

**Claimant used profane language and lunged at a coworker in response to the coworker's ongoing verbal assault. Because the claimant's efforts to ignore the coworker did not stop the behavior and the manager did not intervene, she established that there were mitigating circumstances for her misconduct. Held the employer failed to meet its burden to show that the claimant's actions were in wilful disregard of the employer's interest, 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: 0079 4602 52**

### 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 reverse.

The claimant was discharged from her position with the employer on July 20, 2022. She filed a claim for unemployment benefits with the DUA, effective July 24, 2022, which was denied in a determination issued on April 4, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on May 27, 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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest, when the claimant swore and lunged at her coworker during a verbal altercation, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

The review examiner's findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant worked full time as a fulfillment associate for the employer, a retail business, from October 15, 2019, until July 20, 2022, when she was discharged from employment.

2. The claimant worked Sunday through Wednesday from 4:30 a.m. to approximately 1:00 p.m.
3. The claimant was paid \$18.00 per hour.
4. The claimant's immediate supervisor was the Area Manager.
5. On October 13, 2019, the claimant signed an acknowledgement of the employer's policies.
6. The employer maintained a Standards of Conduct, which advised employees that "Assaulting, threatening, intimidating, coercing, or interfering with supervisors or fellow associates" and "fighting or threatening violence in the workplace" is prohibited. The employer maintained the policy to create a safe and happy environment for all employees. The consequence for violation of the policy is a final written warning or termination based on the severity of the infraction and at the discretion of the human resource manager.
7. On July 18, 2022, at the start of the claimant's shift, the claimant was cleaning, and another co-worker (Co-worker A) asked a manager near the claimant a question and then walked away. Co-worker A returned to the area where the claimant was cleaning and complained that she (Co-worker A) had to do all the work. The claimant ignored Coworker A. Co-worker A returned to the area that the claimant was in and screamed that it was unfair that she had to do all the work, and no one helped her. Co-worker A yelled and swore for approximately 20 minutes. The claimant lunged at Co-worker and called her a bitch. The Manager restrained the claimant to prevent a physical altercation.
8. The claimant swore at Co-worker A because she was frustrated with her, and she lunged at her because she wanted her to get away from her.
9. The claimant reported to the Human Resource Manager that the claimant and Co-worker A had a verbal altercation.
10. The Human Resource Manager viewed video surveillance and observed the interaction between the claimant and Co-worker A.
11. The employer suspended the claimant from work with pay on July 19, 2022.
12. The employer discharged the claimant from work on July 20, 2022, for use of foul language in the workplace towards Co-Worker A and being physically aggressive towards her.
13. The employer discharged Co-worker A for the altercation.

14. On April 4, 2023, the Department of Unemployment Assistance issued a Notice of Disqualification under Section 25(e)(2) of the Law of the claimant's eligibility for unemployment benefits beginning July 24, 2022 (the determination).
15. The claimant appealed the determination.

### 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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not 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).

Because the employer had discretionary authority with the form of discipline to impose when an employee violates the employer's Standards of Conduct, we cannot conclude that the claimant violated a reasonable and *uniformly* enforced rule or policy. *See* Finding of Fact # 6. Alternatively, we consider whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

To meet its initial burden, the employer is required to show that the claimant's actions were not only misconduct but that they were deliberate. The employer prohibited employees from fighting or intimidating other coworkers. *See* Findings of Fact ## 5 and 6. On July 18, 2022, the claimant swore and lunged at a coworker in violation of the employer's standards of conduct policy. In doing so, she engaged in misconduct. *See* Finding of Fact # 7. Since there is no evidence to suggest that the claimant's actions were accidental or mere inadvertence, we can reasonably infer that her actions were deliberate.

The employer must also show that the claimant's actions were done in wilful disregard of the employer's interest. 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 claimant does not dispute that the employer had an expectation that prohibited fighting in the workplace. *See* Findings of Fact ## 5 and 6. The purpose of the expectation was to maintain a safe and pleasant work environment. As such, we believe the employer's expectation was reasonable.

We next consider whether the record supports the presence of mitigating circumstances which prevented the claimant from complying with the employer's expectation. 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).

On appeal, the claimant conceded that she called the claimant a bitch out of frustration and that she turned towards her coworker to address her because she felt threatened. The record supports this statement. However, the record further shows that the coworker instigated the altercation, initially just complaining, but escalating into yelling and swearing at the claimant. Although the claimant attempted to ignore the coworker, the coworker returned and continued her verbal assault with an outburst lasting 20 minutes. *See* Finding of Fact # 7. As the review examiner found, the claimant became frustrated and wanted to get away from the coworker. *See* Finding of Fact # 8. Meanwhile, the manager, who apparently was near the claimant during this tirade, did nothing to stop it until the claimant lunged at the coworker. *See* Finding of Fact # 7. Given the manager's inaction, the coworker's continuous berating behavior, and the claimant's inability to stop the verbal assault by simply ignoring it, we cannot say that the claimant acted unreasonably under the circumstances. Thus, her actions were not done in wilful disregard of the employer's interest but due to circumstances beyond her control.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interests 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 ending July 23, 2022, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 22, 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