The claimant established mitigating circumstances for swearing at her district manager. A customer had assaulted and threatened to kill her a few days before, she felt unsafe in the store, the district manager had not reported it to human resources, and he was standing in close proximity insisting only on discussing her attendance issues. Held her misconduct was not done in wilful disregard of the employer's interest, and she may not be disqualified 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 3761 36

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 we affirm in part and reverse in part.

The claimant was discharged from her position with the employer and filed a claim for unemployment benefits with the DUA, effective June 12, 2022, which was denied in a determination issued on July 16, 2023. 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 beginning June 12, 2022, in a decision rendered on December 13, 2022. 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 rule or policy of the employer, and, thus, she 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 afford the employer an opportunity to participate in the hearing and to obtain further evidence about the circumstances which led to the claimant's discharge. 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 did not deliberately swear at her district manager 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. The claimant was employed as a full-time commercial parts sales associate for the employer, an auto parts store, until June 16, 2022.

2. The employer maintained a standard of conduct policy that addresses improper conduct in the workplace and prohibits unprofessional behavior.

3. The purpose of the policy was to ensure a professional work environment.

4. The claimant was aware of the policy when she attended the onboarding at new hire orientation through the company's web portal.

5. The policy indicates that violations may result in disciplinary action up to and including termination.

6. The employer maintained an expectation that employees act in a professional, courteous manner to customers, vendors, and team members.

7. The employer maintained this expectation to ensure a professional work environment for all team members, vendors, and its customers.

8. The expectation was stated in its standard of conduct policy which the claimant received at hire. The claimant was aware of this expectation as a matter of common sense.

9. Throughout her employment, the claimant had multiple attendance infractions.

10. On June 10, 2022, the claimant was working with the store's general manager; they were the only two employees on duty. The employer has a policy of not leaving a store with less than two employees.

11. On June 10, 2022, the employer's store manager (SM) left the store for a period of time while the claimant was assisting a commercial customer via phone. Another customer (the customer) was waiting to purchase an item at the front register.

12. The customer was unhappy that the claimant had answered the call and threw a bottle of power steering fluid toward her face. The customer then yelled, "you're lucky I don't bring a gun back and shoot you."

13. The claimant was upset by these events. The claimant did not feel safe at the store because the customer could come back.

14. On June 10, 2022, the claimant contacted the police, and the police took an incident report. The report stated that the customer threatened to come back to the store with a gun and shoot the claimant. The person who assaulted the claimant had not yet been identified or charged with an offense.

15. The police reviewed video footage from nearby business but could not identify the customer using the footage.

16. On June 10, 2022, via text messages, the claimant repeatedly told the employer's district manager (DM) that she did not feel safe at the store. Her first text message stated: "This morning i was assaulted by a female customer who threw a bottle of power steering fluid at me because i answered a phone call to put it on hold to then ring her up. I was alone in the store because both [co-worker] and [SM] were out on delivery. Not only did she assault me but she then continued to verbally disrespect me and then threatened my life by saying that i was lucky she didnt come back to shoot me. I had to call the cops and file a report on my own. I do not feel safe working for this company and much less the [City] store at this point. I told [SM] what happened, and nothing was done to help me. At this point i will be looking for another job and will keep you informed as to when my last day will be and i will also be following up with a lawyer as to what rights im entitled to as an employee."

17. The claimant was upset that she had been left alone in the store. She felt that the incident with the customer could have been prevented had there been at least two employees on duty.

18. On June 10, 2022, the DM responded to the claimant via text messages. The text messages read, in relevant part, "I am here to answer and help at anytime. [. . .] I can definitely help and if you have filled *[sic]* police report. I can send that to hr [human resources] and ap [asset protection] and see what more we can do. I also can ask for no trasspassing *[sic]* for that customer and see if there are any video evidence from our near store businesses. All thise *[sic]* steps I can offer and do. Would you like me to do that? [. . .] Again. I am here to help, let me know if you want me to do anything. I will also report case to HR and AP."

19. On June 10, 2022, the claimant responded to the DM explaining that the steps he had offered were insufficient to make her feel safe. The text messages read, in relevant part, "None of those options are going to help me feel safe in my work environment. They are also not going to help if the customer was to come back and retaliate. Everything you just said the police are already doing. [. . .] Like i said before im going to follow up with whom i need to follow up with. This is ridiculous *[sic]* especially with all the current issues with mass shootings. I no longer feel safe working for [the employer] or the [City] store and clearly from what im seeing this company doesnt care about the safety of its employees. Have yourself a great day!"

20. The claimant did not believe that the employer valued the safety of its employees.

21. On June 10, 2022, the DM texted the claimant back. The text message read, in relevant part, "I am offering everything that is possible to do. All the way to trasspassing *[sic]*. If you have a suggestion ot *[sic]* you want me to do something let le *[sic]* know and I'll be more than happy to help. You tell me what would be good and what you think i can do."

22. The claimant did not send any subsequent text messages with further requests regarding the June 10, 2022 incident to the DM.

