

Claimant discharged for deliberate misconduct in wilful disregard of the employer's interest, where review examiner credited employer's testimony that the claimant threatened a subcontractor.

**Board of Review
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Issue ID: 0033 8322 10

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 was discharged from his position with the employer on January 24, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 11, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on September 17, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant 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, was entitled to benefits pursuant to 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 remanded the case to the review examiner to take testimony and evidence from the employer. Only the employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 claimant's discharge for allegedly threatening a subcontractor did not constitute deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy of the employer, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a General Laborer for the employer, a remodeling company, from 11/1/17 to 1/22/20 when he separated.
2. The claimant was hired to work full time, earning \$19.00 an hour.
3. The claimant was discharged for workplace violence by threatening a subcontractor. The employer has no written, uniformly enforced rule or policy accompanied by specific consequences which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the Managing Member.
4. The employer maintains a workplace violence policy. Under the policy violence or threats of violence towards another individual is not tolerated. Any threats should be reported to the Manager. Failure to follow the workplace violence policy could result in discipline up to and including termination.
5. The claimant was aware of the policy, he received and acknowledged a copy of the policy on 10/6/17. The claimant had been made further aware of the employer's expectations regarding workplace violence through previous warnings he received for similar behavior. He received a verbal warning on 2/8/28 [sic] for abuse and swearing at a Manager of the Store; and he received a written warning on 5/13/19 for engaging in a confrontation with another employee in the warehouse.
6. The Managing Member received a report from the Superintendent informing him that the claimant had been involved in an incident on site on 1/22/20. It was report [sic] by a subcontracting employee that at 11:15 p.m. he feared for his safety after being threatened by the claimant. The subcontracting employee had pushed a table into the claimant and the claimant responded by stating he was going to "kick the kid's ass" because he pushed the table. The subcontracting employee reported the incident to the Superintendent. The Superintendent reported that the claimant was combative throughout the shift after being asked to calm down.
7. The Managing Member spoke to the claimant on 1/24/20 over the phone to ask what happened. The claimant denied being combative or threatening towards the subcontracted employee.
8. After his receipt of previous warnings, the employer decided to discharge the claimant for his behavior.

Credibility Assessment:

The employer's testimony that the claimant engaged in threatening behavior is deemed more credible than that of the claimant's previous denial of these actions, as it is more likely than not that the claimant did engage in such behavior given the

additional testimony from the employer that he had been warned in the past for similar behavior. In addition, the employer provided more detailed information surrounding the event that led to the claimant's discharge.

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.

The review examiner awarded benefits after analyzing the claimant's separation under 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 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

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Solely on the basis of the claimant's testimony at the initial hearing, the review examiner concluded the employer had not met its burden. After remanding the case in order to take the employer's testimony, however, we now conclude that the employer has met its burden.

The consolidated findings show that the employer maintains a policy that prohibits workplace violence or threats of violence towards others. *See Consolidated Finding # 4.* The claimant signed an acknowledgement of this policy on October 6, 2017. *See Consolidated Finding # 5.* The employer determines discipline for those who violate this policy based on the nature and severity of the incident. *See Consolidated Findings ## 3–4.* Where there is no evidence that the employer uniformly enforces discipline for violations of the policy, we conclude that the employer failed to meet its burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule.

Arising from the employer's above-referenced policy, however, was an expectation that employees would refrain from violence or threats of violence towards others. The employer's expectations are reasonable. The claimant was aware of the expectation, as he was aware of the underlying policy. The claimant was also reminded of the policy and expectation when he was issued a verbal warning for abusive conduct and swearing at a store manager on February 8, 2018, and again when

he received a written warning for a confrontation with another employee in a warehouse on May 13, 2019. *See Consolidated Finding # 5.*

After remand, the review examiner found that, on January 22, 2020, the employer's superintendent reported to the manager that the claimant had been involved in an incident that day. A subcontractor had reported to the superintendent at 11:15 p.m. that he feared for his safety after being threatened by the claimant. The subcontractor reported he had pushed a table into the claimant, who responded by stating he would "kick the kid's ass" for pushing the table. The superintendent also reported that despite asking the claimant to calm down, the claimant remained combative throughout the rest of the shift. *See Consolidated Finding # 6.*

The employer's manager spoke to the claimant by telephone on January 24, 2020, to get his version of events. The claimant denied being threatening or combative towards the subcontractor, but the manager discharged the claimant for his conduct. *See Consolidated Findings ## 7-8.*

At the initial hearing, the claimant denied making threats or being combative. After remand, the review examiner provided a credibility assessment citing her reasons for accepting the employer's version of events over the claimant's, noting particularly that the employer provided more detailed information regarding the event, and that the claimant had been warned in the past for similar behavior.¹ 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 light of the evidence presented, we believe her assessment is reasonable.

In order to determine whether the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest, we must also consider his state of mind at the time of the behavior. *See 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).

Here, the review examiner found that the claimant knew the employer expected him to refrain from violence or threats of violence on the job. The expectation is reasonable. There is no indication that the claimant's threatening remark and combative behavior were accidental. Since the claimant denied engaging in the behavior, he failed to offer any mitigating circumstances for his conduct. Thus, the employer has met its burden to demonstrate the requisite state of mind to support disqualification from benefits.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

¹ We also note that the superintendent reported that after he asked the claimant to calm down, the claimant's behavior was "combative" during the rest of the shift, which suggests the claimant had been agitated by his encounter with the subcontractor. *See Consolidated Finding # 6.*

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 25, 2020, 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 - November 19, 2020

Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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 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.

JPCA/rh