

Although the employer's case consisted mostly of hearsay, there was sufficient evidence in the record to lend credibility to the hearsay. This, coupled with the review examiner's reasonable credibility assessment finding the claimant's denials of the alleged behavior to be not credible, supported a conclusion that the claimant, who was accused of engaging in physical altercations with co-workers, should be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0027 2637 83

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 her position with the employer on September 28, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 25, 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 December 8, 2018.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding her separation from employment. 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 to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the employer offered hearsay evidence of the final alleged conduct which led to the claimant's separation and the review examiner has found the claimant's testimony about the alleged conduct to be not credible.

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 machine operator for the employer's manufacturing business from 6/21/1999 until 9/28/2018. The claimant worked a regular schedule of 40 hours per week and was paid \$20.25 per hour.
2. The employer maintains an employee handbook that contains a policy related to workplace violence. The policy reads in part: "Employees are prohibited from committing acts or threats of violence against any other employee, former employee, customer, or visitor at any time or place. (Employer) is committed to: 1. Providing a safe and healthful work environment, in accordance with (Employer's) safety and health policy...Any employee who displays a tendency to engage in violent, abusive, or threatening behavior, or who otherwise engages in behavior that (Employer), in its sole discretion, deems offensive or inappropriate will be subject to disciplinary action up to and including termination." Supervisory and human resources staff determine the specific discipline that will result for violations of workplace policies, except in cases where termination is recommended. Prior to discharging an employee, either the employer's executive level or legal department staff must approve the recommendation to terminate.
3. On 2/12/18, the claimant signed an acknowledgment form, confirming her receipt of the employee handbook that contains the workplace violence policy. The claimant was aware of the employer's policy that prohibits employees from making threats or engaging in acts of violence in the workplace. The claimant was aware that her employment could be terminated if she engaged in such behavior.
4. On 8/23/18, the claimant passed through a work area where the first employee was working. The claimant pushed a table into the first employee as she passed through the area. The first employee began yelling at the claimant as the claimant continued to walk away toward her supervisor; the claimant raised both hands with her middle fingers sticking up. The supervisor heard the first employee yelling and observed the claimant with her middle fingers sticking up. The claimant spoke with the supervisor about a work issue and walked back toward the first employee. The claimant engaged the first employee, telling the first employee that she needed to stop talking about the claimant. Other employees heard the claimant and first employee raising their voices; a second employee placed herself between the claimant and first employee. The supervisor heard the yelling between the claimant and first employee and returned to the area. The first employee subsequently told the human resources manager that this type of issue with the claimant would not have been a problem in the past; however, she was too old now. The first employee told the human resources manager that there were family issues outside of the workplace which were being brought into the workplace. The

claimant's aunt and the first employee's sister had a disagreement in the workplace during an overtime shift in May. This incident was not reported to the employer. Based upon the first employee's report of the incident on 8/23/18, the human resources manager, claimant's supervisor, and the employer's attorney met with the claimant. The claimant told the employer representatives that the first employee was gossiping about the claimant behind her back. The claimant denied having engaged in the behavior alleged by the first employee; the claimant stated that she slid the table in order to pass by and denied hitting anyone. The second employee reported that she was working with her back toward the claimant and the first employee at the time the incident began. The second employee reported turning around when she heard yelling, and that she placed herself between the claimant and the first employee in order to de-escalate the situation. The claimant was told that based upon her lengthy term of service and no prior history of such behavior, she was being given the benefit of the doubt. The employer reminded the claimant of its workplace violence policy and discussed her displaying her middle fingers. The claimant was told that she was expected to de-escalate any such incidents in the future.

5. On 9/27/18, the employer received reports from two employees who expressed concerns with the claimant's behavior. The third employee reported that he did not have any problems with the claimant and that she treated him well. The third employee reported that he observed the claimant making statements directed to the first employee in order to provoke her. The third employee told the employer that the statements appeared to be intended to defend the claimant's aunt. The third employee told the employer that the claimant strikes others with her shoulder, or acts as if she is going to hit them, and is aggressive toward others. The third employee told the employer that this behavior typically happened in the cafeteria, where the employer does not have surveillance cameras. The third employee refused to say whom he saw the claimant hit but stated that he was upset because the claimant's aunt stated, during an overtime shift on 9/23/18, that she was going to bring her husband and two sons to the workplace to kill someone. The third employee was shaken up by the claimant's behavior and the aunt's threatening statement.
6. On 9/27/18, a fourth employee told the employer that there were issues with the claimant's behavior, particularly when the supervisor was not present. The fourth employee reported that the claimant bullied others; the fourth employee told the employer that the claimant pushed her while they were in the cafeteria and that the claimant physically pushed other employees. The fourth employee told the employer that the claimant's behavior was ongoing but she felt that it had gone too far. The fourth employee reported that she was afraid because she heard rumors that the claimant and her aunt's family left the [Country A] because they killed people there.