23. The DM subsequently reported the customer's assault on the claimant to the employer's asset protection manager. He did not report the assault to HR because he believed it was not necessary to do so after reporting it to the asset protection unit.

24. The DM did not report the assault to HR, did not request a no trespass order, did not get a copy of the police report, and did not check other stores for video evidence because he did not hear back from the claimant after his final text message on June 10, 2022.

25. After June 10, 2022, the claimant felt unsafe at the employer's workplace.

26. On, June 15, 2022, the DM approached the claimant at the store. The claimant told the DM that she was upset by how he had handled the assault, and she repeated that she wanted HR involved in further communications. The claimant inquired if the DM had contacted HR about her safety concerns, but the DM ignored her by not responding to her questions and changed the topic to the claimant's prior tardiness and attendance infractions.

27. As the DM approached her, the claimant felt intimidated when she felt that DM invaded her space when he got in close physical proximity to her at the work counter. The claimant then asked the DM to back up. The DM did not leave the claimant's workstation or allow her to return to her work as he continued to ask her about her past attendance issues. At some point, DM left the work counter area because the work phone was ringing and allowed the claimant to continue working.

28. The claimant, who was in a fragile state after being assaulted on June 10, 2022, told the DM, in a loud tone of voice, "get the fuck away from me." The claimant told the DM several additional times to "get the fuck way from [her]," when she perceived the DM invaded her personal space by getting approximately one foot away from her. At the time she said it, the claimant felt unsafe and intimidated by the DM approaching her. The DM attempted to initiate a further conversation, but the claimant did not engage with the DM any further.

29. The SM, who was within earshot of the claimant and the DM, heard the claimant state several times, "get the fuck away from me." The SM also heard the claimant state, "I don't want to talk to you, leave me the fuck alone." The

SM observed that the claimant was very upset. After the DM tried to speak with claimant further, the claimant did not respond, [sic] at some point, DM walked away and approached SM to confer as to what just occurred.

30. The claimant was deeply upset. All she could think about was getting the DM away from her so she could get back to work. She inadvertently and spontaneously swore at the district manager. The swearing was the consequence of the stress and provocation of the situation.

31. The claimant was in a fragile state after being assaulted and became upset by her perception that the DM did not want to discuss her safety concerns and only wanted to talk about her attendance and tardiness.

32. On Wednesday June 15, 2022, as a result of his earlier interaction with the claimant, the DM sent an email to HR which read, in relevant part, "I have [team member] that we are parting ways with. I need to have final pay processed. [. . .] [Team member] info: [the claimant] [. . .]. Would we be able to term sooner? Can you process pay (since we are a final pay on hand state) or do we have to wait til Friday [June 17, 2022]? Already processed on workday term steps [. . .]"

33. The DM decided to discharge the claimant as a result of her telling him, "Get the fuck away from me" on June 15, 2022. The DM, however, could not discharge the claimant without final approval from HR.

34. On June 16, 2022, the claimant reported to work, and DM tried to have a conversation with claimant. The DM asked claimant to go to the office. The claimant refused and told DM "to go fuck [him]self" multiple times.

35. The DM tried to calm claimant down and asked her to go to the office with him and the SM. The claimant again told the DM "to go fuck [him]self." At that point, the DM told the claimant she was suspended pending an investigation. The claimant picked up her personal belongings and left the store. At the time, the SM was present and observed the interaction between the claimant and the DM.

36. On Monday, June 20, 2022, the claimant spoke with an HR representative and discovered that neither the DM nor the SM had reported the June 10, 2022 assault to HR.

37. On June 22, 2022, the employer's HR representative called the claimant and discharged her from her employment for stating "Get the fuck away from me" to the DM on June 15, 2022.

38. On June 22, 2022, the claimant sent an email to the employer's HR representative and provided a brief summary of her interactions with the DM

on June 15, 2022 and June 16, 2022. At no point did the claimant state in the email that she had used profanity towards the DM on either day.

39. On July 13, 2022, after the claimant filed for unemployment benefits, the DM sent a detailed email to HR describing the language and profanity which the claimant used against him on June 15, 2022 and June 16, 2022.

40. After being denied unemployment benefits, the claimant submitted a written appeal with a summary of her interactions with the DM on June 15, 2022 and June 16, 2022. At no point did the claimant state in her appeal that she had used profanity towards the DM on either day.

Credibility Assessment:

Throughout the proceedings, the claimant testified that she could only recall swearing once at the DM, on June 15, 2022, telling him to "get the fuck away from [her]." The DM, however, directly rebutted the claimant's contentions, testifying that she swore at him multiple times on both June 15, 2022 and on June 16, 2022. The DM provided consistent and detailed testimony (which was corroborated by the SM and by written documentation completed shortly after the relevant events) of how the claimant swore at him multiple times not only on June 15, 2022, but also told him to "go fuck [him]self" repeatedly on June 16. 2022. Furthermore, the claimant wrote two summaries of her version of events which she submitted to the employer's HR representative and as part of her unemployment appeal. At no point did the claimant state in either summary that she had used any profanity against the DM, which was in direct contradiction of her testimony at the hearing—where she admittedly swore at the DM on June 15, 2022. Moreover, given the claimant's clear dissatisfaction with the employer (including stating that she did not believe the employer valued her and that she would be seeking other work), it is concluded that the claimant had the motivation to engage in the conduct that led to her discharge. In light of the totality of the evidence, it is concluded that the claimant swore and used profanity towards the DM multiple times on both June 15, 2022 and June 16, 2022.

