

A claimant who threatened a co-worker and his manager following his suspension is disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St.
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: 0032 6542 48

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 his position with the employer on November 8, 2019. He filed a claim for unemployment benefits with the DUA, and the claim was determined to be effective November 3, 2019. On November 27, 2019, the DUA sent the employer a Notice of Approval, which stated that the claimant is eligible to receive benefits. 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 January 9, 2020.

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 explain the circumstances surrounding his separation from employment. Both parties attended the remand hearing, which occurred over the course of two sessions. Thereafter, the review examiner issued his 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 claimant was fired for threatening and intimidating other employees after he was suspended from work on October 17, 2019.

Findings of Fact

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

1. From May 6, 2019, until October 17, 2019, the claimant worked as a full-time (45 hours per week) assistant valet service manager for the employer, a casino.
2. The claimant reported directly to the employer's valet service manager (the manager).
3. The employer maintained a Code of Conduct policy (the policy) in order to protect its employees and ensure their safety. The policy read, in relevant part, "The following are examples of expected personal conduct [. . .]: [. . .] Refraining from any form of violence, including threats, [. . .] Failure to display proper conduct and abide by these standards may result in disciplinary action up to and including termination."
4. On May 6, 2019, the claimant e-signed an acknowledgment that he had received a copy of the policy.
5. The claimant was aware, as a matter of common sense, that the employer expected him to refrain from engaging in threatening and intimidating conduct towards his co-workers.
6. On October 16, 2019, the claimant met with the employer's director of front service (the director) regarding an altercation that had taken place between other employees on October 4, 2019, which the claimant had witnessed. During the conversation, the claimant told the director that the manager had been engaged in inappropriate sexual discussions with other employees.
7. The manager subsequently complained to the director that the claimant had been allegedly spreading false rumors about 2 female co-workers, both valet booth attendants (the VBA1 and the VBA2).
8. On October 17, 2019, around 9 a.m., the VBA1 met with the director. During the meeting, the VBA1 told the director that she felt threatened and intimidated by the claimant. The VBA1 then wrote and signed a statement which read, in relevant part, "I don't feel safe. I feel threatened by [the claimant] as he has been asking me what I was going to say to HR, as he knew I had an [appointment] before I even knew, and what I should and should not say. I feel extremely threatened and intimidated in this whole situation."
9. The director did not influence the VBA1 or told [sic] the VBA1 what to write in her signed statement.
10. On October 17, 2019, around 9:15 a.m., after meeting with the VBA1, the director met with the claimant. During the meeting, the director told the claimant that he was suspended, indefinitely and without pay, pending an investigation into the allegations made against him. The director told the claimant not to return to work until the employer reached out to him and not to

contact anyone involved in the investigation surrounding the allegations, including the manager.

11. As the director escorted the claimant out of the employer's workplace, the claimant told him something along the lines of, "You're going to fall," "This is bullshit," and "It's going to bite you in the ass."
12. On October 17, 2019, around 9:30 a.m., the claimant called the manager on his personal cellphone. The claimant told the manager, "You know what you did, motherfucker." The manager hung up the phone.
13. On October 17, 2019, around 9:30 a.m., the claimant called the VBA2, used profanity, and made threats towards her.
14. On October 17, 2019, around 9:45 a.m., the claimant called the manager back. The claimant then made threats of physical harm towards the manager, stating that he knew "all about [him]" and that he knew "where to find [him]."
15. The claimant intended to threaten and place the manager in fear as a result of his phone call.
16. On October 17, 2019, at 10:13 a.m., the manager sent an email to the director informing him of the claimant's phone calls and provided specific details of what the claimant said to him.
17. On October 17, 2019, at 11:36 a.m., the VBA2 sent an email to the director informing him of the claimant's phone call and expressing that she felt intimidated by him.
18. Later during the day on October 17, 2019, the claimant received a phone call from a state trooper (the trooper), who was assigned to the employer's workplace, telling the claimant that he was not allowed on the employer's property as a result of the threat he made towards the manager. The claimant denied making any threats.
19. Sometime in late October or early November 2019, the employer discharged the manager as a result of an investigation following the claimant's allegations against him.
20. On November 1, 2019, the claimant sent an email to the director, apologizing for the "unprofessional" manner in which he had spoken to him as he was escorted out of the employer's workplace on October 17, 2019, manner, [sic] and expressing frustration by stating that he "[felt] as if [he] was being targeted by [the manager]."

21. The director, concluding that the claimant had violated the employer's policies and expectations by threatening and intimidating the manager and the VBA2 on October 17, 2019, decided to discharge the claimant.
22. On November 4, 2019, the claimant filed a claim for unemployment benefits with an effective date of November 3, 2019.
23. On November 8, 2019, the director called the claimant and discharged him from his employment effective immediately.
24. The claimant was not discharged for the allegations that resulted in his suspension.
25. On January 28, 2020, the claimant sent a text message to the manager. The text included a picture of the claimant holding a gun. The text read, in relevant part, "Here so you don't gotta record anymore phone calls man when I see you I'm putting a hole in you."
26. By sending the text message, the claimant intended to threaten the manager's life, to "put fear" in him, and to "shake him up."

