

**Claimant complained on several occasions to the store owner about the coworker instigating fights with her. When an altercation ensued between the coworker and the claimant, she left work and went home. Although the claimant left work in defiance of the employer's directive to remain, her behavior was a reasonable response to the coworker's aggressive actions. Held the claimant demonstrated mitigating circumstances for her misconduct, and she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**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: 0077 3049 08**

### 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 affirm.

The claimant was discharged from her position with the employer on June 10, 2022. She filed a claim for unemployment benefits with the DUA, effective June 19, 2022, which was denied in a determination issued on July 1, 2022. 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 January 13, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced policy and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional testimony regarding the circumstances surrounding the claimant's separation. 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's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy when the claimant left work because she was upset after a verbal altercation with a coworker, 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 employer is a frozen pie company with a retail store that sells baked goods and frozen pies. The claimant worked full-time as a co-manager of the retail store for the employer from September 21, 2020, to June 10, 2022.
2. The employer did not have any written policies or procedures for its employees to follow.
3. The claimant started work with the employer each day, Monday through Friday, at approximately 5:30 to 6:00 a.m.
4. The employer's retail store opened at 8:00 a.m.
5. The claimant usually worked at the retail store with another employee ("[CO-MANAGER]"), who was also a co-manager.
6. The claimant usually worked without any other employee present except [CO-MANAGER].
7. [CO-MANAGER] would leave her job with the employer for two hours each day to perform another job as a dog walker. [CO-MANAGER] would return to her job with the employer after she walked the dogs.
8. Sometime in November 2021, [CO-MANAGER] began to treat the claimant differently. [CO-MANAGER] would ignore the claimant, pick fights with the claimant, and sometimes not perform her job duties so that the claimant was required to do extra work.
9. The claimant told the Owner the problems that were occurring with [CO-MANAGER]. The claimant spoke to the Owner approximately six times regarding problems she was having at work with [CO-MANAGER].
10. The Owner spoke with both the claimant and [CO-MANAGER] several times since November 2021 regarding the problems they were having working together.
11. On or about June 6, 2022, the Owner laid off an employee (E2). E2 was chronically late for work and was struggling on the job.
12. The Owner talked to E2 about possibly rehiring her after the summer.
13. On or about June 7, 2022, the claimant found out that E2 had smoked marijuana at work. The claimant was told this by a friend who worked next door to the employer's business.
14. On June 10, 2022, the claimant arrived at work around 5:30 a.m. and [CO-MANAGER] arrived after 6:00 a.m.

15. On the morning of June 10, 2022, the claimant spoke to [CO-MANAGER], but [CO-MANAGER] did not speak to the claimant.
16. On June 10, 2022, the Owner called the claimant regarding a large order. While on the phone with the claimant, the Owner heard shouting in the background. [CO-MANAGER] was yelling at the claimant. [CO-MANAGER] was yelling because she was trying to make scones and donuts and the oven was on too high. [CO-MANAGER] pushed a bowl and bowl truck mixer that is on wheels against the worktable where the claimant was working. [CO-MANAGER] said, "You better get on that order now." The claimant felt unsafe and started crying.
17. The claimant took her purse and went to sit in the car. The claimant was still on the phone with the Owner, and she continued to cry.
18. The Owner heard the car ignition and told the claimant she was coming to the store. The Owner asked the claimant not to leave. The Owner told the claimant she was coming into the store to talk to both of them and to work out the problem.
19. The Owner was coming into the store because it was becoming a hostile work environment.
20. The claimant drove to her home while still on the phone with the Owner. The Owner asked the claimant to come back to the store. The claimant refused to return to the store to talk to [CO-MANAGER] because the claimant was upset. The claimant told the Owner that she could not work with [CO-MANAGER] and that she would not come back to the store right then.
21. The Owner expected the claimant to come back to the store to talk with her and [CO-MANAGER] about the altercation that morning.
22. The claimant told the Owner she would come back to the store to close for the Owner. The Owner told the claimant she did not want her to return to close the store.
23. On or about June 10, 2022, the claimant's friend told the Owner that E2 had smoked marijuana at work.
24. The Owner expected that the claimant would inform her if co-workers were smoking marijuana at work.
25. The claimant was discharged from her job with the employer on June 10, 2022, because she left the job and would not return to meet with the Owner and [CO-MANAGER] on June 10, 2022, and because she did not tell the Owner that E2 had smoked marijuana when she found out on June 7, 2022.

26. After the claimant was discharged, the claimant told the Owner that [CO-MANAGER] would smoke marijuana when she walked the dogs.
27. The claimant was not sure whether [CO-MANAGER] smoked marijuana when she walked the dogs.
28. The employer had no plan to discharge the claimant prior to June 10, 2022.