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 that the claimant is eligible for benefits, we move the eligibility date forward a week.

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 . . . .

"[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 discharged the claimant for swearing at the district manager on June 15, 2022. *See* Consolidated Findings ## 33 and 37. It is self-evident that swearing at a supervisor violates the employer's expectation that employees act in a professional, courteous manner. Thus, she engaged in the misconduct for which she was fired.

Because the employer maintains discretion as to the level of discipline it imposes for violating this rule, and nothing in the record indicates that the employer has discharged other employees for engaging in such misconduct, the employer has not met its burden to demonstrate a knowing violation of a reasonable and *uniformly enforced* rule or policy. *See* Consolidated Finding # 7. Alternatively, it may show deliberate misconduct in wilful disregard of the employer's interest.

In Consolidated Finding # 30, the review examiner wrote that the claimant swore at her district manager inadvertently and spontaneously because she was deeply upset and provoked. Considering that, at the time, on June 15th, the district manager was also standing in such close physical proximity to the claimant that she felt intimidated, and that she had to ask him to back up, her reaction could reasonably be viewed this way. *See* Consolidated Findings ## 27 and 28. However, she swore at the district manager again, multiple times when he approached her on June 16, 2022. *See* Consolidated Finding # 34. Nothing in the record shows that he was provoking her by standing in her personal space on June 16, 2022. Given the 24 hours between these instances of swearing, enough time for the claimant to reflect upon her words with the district manager, we are not persuaded that her swearing was spontaneous and inadvertent. Rather, the evidence indicates that it was deliberate.

However, even if the record shows that it was deliberate, proving deliberate misconduct is not enough. The employer must also prove that the claimant acted 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). 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). 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).

There is no dispute that the claimant was aware of the employer's expectation to act in a professional manner toward the district manager. *See* Consolidated Findings ## 6 and 8. Inasmuch as its purpose was to ensure a professional work environment, we believe the expectation was reasonable. The question is whether there were mitigating circumstances for her conduct. When we consider the entire week's events, we believe there were.

On Friday, June 10, 2022, a customer threw a bottle of power steering fluid at her face, then threatened to kill her. Consolidated Finding # 12. Understandably, the claimant was frightened. Because the police had not yet identified the assailant, she also felt unsafe at the store, afraid that the customer could come back and follow through with the threat. *See* Consolidated Findings ## 13 and 14. She was also upset that her store manager left her alone in the store against the employer's policy, contending that the assault might not have happened if two employees were on duty. *See* Consolidated Findings ## 10, 11, and 17.

Also on June 10th, the district manager let her know via text message that he would report the incident to Human Resources. *See* Consolidated Finding # 18. Yet, here it was five days later, she still felt unsafe, and, not only had he not reported it to Human Resources, but the findings indicate that he would not talk about the assault topic at all. *See* Consolidated Findings ## 25 and 26. Compounding this anxiety, she felt intimidated by the district manager standing so close to her and by his refusal to leave. *See* Consolidated Finding # 27. Separately and together, these factors constitute circumstances that were out of the claimant's control. We can reasonably infer that the frustration of working under these conditions caused her to lose her temper and swear at the district manager.

We, therefore, conclude as a matter of law that the employer has not sustained its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy or that she engaged in 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 as to the claimant's eligibility for benefits. However, we reverse the portion of his decision that found her eligible for benefits during the week beginning June 12, 2022. The record shows that she was placed on a suspension beginning the afternoon of Thursday, June 16, 2022, and not terminated until the following week. *See* Consolidated Findings ## 35 and 37. Although claimants may be eligible for benefits during periods of disciplinary suspension under certain circumstances, the claimant in this case is not because the employer paid her $726.09 for this week, including wages and vacation pay.[1] The DUA's electronic record-keeping system shows that, under this benefit claim, the claimant had a weekly benefit amount of

[1] Payroll records introduced into evidence include the claimant's paycheck record for the week of June 12 to 18, 2022. This shows gross wages paid in the amount of $726.09, including pay for hours worked and vacation pay. The review examiner identifies these 2022 payroll records as Remand Exhibit 19, which, if numbered correctly, should have been Remand Exhibit 23. While not explicitly incorporated into the review examiner's findings, this paycheck information is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

$ 443.00 and an earnings disregard of $ 147.67. Because she was paid more than her weekly benefit amount plus earnings disregard ($ 590.67), she is not entitled to unemployment benefits for this week. *See* G.L. c. 151A, §§1(r)(1) and 29(b).

The claimant is entitled to receive benefits for the week June 19, 2022, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 2024

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

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.

AB/rh