Neither the claimant's anxiety nor any other circumstances outside of her control caused her to make a threatening statement that she was going to punch her coworker in the face. She is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), due to deliberate misconduct in wilful disregard of the employer's interest and a knowing violation of a reasonable and uniformly enforced policy.

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: 0078 5310 15

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 her position with the employer on October 26, 2022. She filed a claim for unemployment benefits with the DUA, effective October 30, 2022, which was denied in a determination issued on November 23, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 15, 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 rule or policy of the employer 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 for subsidiary findings from the record. 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 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 when she made a threat against 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 are set forth below in their entirety:

1. The claimant worked as a full-time paraprofessional in the day habilitation program for the employer from April 25, 2022, until her separation on October 26, 2022.

2. The employer is a provider of social services.

3. The employer maintains an Employment Manual which includes a policy (policy) which prohibits an employee from making a "direct or implied threat, intimidation or coercion which creates a reasonable fear of injury" to an employee or individual or "unreasonably subjects" such individuals to emotional distress.

4. The employer's policy states that an employee who makes a direct or implied threat will immediately be terminated.

5. The employer has terminated all employees who have made a direct or implied threat in violation of the policy.

6. The purpose of the policy is to ensure a safe working environment for all.

7. The employer retains the right under the policy to investigate complaints and make a determination of whether a violation occurred and, if so, what disciplinary action will be taken.

8. The claimant reviewed the policy at the time of hire and again on April 26, 2022.

9. The employer expects employees to inform their supervisor of issues or concerns.

10. The purpose of the expectation is so that the supervisor can address the issues of [sic] concerns.

11. The claimant was informed of the expectation at her new-hire orientation.

12. Approximately 1 month prior to October 14, 2022, the claimant had brought concerns about coworker A using the only handicapped accessible bathroom to her supervisor's attention. Following that report, a meeting was held between the claimant, her supervisor, and coworker A to review the bathroom use policy and it was agreed that individuals in wheelchairs would have priority in use of the restroom.

13. On October 14, 2022, shortly before lunch, the claimant was bringing 2 clients in wheelchairs to the restroom when she found coworker A using the wheelchair bathroom. The claimant waited for coworker A to exit the restroom and then proceeded to toilet the 2 clients.

14. Shortly after exiting the restroom, the claimant was asked to report to another group to take another client for a walk.

15. The claimant walked a client around the building for 2 laps until the client lead [sic] her back into his classroom, indicating that he did not want to walk any longer.

16. Immediately after returning the walking client to his classroom, the claimant was asked to report to another group. Shortly after entering the other group, the claimant was informed that coworker A had resumed walking the prior client and had made comments to a group of coworkers that the claimant had only taken the client for a short walk.

17. On October 14, 2022, the claimant was walking out of the facility at the end of the work day with coworker B when the claimant stated she was going to punch coworker A in the face.

18. On October 17, 2022, coworker B reported [the] claimant's comment to the Employee Relations Manager.

19. On October 18, 2022, the employer placed the claimant on administrative leave pending an investigation.

20. Between October 18, 2022, and October 26, 2022, the Employee Relations Manager conducted an investigation, which included a response from the claimant in which she acknowledged making the statement.

21. Between the meeting with her supervisor and coworker A in mid-September of 2022, and October 14, 2022, to review the policy regarding use of the handicapped accessible bathroom, coworker A accused the claimant of damaging her personal car while the claimant was parking a company van. A subsequent investigation by the employer confirmed that the claimant had not struck or damaged coworker A's car.

22. The claimant was frustrated at the time of making the comment and there were no clients or other coworkers in the area.

23. The claimant's long-standing anxiety contributed to her conduct on October 14, 2022.

24. The claimant did not threaten coworker A.

25. Coworker A did not have a reasonable fear of injury or sustain emotional distress due to claimant's comment.

26. At the time the claimant made the comments, she did not intend to threaten coworker A.

27. At the time the claimant made the comments, she did not believe she was threatening anyone and did not think she would be disciplined for making the statement.

28. On October 26, 2022, the employer discharged the claimant for stating she would punch a coworker in the face.

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. We reject Consolidated Finding # 23, which states that the claimant's anxiety contributed to her conduct, as this finding is not reasonable in relation to the evidence presented. For the same reason, we reject Consolidated Findings ## 26–27 regarding the claimant's intent, and Consolidated Finding # 25 regarding coworker A's state of mind. Further, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits.