Credibility Assessment:

The claimant credibly testified in the hearing about the altercation with [CO-MANAGER] on June 10, 2022. The claimant described that [CO-MANAGER] was yelling at the claimant and pushed a mixer on wheels into the claimant's worktable. Although the Owner testified in the hearing that the claimant had been untruthful when she said that [CO-MANAGER] pushed a mixer, the claimant clarified that it was the mixer bowl with the bowl truck which is on wheels. The claimant's testimony regarding what occurred with the mixer bowl and bowl truck is not undermined by this clarification of the equipment. The Owner credibly testified in the hearing that she was coming into the store on June 10, 2022, because it was becoming a hostile work environment. The claimant credibly testified that she did not know that E2 smoked marijuana at work until June 7, 2022, after E2 had already been laid off. The claimant credibly testified in the hearing that she believed [CO-MANAGER] was smoking marijuana while walking the dogs each day, but she was not sure.

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, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is eligible for benefits.

Because the claimant was terminated from her employment, her 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 did not have any written policies and procedure for its employees, it failed to meet its burden to prove that the claimant knowingly violated a reasonable and uniformly enforced policy. *See Consolidated Finding # 2*. Alternatively, we consider whether the claimant’s actions constituted deliberate misconduct in wilful disregard of the employer’s interest.

Because the employer discharged the claimant for two distinct reasons, we analyze each transgression separately under G.L. c. 151A, § 25(e)(2). *See Consolidated Finding # 25*.

The consolidated findings show that, on June 10, 2022, a verbal altercation occurred between the claimant and co-manager surrounding the temperature of an oven. *See Consolidated Findings ## 15 and 16*. The shouting match escalated when the co-manager pushed an industrial bowl truck mixer up against a table where the claimant was working and informed her that “she better get on that order now.” The claimant was upset and left the premises. *See Consolidated Findings ## 15 and 16*.

Because the employer owner was on the telephone with the claimant, she was aware of the verbal altercation between the claimant and co-manager and instructed the claimant to return to work. *See Consolidated Findings ## 16, 17–18, and 20*. Although the claimant was aware of the employer’s expectation that she return to the workplace, she refused. *See Consolidated Findings ## 18, 20 and 21*. Her failure to comply with the employer’s directive to return to the workplace constitutes misconduct. Her repetitive refusal indicates that her actions were deliberate.

We also consider whether the claimant’s misconduct was 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, the review examiner found that the owner had an expectation that the claimant return to work for the purpose of resolving the conflict and growing animosity between the claimant and co-manager. *See Consolidated Findings ## 8, 15, and 18–21*. On its face, the owner’s request was reasonable, as it was an effort to restore the workplace to a productive working environment. However, we also believe the record shows mitigating circumstances for not complying with the request. 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).

The verbal altercation on June 10, 2022, was not an isolated occurrence. Since November of 2021, the claimant had been having difficulties with the co-manager. *See Consolidated Finding # 8.* The claimant had informed her employer on six occasions of the issues that she was having with the co-manager. *See Consolidated Finding # 9.* Although the employer attempted to address the problems by speaking with both the claimant and co-manager on several occasions, the co-manager's animosity not only continued but escalated to violence. *See Consolidated Finding # 16.* The workplace had become a hostile working environment. *See Consolidated Finding # 19.* Although the claimant's departure disrupted work productivity, it is apparent that the co-manager's behavior left her feeling emotional and unsafe. *See Consolidated Findings ## 16 and 19.* She had no control over the co-manager's conduct. Although the employer made multiple requests for the claimant to return to work, the owner was not physically at the workplace and the claimant feared for her safety. We believe that leaving work was a reasonable reaction to an intense verbal altercation and violent behavior. In short, the on-going and escalating nature of the co-manager's behavior constituted mitigating circumstances for the claimant's misconduct.

We next address the claimant's failure to notify the employer that a separate coworker, E2, was smoking marijuana on the premises.

The owner had an expectation that co-managers would inform her if any employee was smoking marijuana on the premises. *See Consolidated Findings ## 1 and 24.* Such an expectation is reasonable and commonsense, as it is necessary for the employer to protect the safety of its employees who are operating large machinery.

However, the findings show that E2 was laid off by the employer on June 6, 2022, due to poor work performance and habitual tardiness. *See Consolidated Finding # 11.* It was not until the next day that the claimant was made aware that E2 had been smoking marijuana while at work. *See Consolidated Finding # 13.* Since E2 was no longer an employee, on June 7, 2022, the claimant was not obligated to inform the employer of E2's conduct. Her failure to inform the owner of a former employee's past actions was not misconduct.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, nor did she knowingly violate a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending June 18, 2022, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 29, 2023**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, 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