

Claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest, where the review examiner credited the employer's testimony that the claimant angrily instigated a loud argument with an assistant manager shortly after being issued a final written warning for insubordination and other incidents. Held he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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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 June 5, 2020. He filed a claim for unemployment benefits with the DUA, effective June 14, 2020, which was approved in a determination issued on July 16, 2020. The employer appealed the determination to the DUA hearings department. Following a two-day hearing on the merits, attended by both parties on the first day but only by the employer on the second day, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on April 9, 2022. We accepted the claimant's application for review.

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 remanded the case to the review examiner to allow the claimant to present testimony and evidence and to ensure the review examiner properly entered the employer's proffered documents into evidence. Both parties attended the three-day 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 instigating an argument with an assistant manager shortly after receiving a final written warning for insubordination constituted deliberate misconduct in wilful disregard of the employer's interest, 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. From July 5, 2011, to June 5, 2020, the claimant worked as a full-time (40 hours per week) maintenance worker for the employer, a non-profit mental health organization.
2. The claimant reported directly to the employer's director of facilities (supervisor).
3. The employer maintained a Code of Conduct (code) in order to ensure a professional and respectful working environment. The code read, in relevant part, "employees will be conscientious...respect the dignity of all individuals; work collegially, cooperatively and effectively with co-workers and supervisors...to resolve any issues or problems, and not demonstrate insubordination."
4. Violations of the code of conduct result in disciplinary action up to and including termination at the discretion of the employer.
5. The code is included in the employee handbook which the claimant acknowledged receipt of on August 1, 2019.
6. The employer expected employees to act in a professional and respectful manner at work.
7. The claimant was aware the employer expected him to act in a professional and respectful manner through receipt of the handbook and written disciplinary warnings issued on April 17, 2020, and June [3], 2020.
8. On or about March 2020, the employer hired a new director of facilities, who became the claimant's new supervisor. The claimant and the supervisor had a personality conflict.
9. On April 17, 2020, the employer issued the claimant a written warning. The April warning referred to incidents on April 1st, 9th, 10th, and 15th. The April 9, 2020, incident involved substandard work product.
10. On April 1, 2020, the claimant "displayed aggressive conduct...demonstrated outward frustration...slammed items as he moved them and threw items unnecessarily." Later that day, when the supervisor denied the claimant's request to go off-site for coffee, the claimant "became agitated and was confrontational shortly after in person with his supervisor." The claimant asked his supervisor, "Do you have a problem with me?"
11. On April 10, 2020, when asked to adjust assembled cabinets, the claimant became frustrated, stated it was "bullshit," and proceeded not to fix the cabinets.

12. On April 15, 2020, the claimant became “irritated” when the supervisor told him his co-worker would show him the proper way to remove window films. When the supervisor returned to the work site later that day, the claimant had not completed the window film, as instructed. When the supervisor called the claimant instructing him to return and complete the windows the claimant became “agitated and argumentative.”
13. The April 17, 2020, warning, included the language “Going forward [claimant] is expected to maintain appropriate professional behavior at all times. He is also expected to complete work assigned to him in an effective, timely, cooperative and supportive manner with his team as it arises...failure to meet these criteria will result further disciplinary action, up to and including termination of your employment.” The claimant refused to sign the warning.
14. In May 2020, the employer’s assistant director of human resources met with the claimant and his supervisor to discuss ongoing “miscommunication issues.” The supervisor and claimant agreed to communicate through text or email or with a third-party present to avoid further misunderstandings.
15. On June 3, 2020, in the morning, the employer’s associate vice-president of operations and the supervisor met with the claimant and issued him a final written warning for insubordination, faulty workmanship leading to potential safety issues, failure to properly store and secure equipment, and failure to submit timely paperwork. The warning included an incident on May 13th, which involved the assistant facilities manager. The June 3, 2020, warning included the language “any further instances of failure to meet these criteria” (completing assigned tasks in an effective and timely manner, following instructions, following safety precautions) “will result in termination of your employment.” The claimant refused to sign the warning.
16. During the meeting, the claimant denied any wrongdoing and disputed the accuracy of the examples listed in the warning. The claimant was angry and became argumentative. Due to the claimant’s “disruptive behavior,” the associate vice-president had the employer’s assistant director of human resources join the meeting remotely. During the meeting, the employer’s assistant facilities manager’s involvement in the subject incidents was discussed. The associate vice-president and the assistant director decided to meet with the assistant manager later that day.
17. Later that day, the associate vice-president, the assistant director and the assistant manager discussed the claimant’s written warning. The assistant manager agreed that the events cited were accurate. Subsequently, around 2:00 pm, the associate vice-president, the assistant director, the assistant manager, and the claimant met to discuss the claimant’s written warning. The assistant manager stated that he did not disagree with the warning. While the assistant manager was speaking, the claimant repeatedly shook his head in disagreement.