7. On 9/28/18, the employer's human resources manager, the claimant's supervisor, and the employer's attorney met with the claimant to review the employees' complaints. When presented with the claims that she hit others, the claimant told the employer that she did not remember hitting anyone. The claimant told the employer that she was surprised by the allegation as this had come up in the past, that there had been a lot of commotion, and that she would defend herself but not physically. The claimant attributed the employee complaints to jealousy of the claimant. The employer concluded that the statements made by the third and fourth employees were more credible than the claimant's because she claimed to have no memory of hitting others and did not deny having done so.
8. On 9/28/18, the employer discharged the claimant for engaging in physical altercations with other employees. When she was notified of her termination, the claimant requested the employer issue her a disciplinary warning for her behavior and allow her to continue working. The claimant requested the employer issue her discipline instead of discharging her. The claimant made this request because she thought this could serve as an alternative discipline, if the employer had witnesses who were accusing her of hitting others.
9. The claimant filed an initial claim for unemployment insurance benefits, effective 9/30/18.
10. On 10/2/18, the claimant completed a DUA fact finding questionnaire in which she confirmed that she was discharged on 9/28/18. The claimant wrote: "There were issues with coworkers that were never reported to HR by my boss (Name) Coworkers decided to come forward to HR and falsely accuse me that I was threatening and pushing them with my shoulders when I walked by them but yet I asked if they had videos of me doing such act and they said no. But yet there is surveillance all over the company."
11. On 10/25/18, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits under Section 25(e)(2) of the law.
12. On 10/26/18, the employer appealed the Notice of Approval.

Credibility Assessment:

The claimant's overall credibility was diminished by the fact that her actions in the workplace were inconsistent with her testimony. For example, the claimant testified that she would not engage in discord with other employees because she was unwilling to jeopardize her job. She also testified that in order to avoid conflict, she would walk in the opposite direction whenever she saw certain people coming towards her. Yet, the claimant offered direct testimony about an altercation that she initiated with another employee on 8/22/18. On that day, the claimant testified that she extended her middle fingers to another employee after that employee yelled at her. The weight of the evidence suggests that the claimant

instigated the exchange by pushing a table into the employee. Although the claimant attempted to correct her testimony by stating that she moved the table, her initial statement that she pushed the table was consistent with the report made to the employer by the other employee. Likewise, it is more likely that the claimant pushed the table into the employee because the claimant was unhappy with the employee due to some alleged gossiping, and the claimant returned to the area and engaged in a verbal exchange with the employee. After leaving the area and speaking with her supervisor, the claimant chose to return to the area; she went directly to the employee, engaging her in a verbal altercation about the alleged gossiping. The claimant's actions do not represent an attempt to avoid conflict in the workplace. Likewise, the claimant testified that she would notify the supervisor of any issues or incidents in the workplace. Yet, after walking through the work area where the second employee began yelling, the claimant did not report this incident to the supervisor, despite engaging in conversation with him immediately after the incident occurred. Instead, the claimant returned and engaged in a dispute with the employee.

The employer's attorney provided hearsay testimony with regard to the complaints made by other employees. The employer chose not to offer direct testimony from the employees who made the complaints about the claimant's behavior due to concerns for their safety.

The attorney offered direct testimony as to statements made by the claimant during her meeting with the attorney, human resources manager, and supervisor on 9/28/18. The attorney testified that when asked about hitting other employees, or striking them with her shoulder, the claimant responded that she did not remember. During the hearing, the claimant confirmed during cross examination of her testimony that she told the employer she did not remember engaging in this behavior. During direct questioning, the claimant denied hitting or striking other employees with her shoulder. The claimant testified that she told the employer on 9/28/18 that she did not remember striking others because she was in shock at being called into the meeting. The claimant also testified that stating she did not remember was the equivalent of a denial. The claimant's contention that a lack of memory equates to a denial of the behavior was given no weight because it is not plausible. The claimant failed to offer a credible explanation for failing to deny the behavior, if in fact she was certain on 9/28/18 that she did not engage in it. Likewise, it is unlikely the claimant would have attempted to negotiate a less severe form of discipline, in this case a warning, in lieu of termination, if in fact she had not engaged in misconduct.

