The review examiner credited the claimant's direct testimony over the employer's hearsay evidence and found that he did not threaten a coworker while he was at work. Thus, the findings do not establish that the claimant engaged in misconduct. His discharge is not disqualifying under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0050 0123 07

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 reverse.

The claimant was discharged from his position with the employer on July 24, 2020. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 18, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties in the first two sessions, but only by the employer in the third session, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 16, 2021. 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 provide further testimony and afford both parties an opportunity to present additional evidence. 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, which concluded that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest by committing an act of workplace violence, is supported by substantial and credible evidence and is free from error of law, where following remand, the review examiner credited the claimant's testimony and found that the claimant did not threaten another employee while at the employer's workplace.

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 Service Tech for the employer, a retail store, from 11/1/08 until 7/24/20 when he became separated.

2. The claimant was hired to work full time, 40 hours a week, earning $17.01 an hour.

3. The claimant was discharged for threatening another Associate while in the workplace. The employer has no written, uniformly enforced policy or rule, accompanied by specific consequences, which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the Marketing Manager in conjunction with the Human Resource Manager.

4. The employer expects employees to refrain from harassing, intimidating, bullying or verbally threatening another in the workplace. This is necessary to prevent violence in the workplace.

5. The claimant was made aware of the employer's expectations in this regard through the workplace violence policy which is posted on the board and other areas in the workplace. The employer also informs employees throughout the year on the policy at staff meetings.

6. On 7/8/20, at approximately 10 a.m. the claimant and Associate #1 went to the front of the store to purchase some items on their break. As they passed in front of the pharmacy, Associate #2 kept staring at the claimant and started to stand up as they were approaching. The claimant asked Associate #2 if something happened and Associate #2 asked the claimant "Why are you looking at me?" The claimant told Associate #2 that he was not looking at him but was looking for an item. The claimant asked Associate #2 what was the problem because his behavior towards the claimant was occurring on a daily basis. Associate #2 told the claimant if there is a problem he could fix it outside of working hour [sic].

7. The claimant had previously asked the General Manager Coach to keep Associate #2 away from him while at work because he did not want any issues since his wife's cousin had a protective order against Associate #2. The protective order was granted because Associate #2 had hit the cousin while she had a child in her arms. The General Manager Coach informed the claimant when he had brought it to his attention that unless the claimant had a protective order against Associate #2, there was really nothing he could do about the situation.

8. The claimant never threatened Associate # 2.

9. The General Merchandise Coach and Store Manager began an investigation into the incident. On 7/8/20, the claimant was placed on suspension pending the outcome of the investigation.

10. Associate #1 gave a written statement indicating that at no moment did the claimant threaten Associate #2 and he indicated that Associate #2 was the one staring at the claimant when they came to the front of the store.

11. The claimant remained on suspension until 7/24/20 when he was notified by phone that he was being discharged.

Credibility Assessment:

The claimant's assertion that he did not threaten Associate #2 is deemed more credible than the employer's contrary testimony since Associate #1 who participated as a witness for the claimant at the hearing corroborated the claimant's assertion. Additionally, the only employer witness at the hearing, the General Manager Coach, provided only second hand testimony of the event that led to the claimant's termination. He did, however, corroborate with firsthand testimony, that Associate #1 gave a statement after the event occurred to the employer indicating that the claimant had not made any threats.

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. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact now support the conclusion that the claimant is qualified for benefits.

Since the claimant was discharged from his employment, we analyze his eligibility for benefits 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] . . . (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, 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, . . .

In the original decision, the review examiner decided the claimant's eligibility under the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2), as opposed to the knowing policy violation prong.

Since the employer did not present evidence that the claimant's alleged acts violated any written policy, we believe the review examiner properly analyzed this case under the deliberate misconduct prong.

We note at the outset that "the grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Thus, it is the employer's burden to establish that the claimant actually engaged in the alleged conduct, that such conduct violated a reasonable expectation, and that the conduct was done deliberately in wilful disregard of the employing unit's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

Our first inquiry is whether the claimant actually engaged in the misconduct alleged by the employer. In this case, the employer's evidence referred to a July 8, 2020, interaction between the claimant and another employee, in which the claimant was alleged to have threatened the coworker. *See* Consolidated Findings of Fact ## 6 and 9. Although the parties disputed the events that led up to the claimant's discharge, the parties did not dispute that the employer discharged the claimant after determining that he engaged in workplace violence against another employee.[1] *See* Consolidated Finding of Fact # 11. However, the review examiner found that the claimant "never threatened Associate # 2." *See* Consolidated Finding of Fact # 8.

In rendering her consolidated findings, the review examiner provided a credibility assessment where she explained why she viewed the employer's testimony to have been less believable than that of the claimant. 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 review examiner's assessment is reasonable in relation to the evidence presented, and we find no reason to disturb it.

Since the consolidated findings provide that the claimant did not engage in the alleged wrongdoing of threatening another employee, the employer has not met its burden to establish misconduct.

We, therefore, conclude as a matter of law that that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interests, or for a knowing violation of a uniformly enforced rule or policy, within the meaning of G.L. c. 151A, § 25(e)(2).

[1] We have supplemented the findings of fact, as necessary, with this unchallenged evidence before the review examiner. *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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 5, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 2021

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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 apply at: https://ui-cares-act.mass.gov/PUA/_/. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

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.

JMO/rh