

**Claimant was discharged from his subsidiary part-time employer for deliberate misconduct in wilful disregard of the employer's interest for threatening to bring firearms to work in response to a verbal dispute with a coworker. However, because the claimant was not aware of his impending separation from his full-time employer at the time of this discharge, he was not subject to any reduction in benefits pursuant to 430 CMR 4.76(1)(a).**

**Board of Review  
100 Cambridge Street, Suite 400  
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: 0063 3231 82**

### 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 we affirm in part and reverse in part.

The claimant was discharged from his position with the employer on January 12, 2021. He filed a claim for unemployment benefits with the DUA, effective January 31, 2021, which was approved in a determination issued on October 13, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner reversed the agency's determination and denied benefits in a decision rendered on January 18, 2023. 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 obtain additional information pertaining to the claimant's earnings. Both parties 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 claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when he threatened to bring guns to the fire station to resolve a personal dispute, 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. On February 2, 2021, the claimant opened an unemployment claim having an effective date of January 31, 2021. The Department of Unemployment

Assistance (DUA) determined his benefit rate to be \$298.00 per week. The claimant's earnings disregard (the amount he can earn before deductions are made from his benefits) was determined to be \$99.33.

2. From August 1, 2020, through February 1, 2021, the claimant worked full-time as an assembler for a manufacturing company (the manufacturing company).
3. The claimant worked 40 hours per week at \$16.00 per hour. His weekly gross wages were \$640 per week.
4. During the fourth quarter of 2020, the claimant earned total gross wages in the amount of \$7,381.00 from this employment.
5. The claimant separated from the manufacturing company on February 1, 2021, when he was laid off due to lack of work.
6. From October 1, 2020, through December 31, 2020, the claimant was also employed as a volunteer on-call firefighter for a regional fire district (employer #2). The claimant started working as an on-call firefighter for this fire district on May 1, 2016.
7. Employer #2 paid the claimant a stipend in the amount of \$1,200.00. The stipend was paid to the claimant in two interval payments of \$600, in June and December of 2020.
8. The claimant is still employed with employer #2.
9. The claimant also worked as a volunteer on-call firefighter for the employer, a regional fire district, from May 1, 2016, until January 12, 2021.
10. The employer paid the claimant a yearly stipend of two thousand dollars (\$2,000). The stipend was paid in two interval payments on June 12, 2020, and December 11, 2020, in the amount of \$1,000 each.
11. The stipends are paid to the firefighters on the district roster. The stipends are not based on hours worked, calls answered, or the amount [sic] work performed. It is a "thank you" payment for your services as an on-call firefighter.
12. As an on-call firefighter, the claimant did not have a set schedule. The claimant received work via a pager call to either report to the stationhouse or the incident location. The claimant did not have set weekly hours. The claimant's work for the employer varied from week-to-week, and month to month depending on the number of calls the claimant responded to.
13. The claimant worked a total of 36 shifts for the employer in 2020.

14. Neither the claimant nor the employer has any records of which days the claimant worked from October 1, 2020, through December 31, 2020.
15. The employer maintained a code of conduct policy prohibiting fighting, threatening and abusive behavior.
16. The purpose of the policy was to ensure a safe work environment.
17. The claimant was given a handbook with the code of conduct at his time of hire.
18. The employer maintained an expectation that employees act in a professional and non-abusive manner, and there is zero tolerance for fighting and threats when interacting and communicating with co-workers and the general public, whether responding to a call or off-duty.
19. The employer maintained this expectation to ensure a safe and respectful work environment for all employees and the general public.
20. The expectation was stated in its guideline for appropriate conduct which the claimant received at hire and there are yearly firefighter refresher trainings that cover the prohibition against fighting and threats.
21. On January 9, 2021, the claimant and another firefighter were at the station house working out and were engaged in a conversation.
22. The conversation was about personal differences between the members in the fire department. The claimant stated another fire fighter (not present at the stationhouse) suggested bringing boxing gloves to the station so people could work out their differences.
23. The claimant then made a statement to the firefighter: "I have something better for [firefighter] at my house than boxing gloves." The firefighter became alarmed because he knew the claimant had firearms at his house.
24. On January 12, 2021, at around 9:00 a.m., the fire chief and the firefighter filed a police report with the local police department about the incident that occurred on Saturday between the firefighter and the claimant.
25. The fire chief was concerned because he was aware that the claimant had guns in [sic] possession (shotgun & rifle) and wanted to take proactive steps, so the situation did not escalate.
26. On January 12, 2021, at around 4:49 p.m. the claimant gave his statement to the police department and confirmed that an argument ensued between the claimant and the firefighter about the claimant's tattoo. The claimant stated he showed the firefighter his tattoo, and the fire fighter made a snide remark to the claimant

by calling him a “whacker,” and that the claimant should place acid on the tattoo.

27. The claimant stated the argument segued into using boxing gloves and going to the claimant’s house to “settle things out,” rather [sic] use them at the station because of the department’s prohibition about fighting.
28. The claimant stated that he owns hunting guns, a shotgun, and a rifle. The local police department filed a police report but did not file any criminal charges or take out any protection orders and no trespass orders against the claimant.
29. On January 12, 2021, in the evening, the claimant spoke in-person with the fire chief at the station house and stated that he mentioned bringing guns to the station for people who were giving him problems.
30. The claimant stated that he did get along with that firefighter when the argument occurred, but that he was allegedly joking about bringing guns to the station.
31. The fire chief, on January 12, 2021, discharged the claimant when he threatened to bring guns to the station house to “take care” of some people in violation of the employer’s zero tolerance for threats.

