant had previous disagreements with laughed at him.

10. The claimant said "fuck" because he was upset and told the VP about what happened. The claimant took a steel rake and leaned it up against the building with the hopes that the other employee would "get the hint" and rake the grounds.

11. The claimant walked over to the garage door and said, "it's not going to rake itself" twice. The other employee walked by the rake several times but did not fix the grounds.

12. The claimant walked over and knocked the rake over to his left. The other employer was approximately 15 feet away to his right. The other employee acknowledged the claimant when the rake hit the ground.

13. The other employee said, "listen you mother fucker" and ran over and picked up the rake and got within less than a foot of the claimant's face and pumped the rake at him. The claimant flinched and the other employee said, "that's what I thought." The claimant felt threatened by the other employee's behavior.

14. The other employee proceeded to throw the rake over the claimant's shoulder and over a 12-foot fence. The other employee then pumped his fists at the claimant and the claimant flinched again. The other employee again said, "that's what I thought."

15. The claimant backed up and walked away because he didn't want the situation to escalate any further and the other employee called the claimant a psychopath. The other employee went in and spoke with the VP and left the building.

16. The claimant then went to the VP who had been in another area at his computer the entire time during the argument and said that he can't work with someone who acts like that. The VP told the claimant that he was overreacting and that he threw a rake at the other employee.

17. The claimant was extremely upset that the VP was automatically taking the side of the other employee and said, "fuck you, I'm done" and "you will be lucky if you see me tomorrow."

18. The claimant left and did not report to work the next day on Saturday.

19. On Monday, approximately an hour before the claimant was to begin his workday, he sent the VP a text message that he was still upset about what happened on Friday and asked to meet with him and the President of the company to discuss the situation.

20. The VP responded "I'm sorry you feel that way. I feel very differently about what happened. It's clear your not happy working with us. I think it's best for both of us to part ways." [sic]

21. The claimant believed that he was discharged from the job.

[Credibility Assessment:][1]

The claimant testified he had been having problems with the other employee and had complained to the employer previously. The claimant testified that on that day he was so upset and his adrenaline was pumping that he may have said "fuck you I'm done" but that he was not intending to quit his job. He was upset that the

[1] We have copied and placed here the portion of the review examiner's Conclusions and Reasoning section that compared the parties' testimony and reached a credibility assessment.

employer was taking the other employee's side without hearing him out. Further, the claimant testified that the employer was in another room during the entire confrontation. The claimant testified that he did not report to work Saturday because of what happened and that he was asking for a meeting on Monday to discuss the situation. After he received the text message back from the VP he believed that he was discharged from the job.

At the hearing, the employer testified that the he did not discharge the claimant, but rather that the claimant quit after the argument with the other employee. The employer testified that if the claimant had come in on Monday and apologized to the other employee that he most likely would still have his job. However, the claimant was never presented that opportunity because the VP responded that he wouldn't meet with the claimant and "it's best for both us to part ways." The employer testified that the claimant was requesting the meeting as "leverage to dictate his employment with the company." The employer's testimony on this matter is unreasonable. Further, it's concluded that the claimant would not have attempted to set up a meeting on Monday if he intended to quit his job.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).

The first issue we must decide is whether the review examiner's conclusion that the employer fired the claimant is supported by substantial evidence. It is not. We begin with the credibility assessment, which states that the claimant would not have tried to set up a meeting on Monday, if he intended to quit. Ordinarily, "[t]he 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). 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). In this case, the assessment is not reasonable in relation to the evidence presented.

The claimant did not send this text message asking to meet with the employer until early Monday morning. Finding of Fact # 19. On Friday afternoon, August 24th, the claimant told the employer, "Fuck you, I'm done. You will be lucky if you see me tomorrow." Finding of Fact # 17. Consistent with this statement, the claimant did not report for work the next day. Finding of Fact # 18. There is no evidence that, in the course of their discussion on Friday afternoon, the employer's vice president told the claimant he was fired or suggested that he not come in the next day. In short, we think the plain meaning of "fuck you, I'm done" is that the claimant was

telling the employer he quit. His failure to show up on Saturday reinforced that decision. Since the claimant had already quit, the only reasonable inference to be made about the text message on Monday morning was that after cooling off over the weekend, he had a change of heart and wanted to talk about returning to work.

Because we conclude that the claimant voluntarily left his job, his eligibility for benefits is properly analyzed under G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

The express terms of this statutory provision place the burden of proof upon the claimant.

In order to show good cause for leaving employment under G.L. c. 151A, § 25(e)(1), the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). To determine if the claimant has carried his burden to show good cause, we must first address whether the claimant had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985). It is evident that, on August 24, 2018, the claimant was frustrated and angry. He had cleaned up the yard and it appeared that the coworker then messed it up. *See* Findings of Fact ## 7–9. The claimant complained to the vice president and left not so subtle hints for the coworker to clean up the mess, but the coworker would not do so. *See* Findings of Fact ## 10 and 11. After a heated argument with the coworker, with threats and rakes flying around, the vice president told the claimant he was overreacting. *See* Finding of Fact # 16. While frustration and anger are understandable reactions here, we do not believe the employer's actions created good cause to resign.

To be sure, the claimant's reason for cleaning the yard and wanting it to stay cleaned up was in furtherance of the employer's business interest to prepare for the 56 snow blowers that were to be delivered in a few days. However, the claimant was not a manager or the coworker's supervisor. He did not have the authority to tell the coworker to clean up the mess. Moreover, when the coworker balked at the claimant's "hints" to clean it up, the claimant deliberately knocked over a rake. The claimant instigated the argument. *See* Findings of Fact ## 10–12; *see also* the claimant's statement to the DUA adjudicator in Exhibit 3.[2] Thus, the claimant was far from blameless in the heated exchange that ensued. Under these circumstances, we believe the vice president's measured response, including pointing out that the claimant had also thrown a rake, was reasonable. *See* Finding of Fact # 16. Because the employer's actions were not shown to be unreasonable, the claimant has failed to demonstrate that he had a valid workplace complaint.

[2] While not explicitly incorporated into the review examiner's findings, the claimant's statement to the adjudicator is part of the unchallenged evidence introduced at the hearing and placed in the record, and 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).

We, therefore, conclude as a matter of law that the claimant's separation from employment was voluntary and not for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning August 19, 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 - March 26, 2019

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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