**The claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when he had a verbal altercation with a customer. He had previously received a three-day suspension for engaging in similar conduct. Because the claimant denied engaging in the conduct that resulted in his termination, he failed to establish mitigating circumstances. Held he is ineligible for benefits under G.L. c. 151A, § 25(e)(2).**

**Board of Review**
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**Issue ID: 0060 3470 74**

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 December 16, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 22, 2021. 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 August 19, 2021. 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, he 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 allow the employer to testify and afford both parties an opportunity to present additional evidence. Only the employer attended the remand hearing. 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, which concluded that the employer did not meet its burden to establish that the claimant was discharged for deliberate misconduct in wilful disregard of its interests, is supported by substantial and credible evidence and is free from error of law, where, following remand, the review examiner found that the employer terminated the claimant for violating its workplace violence policy when he engaged in a verbal altercation with a customer.

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 full-time as an operations assistant for the employer, a municipality, from May, 2010, to December 16, 2020.

2. The claimant's immediate supervisor was the director of golf (the DG).

3. The employer maintained a workplace violence policy prohibiting "threatening, hostile or intimidating behavior." The policy was contained in personnel policy guidelines. Violations of the policy were subject to discipline, up to termination, at the employer's discretion.

4. The employer maintained an expectation that employees act in a respectful, professional manner when dealing with constituents. The purpose of the expectation was to ensure constituents could participate in golf without feeling threatened or intimidated. The expectation was communicated to the claimant by the personnel policy guidelines and via warning in October of 2019.

5. In October, 2019, the employer received a complaint from a golfer that had a verbal altercation with the claimant. The claimant received a written warning stating that further offenses would be subject to discipline up to termination. The claimant received a 3-day suspension.

6. On November 28, 2020, after the claimant finished his shift, he played a round of golf with four other golfers (Group A). The course prohibits groups of five or more golfers to ensure pace of play.

7. A group (Group B) playing behind Group A was upset with the pace of play and asked the claimant if groups of five were allowed. The claimant yelled at Group B.

8. A member of Group B called the pro shop to complain about the claimant. The claimant became aware that the pro shop had been called.

9. The claimant confronted Group B about calling the pro shop. The claimant was yelling at them. The claimant told them they were "two seconds away from being thrown off the course."

10. Following the end of the round, the claimant again confronted Group B, taunted them, and waved as they left the course.

11. Following the incident, the customer reported the claimant to the human resources department of the employer.

12. On December 16, 2020, the claimant was terminated for violating the workplace violence policy.

13. Following his discharge, the claimant filed a grievance with the employer.

14. An agreement was signed on June 30, 2021, whereby the claimant's discharge was rescinded and the claimant agreed to resign as of September 15, 2021.

15. The claimant was paid his normal compensation for the period of December 17, 2020, to September 15, 2021.

16. On September 15, 2021, the claimant resigned in accordance with the agreement.

Credibility Assessment:

The original hearing was held by telephone. The claimant participated in the original hearing. The employer did not participate in the original hearing.

The remand hearing was held by telephone. The employer was represented by the human resources director and an attorney. The claimant did not participate in the remand hearing.

In the original hearing, the claimant testified that he had not received prior warnings for violating the workplace violence policy. The claimant made no mention of a settlement agreement with the employer rescinding his termination. The claimant's testimony from the original hearing is deemed less credible than the employer's testimony due to his lack of forthrightness. The employer did not attend the original hearing because they believed the matter was moot due to the settlement agreement.

In the remand hearing, the employer provided the October 2019 written warning showing the claimant had been warned previously about aggressive interactions with customers. The employer also presented testimony and the settlement agreement showing that the claimant's discharge had been rescinded and that the claimant had been paid his full wages for December 17, 2020, to September 15, 2021, when he resigned. The claimant did not participate in the remand hearing and so did not provide testimony concerning his omission of the settlement agreement. After reviewing the testimony from both parties, the employer's testimony is deemed to be more credible than the claimant's testimony.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 7 is unsupported by the record, as there is no testimony or documentary evidence to establish that Group B spoke to the claimant prior to contacting the employer's pro shop, or that Group B initiated contact with the claimant at any time. In adopting

the remaining findings, we deem 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 consolidated findings do not support an award of unemployment benefits.

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 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 . . . .

"[T]he 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).

The employer terminated the claimant for violating its workplace violence policy, specifically for engaging in a verbal altercation with the employer's customers on November 28, 2020. *See* Consolidated Findings ## 7, 9, 10, and 12. This is a violation of the employer's expectations that employees act in a respectful, professional manner when dealing with customers. *See* Consolidated Finding # 4. However, because the record does not contain any information about other employees who committed this infraction, and the level of discipline imposed for violating this policy is discretionary, the employer has not demonstrated that the discharge was for a knowing violation of a reasonable and *uniformly enforced* policy within the meaning of G.L. c. 151A, § 25(e)(2). *See* Consolidated Finding # 3.

Alternatively, the claimant will be disqualified under G.L. c. 151A, § 25(e)(2), if the employer shows that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. At the initial hearing, the review examiner concluded that the employer had not met its burden, solely on the basis of the claimant's testimony. After remanding the case in order to take the employer's testimony, however, we now conclude that the employer has met its burden.

At the initial hearing, the claimant denied making threats or being otherwise combative towards Group B. After remand, the review examiner provided a credibility assessment citing his reasons for accepting the employer's version of events over the claimant's, noting particularly that the employer provided more detailed information about previous warnings and discipline the claimant had received for engaging in similar conduct. 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 his assessment is reasonable in relation to the record.

After remand, the review examiner found that, on November 28, 2020, the claimant joined Group A to play golf after his shift, and that, upon learning that Group B called the employer's pro shop to complain about the pace of play, he proceeded to confront them, yell at them, threaten to throw them off the golf course, and taunt them as they eventually left the golf course. *See* Consolidated Findings ## 6, 8–10. As a result of this incident, the claimant was discharged for violating the employer's workplace violence policy. *See* Consolidated Finding # 12.

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) (citation omitted).

Here, the consolidated findings establish that he engaged in deliberate misconduct in wilful disregard of the employer's interest. The employer maintained an expectation that the claimant treat all customers respectfully and professionally at all times, and to refrain from "threatening, hostile or intimidating behavior." Consolidated Findings ## 3 and 4. The expectation is reasonable. The claimant was aware of the expectation, as he had received personnel policy guidelines and had received a warning and a three-day suspension in October, 2019, for similar conduct. *See* Consolidated Findings ## 4 and 5. Nothing in the record indicates that the claimant's conduct towards Group B was accidental, especially since the consolidated findings show that the claimant engaged Group B a second time as they completed the round and left the golf course. *See* Consolidated Finding # 10. Since the claimant denied engaging in the behavior that resulted in his termination, he has 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).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning December 13, 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 - March 11, 2022**

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.

JMO/rh