#### Credibility Assessment:

The employer’s witness was the fire chief, but not the same fire chief who discharged the claimant and appeared at the January 9, 2023, hearing. Also appearing for the employer was the payroll coordinator for the fire district. The claimant appeared with his mother; the claimant’s mother did not testify and assisted as an advisor for claimant.

During the remand hearing, the claimant’s stipend documentation, UI online Monetary Summary, Employment History and Claimant Profile screen from the claimant’s 2021 claim were entered into the record. The Board’s remand order and questions were reviewed with the parties. The answers provided by both parties were credible and findings were made accordingly. Although neither party could confirm the exact dates the claimant worked for the employer between October 1, 2020, and December 31, 2020, it was confirmed he was still employed during this time period with both the full-time manufacturing company and the employer for the entire fourth quarter of 2020.

#### 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 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, while we agree with the review examiner's legal conclusion, we do not agree that the claimant is subject to a total disqualification from receiving benefits based upon his separation from this employer.

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. . . .

“[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).

Since the employer failed to provide any evidence showing it discharged all employees who violated its code of conduct policy under similar circumstances, it has failed to meet its burden to show that the claimant violated a reasonable and *uniformly enforced* policy. *See* Consolidated Finding # 15. Alternatively, the employer may show that the claimant's actions constituted deliberate misconduct in wilful disregard of the employer's interest.

Here, the record reflects that the employer expected all employees to conduct themselves in a professional and non-abusive manner and refrain from threatening and fighting with coworkers. *See* Consolidated Finding # 18. However, on January 9, 2021, the claimant was in a verbal altercation with another firefighter, which resulted in the claimant alluding to bringing guns to the fire house to settle a dispute. *See* Consolidated Findings ## 21–23, 26–27, and 29. Since the claimant admitted to doing so, he engaged in the misconduct. *See* Consolidated Finding # 29. Because there is nothing contained in the findings to suggest that the claimant's statements were made inadvertently, we can infer that his words were deliberate.

We next consider whether the claimant's misconduct was done in wilful disregard of the employer's interest. 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). 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). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. *Id.* at 95.

Here, Consolidated Finding # 18 shows that the employer maintained an expectation that all employees act professionally and in a non-abusive manner, with zero-tolerance for fighting or threats among its coworkers. We know that the claimant was aware of that expectation, as it was relayed to him at the time of hire and during the employer's annual training. *See* Consolidated Finding # 20. Since the employer maintained its expectation to ensure a safe and respectful workplace, that expectation was reasonable. *See* Consolidated Finding # 19.

However, the claimant will not be disqualified if the violation of the employer's reasonable expectation was attributed to mitigating circumstances. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

Here, the claimant has not shown any mitigating circumstances. He contends that, when he made the comment about bringing guns to the station to resolve a dispute with a coworker, he did so jokingly. *See* Consolidated Finding # 30. However, we see nothing in the findings that would allow us to deduce that this was a joke. Given the context that these words were part of an argument, we see no evidence that his comments were said in jest. Furthermore, in today's environment, saying that you will bring in a gun to address problems in the workplace is self-evidently threatening, in wilful disregard of the employer's zero-tolerance policy against threats.

When a claimant separates from a part-time job for a disqualifying reason, we must also determine if the claimant is subject to a full disqualification of benefits or a constructive deduction.

430 CMR 4.76 provides in relevant part, as follows:

(1) A constructive deduction as calculated under 4.78, from the otherwise payable weekly benefit amount, rather than the complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under G.L. c. 151A, § 25(e), in any of the following circumstances:

(a) if the separation is:

1. from subsidiary, part-time work during the base period, and at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work . . .

The review examiner found that the claimant was working for the present employer on a part-time, on-call basis, while concurrently working full-time for a manufacturing company during his base period.<sup>1</sup> *See* Consolidated Findings ## 2 and 9. This means this part-time job was subsidiary employment. *See* 430 CMR 4.73.

However, there is nothing contained in the record or findings to suggest that the claimant knew of his impending separation from his primary full-time employer when he separated from this part-time job, as he continued to work for his full-time employer until he was laid off due to lack of

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<sup>1</sup> The base period of the claimant's 2021-01 unemployment claim was from January 1, 2020, to December 31, 2020.

work on February 1, 2021. *See* Consolidated Finding # 5. For that reason, we conclude that, although the claimant's separation from this part-time employer was disqualifying, he is not subject to a constructive deduction.

The Board of Review has consistently refused to impose any penalty on individuals who leave part-time subsidiary employment without knowledge of an impending separation from a full-time job. In our prior decisions, we have explained that "430 CMR 4.76(1)(a) is designed to penalize individuals who choose to leave gainful part-time employment knowing that they are about to lose their full-time job." *See* Board of Review Decision 0077 4433 73 (July 31, 2023), *quoting* Board of Review Decision 0011 4858 86 (June 19, 2014). We have stated, "it would be an anomaly to interpret the regulation to mean that an individual who quits a part-time job without knowledge of an impending separation from his full-time work receives the even harsher penalty of a full disqualification." *Id.* Therefore, the claimant's separation from this part-time employer does not subject him to any disqualification of benefits.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2). We further conclude that the review examiner's decision to fully disqualify the claimant from receiving any benefits is based on an error of law, because the claimant separated from this part-time, subsidiary job with the employer with no knowledge of his impending separation from his full-time job. He is entitled to his full weekly benefit amount.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to benefits for the week beginning February 1, 2021, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 28, 2024**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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 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](http://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.

DY/rh