Where a claimant is discharged from employment, her eligibility 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 fired the claimant because she stated that she would punch one of her coworkers in the face. Consolidated Finding # 28. This was both a policy violation and misconduct in the sense that her statement violated the employer's policy prohibiting employees from making threats. Consolidated Finding # 3. The parties disagreed about whether the claimant's statement constituted a threat and whether the claimant intended it as a threat. The review examiner determined that the claimant was credible when she stated that she did not intend to threaten her coworker, and that she did not believe that her statement constituted a threat. Consolidated Findings ## 26–27. We disagree.

Ordinarily, 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). In our view, the weight of the evidence demonstrates that, at the time that the claimant made the statement that she would punch her coworker in the face, she was aware that it was a threatening statement that could create a reasonable fear of injury.

There is no indication in the record that, when the claimant told coworker B that she was going to punch coworker A in the face, she also informed coworker B that she was joking or would not act on her statement. Consolidated Finding # 17. Further, there is no indication in the record that the claimant did not understand that punching someone in the face is a violent act that would cause an injury. Finally, there is no indication in the record that the claimant did not understand, as a matter of common sense, that saying she was going to punch a coworker with whom she had prior issues would be understood as anything but a threat of injury. Consolidated Findings ## 12, 16 and 21.

The review examiner found that the claimant did not threaten coworker A, and coworker A did not have a reasonable fear of injury or sustain emotional distress as a result of the claimant's statement. Consolidated Findings ## 24–25. That the claimant did not make her statement directly to coworker A is irrelevant, as the threatening nature of the statement is not diminished because the claimant made the statement to another coworker. Additionally, the review examiner's finding regarding coworker A's state of mind is not supported by the record, as the record does not contain evidence about coworker A's state of mind, and any reference to that matter is purely speculation on the review examiner's part. Further, the person who heard the claimant's threatening statement, coworker B, clearly felt there to be a reasonable fear of injury to coworker A, as evidenced by the fact that coworker B reported the claimant's statement to the employer. Consolidated Finding # 18. For the above-stated reasons, we reject the review examiner's assessment that the claimant did not intend for her statement regarding punching coworker A to be threatening. The claimant's uttering of the statement was a knowing and deliberate act.

In order to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, "[deliberate] misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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).

Consolidated Finding # 6 provides that the claimant was made aware of the employer's expectation that employees refrain from making threats to their coworkers. We believe that the policy's

purpose, to ensure a safe working environment for all employees, is reasonable. Consolidated Finding # 6. The review examiner concluded that the claimant was not acting in wilful disregard of the employer's interest but due to mitigating circumstances. This was based on what the review examiner determined to be the claimant's credible testimony that anxiety contributed to her conduct. Again, we disagree.

After remand, the review examiner found that, shortly after walking a client, the claimant was informed by her coworkers that coworker A had stated that she had to continue walking the client because the claimant had only taken the client for a short walk. Consolidated Findings ## 15–16. The claimant did not confront coworker A at that time, nor did she make any threats against coworker A while in the presence of these coworkers. It was not until the end of her shift, as she was leaving the employer's premises with coworker B, that the claimant stated that she was going to punch coworker A in the face. Consolidated Finding # 17.

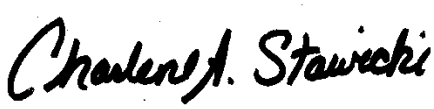
The fact that the claimant exercised sufficient self-control to refrain from confronting coworker A and making any comments about coworker A when initially informed of coworker A's comment, indicates that, whatever role anxiety played in her emotions, it did not render her incapable of working or controlling her behavior. Thus, her anxiety was not a mitigating factor that caused her misconduct.

Absent mitigating circumstances to excuse the claimant's misconduct, we must conclude that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28.*

In this case, the employer has also met its burden to show a knowing violation of a reasonable and uniformly enforced policy. As stated, we believe that the policy prohibiting threats is reasonable, the claimant violated it knowingly, and Consolidated Finding # 5 provides that the employer uniformly enforced the policy by terminating all employees who have made a direct or implied threat. Moreover, the claimant has not shown that her anxiety or frustration with Coworker A's comment rendered her incapable of complying with the policy.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, as well as 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 denied benefits for the week beginning October 30, 2022, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.



BOSTON, MASSACHUSETTS
DATE OF DECISION - June 26, 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

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.

SVL/rh