- The meeting ended and the claimant left. The assistant director, the associate vice-president, and the assistant manager spoke for five more minutes or so, then the assistant director logged off, and the associate vice-president went back to her office, and the assistant manager went to the on-site workshop.
18. A few minutes after the assistant manager returned to the workshop, the claimant, walked past him and stated, "Thanks a lot friend." About ten minutes later, the claimant entered the shop and approached the assistant manager stating the assistant manager had "thrown him [the claimant] under the bus," referring to the assistant manager's approval of the written warning. The claimant, standing inches away from the assistant manager, became angry and started loudly arguing with the assistant manager regarding the unfairness of the warning. The assistant manager loudly argued back, saying, "I don't know what you want me to do about it. There's only so much I can do as a manager." The loud argument continued, and the assistant manager told the claimant to stop yelling and leave him alone. The claimant persisted. The assistant manager told the claimant if he did not leave him alone, they were going for a ride, and the claimant would not return, implying physical violence. The claimant walked away. At the time of the confrontation, the assistant manager believed the claimant had no legitimate work reason to be in the shop.
 19. During the claimant's confrontation with the assistant manager, a co-worker entered the shop with a non-employee. The co-worker heard the claimant and assistant manager arguing loudly and immediately exited the shop in order to prevent the outside worker from witnessing the argument.
 20. On June 4, 2020, shortly before 8:00 a.m., the assistant manager emailed the supervisor an account of the altercation with the claimant the night before. Subsequently, the supervisor notified the assistant director and associate vice-president. Following the assistant manager's report of the incident, the assistant director and associate vice-president wanted to meet with the claimant. The claimant was ill on June 4, 2020, and did not come to work. After the coworker, who witnessed the argument, confirmed the altercation occurred, and was witnessed by an outside worker, the assistant director and the associate vice-president decided to discharge the claimant as a result of his unprofessional and disrespectful conduct towards the assistant manager.
 21. On June 5, 2020, the assistant director and the associate vice-president met with the claimant and discharged him effective immediately, for his unprofessional and disrespectful conduct towards the assistant manager on June 3, 2020. The claimant did not deny the confrontation but alleged the assistant manager was the aggressor and had physically threatened him.
 22. Following the June 3, 2020, altercation, the associate vice-president met with the assistant manager regarding his implied threat to physically assault the claimant, and issued the assistant manager a verbal warning.

23. On June 8, 2020, the co-worker, who entered the shop during the incident, submitted a written statement regarding the confrontation to the supervisor and the associate vice-president.
24. On June 17, 2020, the claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) with an effective date of June 14, 2020.
25. In his responses to the DUA questionnaires, the claimant reported the June 3, 2020, confrontation and alleged the assistant manager instigated the confrontation and physically threatened him. The claimant reported he laughed after the assistant manager threatened him and then accepted the assistant manager's apology.

Credibility Assessment:

In this case, there is no dispute a confrontation occurred on June 3, 2022, between the claimant and the assistant manager. There is no dispute that the confrontation concerned the claimant's final written warning issued earlier that day and concerned the assistant manager's agreement with the written warning. The assistant manager testified he did not approach the claimant after the meeting, but [alleged] the claimant made the comment, "Thanks a lot friend," before confronting the assistant manager for throwing the claimant under the bus. The assistant manager's testimony is corroborated by his contemporaneous written email to the supervisor on June 4, 2020, and the co-worker's, who witnessed the claimant and the assistant manager arguing, written statement. In addition, the assistant director and the associate vice-president both credibly testified the claimant was very upset about the written warning, and adamantly denied any wrongdoing. Indeed, the assistant director credibly testified the associate vice-president had to have the assistant director join the initial meeting, because the claimant's behavior was so "disruptive". Moreover, during the remand hearing, the claimant admitted he was frustrated and upset over the written warning, which he believed was unfair, inaccurate, and due to the supervisor not liking him. In addition, the claimant asserted he was upset the assistant manager did not tell the truth about the events cited in the final written warning. During the remand hearing, the claimant denied saying, "Thanks a lot friend" or accusing the assistant manager of throwing him under the bus. Rather, the claimant asserted, following the meeting, the assistant manager instigated the confrontation by approaching him repeatedly in the workshop, and wanted to talk about the meeting, saying that the claimant did not seem happy about the warning, and that there was only so much the assistant manager could do. The claimant alleged he told the assistant manager he did not want to talk about it and walked away. The claimant asserted subsequently, after he reentered the shop and was washing his tools, the assistant manager approached him again and threatened him "to go for a ride". The claimant alleged he could not recall saying anything to the assistant manager preceding the alleged threat. In addition, at the remand hearing, the claimant alleged he was scared and intimidated when the assistant manager threatened him. However, in his responses, the claimant

reported that following the assistant manager's comment, he and the assistant manager both laughed and shook hands and parted amicably. Given the claimant's vague and evasive testimony regarding his own statements during the confrontation, and where at the time of the confrontation, the claimant was admittedly upset, frustrated, and believed the assistant manager was a liar, and where the assistant manager recalled specific statements made by himself and the claimant during the confrontation, corroborated by the assistant manager's contemporaneous written statement, and where the claimant has a documented history of unprofessional and disrespectful behavior, this review examiner finds the assistant manager's testimony more credible than the claimant's.

