**Frustrated and upset because his truck was making noises and he was struggling for a second day to put together a grill for the employer at a group home, the claimant repeatedly swore and said he would get a gun and shoot up the place. Because the review examiner found that the claimant spoke without thinking, held the misconduct was not done deliberately, and he may not be denied benefits for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review**
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**Chairman**
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**Member**
**Michael J. Albano**
**Member**

**Issue ID: 0077 8257 37**

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. Benefits were denied on the ground that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, effective July 24, 2022, which was denied in a determination issued by the agency on August 23, 2022. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination in a decision rendered on February 11, 2023. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On July 14, 2023, the District Court ordered the Board to make subsidiary findings from the record. Consistent with this order, we remanded the case to the review examiner to make subsidiary findings of fact concerning the claimant's statements which triggered his discharge and his state of mind. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's loss of composure and unprofessional conduct while working at a group home for persons with traumatic brain injuries was deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The employer provides housing for individuals with brain injuries. The claimant worked full-time as a maintenance technician for the employer from February 4, 2020, to July 7, 2022.

2. In the employee handbook, the employer had a list of conduct that could result in immediate discharge. This part of the handbook stated, in part, "It is not to be construed as limiting those instances in which the discharge penalty may be imposed, or limiting (the employer's) right to discharge employees for offenses not contained in the listing of examples…." On the employer's list of conduct that could result in immediate discharge was workplace violence and unprofessional behavior.

3. An employee of the employer who engages in workplace violence and unprofessional conduct may be subject to disciplinary action up to and including termination.

4. The claimant received the employer's manual with the policies and procedures when he was hired.

5. On July 6, 2022, the claimant was working at one of the employer's homes that houses individuals with brain injuries (the home). The claimant was putting together a grill at the home.

6. On July 6, 2022, the claimant had difficulty putting together the grill due to problems with the parts.

7. On July 7, 2022, the claimant had difficulty with his truck. The truck was making noises.

8. On July 7, 2022, the claimant made deliveries for the employer in the morning and arrived at the home he worked at on July 6, 2022, around lunch time. The claimant went to the home to assemble outdoor furniture.

9. On July 7, 2022, the claimant was attempting to assemble the outdoor furniture on a screened in porch at the home. The claimant became very frustrated while working on the furniture because there were many different parts of the furniture that needed to be assembled. As the claimant worked, he became angrier. The claimant started swearing. The claimant repeatedly used profanity while he was working on the porch. The claimant stated he would get a gun and shoot up the place.

10. Because he had had problems with his vehicle and because he was trying to assemble furniture with many different parts, the claimant was frustrated, upset and spoke without thinking.

11. The claimant did not direct his anger or profanity at anyone at the home. The claimant directed his anger and frustration out loud at the situation.

12. After working at the site, the claimant went inside and apologized to the house manager of the home.

13. After working at the site, the claimant called the employer's Vice President of Residential Services (Vice President). The claimant told the Vice President that he "lost control" while working at the home. The claimant told the Vice President that he repeatedly used profanity including "the F word" while working on the furniture because he was angry and frustrated. The claimant told the Vice President that he did this in front of the staff at the home.

14. On the evening of July 7, 2022, the Vice President received a call from the Supervisor of the home. The Supervisor told the Vice President that she received a report from the Site Manager that the claimant had stated at the site that he was going to get a gun and shoot up the place.

15. The Vice President reported to the police the comment the claimant made on July 7, 2022, regarding getting a gun to shoot up the place.

16. The Vice President suspended the claimant from his job on July 7, 2022, pending the outcome of his investigation of what occurred at the home.

17. On July 8, 2022, the claimant sent the employer an email apologizing for his behavior on July 7, 2022.

18. The Vice President conducted his investigation of the incident of July 7, 2022. The Site Manager, a staff person, and a nurse reported to the Vice President that they heard the claimant make the comment that he was going to get a gun and shoot up the place. The Site Manager, staff person and nurse told the Vice President that residents with brain injuries also heard the claimant make the comment. The Site Manager, staff person and nurse told the Vice President that they were fearful, and the residents were fearful and upset by the claimant's comments.

19. The Vice President asked the claimant if he made the comment that he was going to get a gun and shoot up the place. The claimant denied making the comment.

20. The employer discharged the claimant on July 14, 2022, because the claimant became angry, used profanity and made a statement that he was going to get a gun and shoot up the place at a group home for individuals with brain injuries.

21. The employer had no plan to discharge the claimant prior to July 7, 2022.

Credibility Assessment:

> Although the claimant testified in the hearing that he did not make the statement that he was going to get a gun and shoot up the place, I do not find this testimony credible. The Vice President credibly testified in the hearing regarding the investigation he conducted into the incident of July 7, 2022. The Vice President testified in the hearing that he spoke to the Site Supervisor, a staff person and a nurse. All three reported to the Vice President that the claimant's behavior on July 7, 2022, made the staff and the residents fearful. All three reported that the claimant made the comment that he was going to get a gun and shoot up the place. Although this testimony is hearsay, its credibility is enhanced by the fact that the Vice President spoke to three different staff members. Furthermore, the statement itself is particular and specific. The claimant made a statement about getting a gun and coming back to the site. This is not the type of statement that would be fabricated by three witnesses.

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, in light of the consolidated findings, we now disagree with the review examiner's legal conclusion that the claimant is ineligible for 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 . . . .

"[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).

In this case, the employer discharged the claimant for using profanity and stating that he was going to get a gun and shoot up the place on July 7, 2022, while working at one of the employer's group homes. *See* Consolidated Findings ## 9 and 20. The employer has a policy which prohibits workplace violence and unprofessional behavior, but the consequence for violating that policy is

disciplinary action up to and including discharge. *See* Consolidated Findings ## 2 and 3. Given this discretion, we are unable to conclude that the claimant knowingly violated a reasonable and *uniformly enforced* policy. Alternatively, the employer may prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

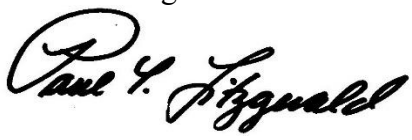
The claimant admitted that he used profanity. *See* Consolidated Finding # 13. Although he denied stating that he was going to get a gun and shoot up the place, the review examiner found that he did. *See* Consolidated Findings ## 9 and 19. There was no dispute that such behavior was misconduct. But to sustain its burden, the employer must prove that the claimant acted deliberately.

After remand, the review examiner found that the claimant engaged in this behavior because he was having problems with his truck and spending a second day trying to assemble the outdoor grill. Specifically, she found that he became frustrated and upset at the situation, and he spoke without thinking. Consolidated Findings ## 5–7 and 9–11. Given both the problem with his truck and his inability to follow the assembly instructions for the grill, the claimant could reasonably become frustrated and upset. Swearing and saying he would bring in a gun "without thinking" means that he did not act deliberately.

We form no opinion about the employer's decision to terminate the claimant's employment for this behavior. The issue before us is whether the claimant may be denied unemployment benefits because of it. Inasmuch as the record shows that he did not engage in the misconduct deliberately, there is no basis to deny benefits due to deliberate misconduct in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced policy as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 24, 2022, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - May 15, 2024**

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.

AB/rh