In light of the above, the claimant's testimony was less credible than the hearsay offered by the employer. Therefore, greater weight was given to the employer's testimony in disputed areas.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the review examiner's consolidated findings of fact support a conclusion that the claimant is subject to disqualification.

Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Following the first hearing, at which only the employer offered evidence, the review examiner concluded that the employer had carried its burden. After reviewing the entire record following remand, including the consolidated findings of fact and the credibility assessment which accompanies them, we agree with the review examiner's conclusion.

The employer discharged the claimant for "engaging in physical altercations with other employees." Consolidated Finding of Fact # 8. In order for the employer to carry its burden to show that the claimant should not receive unemployment benefits, it must first present substantial and credible evidence that the claimant actually engaged in the alleged misconduct. In this case, the employer offered no direct evidence that the claimant engaged in physical altercations with co-workers. The assistant corporate counsel provided hearsay testimony at both hearings as to what was reported by employees to management regarding the claimant. The employer did not present any first-hand witnesses, offered no videos, and did not provide any written statements to substantiate what the assistant corporate counsel orally testified to during the hearings.

The review examiner's consolidated findings of fact clearly credit the employer's version of events. In reviewing the consolidated findings, we must decide whether there is substantial and credible evidence in the record to support them. "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. Assessors of Boston, 383 Mass. 456, 466 (1981); G.L. c. 30A, § 1(6). In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value. *See* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988).

Here, the review examiner noted that the claimant's testimony about the final allegations was not credible. As we have noted above, the credibility assessment is reasonable. In concluding that the review examiner's findings about the final incidents in September of 2018 are supported by the full record, we note that the claimant had been warned previously about similar conduct. Given that she had been accused of similar conduct before, and given that the claimant admitted during the remand hearing that she did use her middle finger in the August, 2018, incident, it is more likely that the September, 2018, allegations are true. That is, it is more likely that the claimant did not always walk away from conflict or issues in the workplace, as she testified to during the hearing. It lends some credibility to the employee allegations that she was aggressive in the workplace. During the remand hearing, the claimant also confirmed that she tried to negotiate a lesser form of discipline in her discharge meeting. The review examiner noted in her credibility assessment that "it is unlikely" that the claimant would have done this "if in fact she had not engaged in misconduct." This is a reasonable conclusion to make, and we agree that it adds a measure of credibility to the allegations against her. It is also important to note that the third employee stated to the employer that he did not have any issues with the claimant. Apparently, they got along well. However, he still reported that the claimant "strikes others with her shoulder, or acts as if she is going to hit them and is aggressive toward others." Consolidated Finding of Fact # 5. Without knowing the identity of this person, it may be hard to confirm that he was on good relations with the claimant, but the fact that a co-worker would profess to be friendly with the claimant but still report her actions gives the allegations more credibility. In light of these observations about the evidence in the record, we conclude that the review examiner's findings about the allegations are supported, and that they lead to a conclusion that the claimant engaged in the behavior alleged by her co-workers.

Our analysis does not end there, however. The key consideration in discharge cases is the claimant's state of mind at the time of the misconduct. See Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). Pursuant to the statute, the claimant's misconduct must have been deliberate. The claimant denied hitting, or striking, her co-workers. However, nothing about the accounts from the third and fourth employees suggests that the claimant's conduct was accidental or unintentional. The third employee reported that the claimant was aggressive, and the fourth employee reported that the claimant bullied others, pushing the fourth employee in the cafeteria. See Consolidated Findings of Fact ## 5 and 6. The conduct was deliberate.

The employer must also show that the claimant's misconduct was done in wilful disregard of the employer's interest. To analyze this, we examine "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). In this case, the claimant directly testified that she was aware of the employer's policies and, thus, its expectations relating to threats and violence in the workplace. The claimant had also been warned previously about the workplace violence policy and that she should de-escalate situations. Consolidated Finding of Fact # 4. The employer's policy is certainly reasonable, as the employer has a strong interest in maintaining a safe work atmosphere for all of its employees. As to mitigating factors, none are present in the record. We note that the claimant denied engaging in the misconduct alleged; therefore, she had no explanation for why the behavior occurred.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is supported by substantial and credible evidence and free from error of law, because the employer has carried its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning September 23, 2018, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 20, 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.

SF/rh