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.

Because the claimant was discharged from his employment, his eligibility 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 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 employer's testimony at the initial hearing, the review examiner concluded that the employer had met its burden. After remanding the case to take the claimant's testimony, we also conclude that the employer has met its burden.

The review examiner's consolidated findings show that the employer maintains a Code of Conduct that requires employees to work professionally with co-workers and supervisors and prohibits insubordination. *See* Consolidated Finding # 3. This policy is contained in the employer's handbook, which the claimant received on August 1, 2019. *See* Consolidated Finding # 5. However, the employer retains discretion when determining discipline for employees. *See* Consolidated Finding # 4. Where there is no evidence that the employer uniformly enforces this

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 act professionally and respectfully in the workplace. *See Consolidated Finding # 6.* The employer's expectation is reasonable. The employer discharged the claimant for his unprofessional and disrespectful conduct. *Consolidated Finding # 21.* We consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

After remand, the review examiner found that, on June 3, 2020, the employer's associate vice president of operations (AVP) and the claimant's supervisor met with the claimant to deliver a final written warning for insubordination and other issues. The warning cautioned that any further failure to comply with the employer's expectations "will result in termination of your employment." *See Consolidated Finding # 15.* During that meeting, the claimant denied any wrongdoing and became angry, argumentative, and behaved disruptively — so much so that the employer's assistant director of human resources (ADHR) was brought in to attend the meeting remotely. *See Consolidated Finding # 16.*

Later that day, the AVP and ADHR convened another meeting around 2:00 p.m. with the claimant and the assistant manager (AM). The employer discussed the final warning again, the AM stated that he did not disagree with the warning, the meeting ended, and the participants dispersed. *See Consolidated Finding # 17.*

Shortly after the second meeting ended, the claimant walked past the AM and said, "Thanks a lot, friend." About ten minutes later, the claimant returned to the shop where the AM was working, accused the AM of "[throwing the claimant] under the bus," became angry, and loudly argued with the AM about the alleged unfairness of the final warning. The AM argued loudly back and told the claimant to stop yelling and to leave him alone. The claimant eventually walked away. At the time of the confrontation, the AM believed that the claimant had no legitimate work reason to be in the shop. *See Consolidated Finding # 18.* Another coworker heard the claimant arguing with the AM. *See Consolidated Finding # 19.*

On June 4, 2020, the AM emailed the supervisor an account of his encounter with the claimant after the meeting about the final written warning. The supervisor reported the incident to the AVP and ADHR, who confirmed with the coworker that the incident had occurred. The employer decided to discharge the claimant for his disrespectful and unprofessional conduct toward the AM, but the claimant did not report to work that day. *See Consolidated Finding # 20.*

On June 5, 2020, the ADHR and AVP discharged the claimant for his unprofessional and disrespectful conduct towards the AM after the meeting about his final written warning on June 3, 2020. The claimant did not deny that there had been another confrontation but alleged that the AM had been the aggressor. *See Consolidated Finding # 21.*

While the claimant denied engaging in any of the wrongdoing that led to his final written warning issued on June 3, 2020, and claimed the AM was aggressive to him that afternoon, the review examiner provided a detailed credibility assessment citing her reasons for accepting the employer's

version of events over the claimant's. In particular, she noted particularly that the AM recalled specific statements he and the claimant made during their exchange, which were corroborated by his contemporaneous written statement. Further, the claimant gave "vague and evasive testimony" about his own statements during the interaction and had a documented history of unprofessional and disrespectful behavior in the workplace. 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 that her assessment is reasonable.

There is no indication that the claimant's behavior that day was accidental. On the contrary, the claimant sought out the AM and initiated another altercation with him shortly after the second meeting had ended. Inasmuch as time had passed between the initial supervisory meeting and the claimant's confrontation with the assistant manager, we can reasonably infer that he acted deliberately.

In order to determine whether an employee's actions were in wilful disregard of the employer's interest, 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).

Here, the review examiner found that the claimant knew the employer expected him to refrain from disrespectful and insubordinate conduct in the workplace. The claimant was issued a final written warning for insubordination on June 3, 2020, before he started the altercation with the AM. The expectation is reasonable. The claimant has failed to offer any mitigating circumstances for his conduct. Thus, the employer has met its burden to demonstrate that the claimant acted in wilful disregard of the employer's interest.

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).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending June 6, 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 - April 26, 2024



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
(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