Credibility Assessment:

During the remand hearing, the claimant testified that he did not threaten either the manager or the VBA2 on October 17, 2019. In support of his contention, the claimant submitted text messages from the VBA1 (from February 14, 2020), in which the VBA1, upon being questioned by the claimant if she ever felt threatened by him, told him that she did not. Notwithstanding the reasons as to why the VBA1 may change her story upon being asked by the claimant, via text message, if she ever felt threatened by him, the employer submitted the manager's and the VBA2's emails, providing specific information (particularly the manager's) of how the claimant threatened them on October 17, 2019. The employer also submitted the VBA1's signed written statement from October 17, 2019, indicating that she felt threatened by the claimant. Even if it were to be concluded that the manager had a motive to make false allegations about the claimant (seeing as the claimant had complained about him to the director on October 16, 2019), the claimant admittedly sent a text message to the manager on January 28, 2020 with a picture of himself holding a gun, and threatening to "put a hole" in the manager. Although incidents that take place after a separation typically have no bearing on unemployment eligibility, in this particular case, the subsequent incident is relevant given the similarity between the incidents and the credibility of the claimant's denials regarding the incident that led to his discharge. Moreover, the claimant's contention that he did not mean to threaten the manager on January 28, 2020 and that he sent the text in a joking manner is determined to be not credible, given how a reasonable person would interpret the relevant text message and the picture of the claimant holding a gun as a threat. Where the claimant stated that his intention at the time was to "put fear" and to "shake up" the manager, it is concluded that his intention

was to threaten him. Therefore, based on this very serious threat on the manager's life, it is also concluded that the claimant's denials of the incident that led to his discharge are not credible, given all the additional facts and circumstances described above. Accordingly, it is concluded that the claimant did, in fact, call and make the relevant statements to the manager and the VBA2 on October 17, 2019, and that his intention was to threaten them and place them in fear.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. 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, as the review examiner did, that the claimant is not eligible to receive unemployment benefits.

It is undisputed that the claimant was suspended from his position on October 17, 2019, and that he was subsequently discharged on November 8, 2019. 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 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. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Following the initial hearing, at which only the employer offered evidence, the review examiner concluded that the employer had met its burden. After reviewing the full record, including the documentary evidence and testimony from the remand hearing, we agree with the review examiner's initial conclusion.

The employer discharged the claimant for violating its expectations regarding intimidating and threatening co-workers. Consolidated Findings of Fact ## 21 and 23. The employer, as an initial matter, must present substantial and credible evidence to show that the conduct happened as alleged. In addition to the testimony provided by the director of front services, the employer provided contemporaneous e-mails from the claimant's manager and a co-worker describing the threats and intimidating behavior. *See Exhibits ## 12 and 13.* The claimant denied that he threatened anyone on October 17, 2019. He also offered testimony and text messages in his attempt to refute the accusations against him.¹ However, the review examiner found the allegations to be true. Consolidated Findings of Fact ## 12–15.

¹ The claimant called into question the character of his manager and speculated as to why the VBA2 might have said what she did about his behavior. The claimant offered text messages from VBA1 and another employee. The text

In resolving this dispute, the review examiner considered a threatening text message sent by the claimant to the manager in January of 2020. *See* Remand Exhibit # 11. His reasons for doing so are cogently stated in his credibility assessment. As his findings are reasonable in relation to the evidence presented, we see no reason to disturb the assessment. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Therefore, we have adopted the consolidated findings of fact, including the findings that the claimant engaged in threatening and intimidating behavior on October 17, 2019.²

Our inquiry does not end here, however. 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). In order to evaluate the claimant's state of mind, we must "take into account 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).

During the remand hearing, the claimant testified that he was aware that he should not threaten or intimidate co-workers. *See* Consolidated Finding of Fact # 5. The employer's expectation that employees refrain from intimidating and threatening behavior is certainly reasonable. It is a rational means of ensuring a safe workplace wherein all employees can carry out their duties to the best of their abilities. Finally, no evidence of mitigating behavior is contained within the record. Nothing suggests that the claimant accidentally or unintentionally contacted the employees in the manner he did on October 17, 2019. In any event, the claimant denied the behavior, thus precluding him from offering evidence of mitigation. *See Lagosh v. Comm'r of Division of Unemployment Assistance*, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance with his employer's expectations, the review examiner properly found that mitigating factors could not be found).

We, therefore, conclude as a matter of law that 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 free from error of law, after the claimant was fired for threatening and intimidating co-workers following his suspension from work on October 17, 2019.

messages were not from his manager or VBA2, the two people he allegedly threatened and intimidated after the October 17, 2019, suspension meeting.

² Although the claimant's manager was subsequently discharged, *see* Consolidated Finding of Fact # 19, both the claimant and the manager were still employed on October 17, 2019. Thus, the employer had a strong interest in determining what happened after the suspension meeting, and the employer was reasonable in taking disciplinary action once it found that the claimant had engaged in a violation of its expectations.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning November 3, 2019, 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 - April 9, 2020



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until May 4, 2020³. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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

³ See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-1-20.