Held that the claimant police officer resigned under the reasonable belief that his discharge was imminent for leaving his shift without permission. Further held that the claimant's discharge would have been for deliberate misconduct in wilful disregard of the employer's interest. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

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: 0080 6876 76

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 resigned from his position with the employer on June 27, 2023. He filed a claim for unemployment benefits with the DUA, effective July 2, 2023, which was approved in a determination issued on September 14, 2023. The employer 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 awarded benefits in a decision rendered on January 6, 2024. We accepted the employer's application for review.

Benefits were awarded pursuant to G.L. c. 151A, § 25(e), after the review examiner determined that the claimant resigned with a reasonable belief that the employer was about to discharge him, and the record did not establish that such discharge would have been for disqualifying misconduct. 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was eligible for benefits because the employer did not establish that the claimant's imminent discharge for insubordination, conduct unbecoming an officer, sexual harassment, and neglect of duty would have disqualified him under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as a Patrol Officer for the employer, a Town Police Department, from April 2019 to June 6, 2023.

2. The employer had no policy prohibiting officers from having romantic relationships with other officers.

3. The employer had a Code of Conduct which set forth the employer's expectations regarding conduct.

4. Allegations of misconduct by an officer while off duty or on duty must be investigated by the employer.

5. Profanity or disrespectful language with a superior officer could be insubordination and conduct unbecoming an officer.

6. The patrol officers and their superiors would use profanity in their conversations.

7. The employer had an expectation that patrol officers would not swear or use disrespectful language with a superior officer.

8. The employer had an expectation that patrol officers would not leave their shifts early or without the approval of their superior officer.

9. Leaving a shift early without the approval from a superior officer or an agreement with an incoming officer was insubordination and neglect of duty.

10. The claimant knew that failing to follow a superior's order was insubordination.

11. The employer had the Code of Conduct and expectations regarding conduct of officers because officers must be professional and accountable to the public.

12. The employer had discretion regarding the disciplinary consequences for a violation of the Code of Conduct (insubordination, conduct unbecoming an officer, and neglect of duty).

13. The employer had a policy regarding sexual harassment.

14. The employer had an expectation that it's [sic] employees would not sexually harass other employees.

15. The disciplinary consequences for sexual harassment were up to and including termination from employment.

16. The claimant knew the employer's sexual harassment policy.

17. The claimant had no history of formal discipline from the employer.

18. In April 2023, the claimant was in a romantic relationship with a female officer who also worked for the employer.

19. On April 25, 2023, the claimant received four naked photos by text from the female officer.

20. On April 25, 2023, on the overnight shift, the claimant received a text message from the female officer while working for the employer where she told the claimant she was going to the bathroom and then texted, "Why don't you just come walk in here and fuck me." The claimant replied, "I want to so bad." The female officer replied, "You should." Additional sexually explicit and graphic text messages were exchanged between the claimant and the female officer on that overnight shift.

21. The claimant had a friendship with the female officer's father.

22. Prior to working at the police department, the claimant worked at a hospital with the female officer's father.

23. The female officer's father was like a second father to the claimant.

24. On or about May 4, 2023, the female officer texted the claimant, "I love you." The claimant told the female officer he was "feeling broken" and had "a bad day." The female officer took the claimant's shift that night.

25. From approximately May 5, 2023, through May 23, 2023, the claimant went out of work on medical leave for anxiety and depression. The claimant had told two different Sergeants that he had suicidal thoughts.

26. While the claimant was out on medical leave, the claimant and the female officer talked on the phone and texted each other.

27. In May of 2023, the claimant started treatment with a therapist and started taking medication for anxiety. The claimant continues that treatment to date.

28. The claimant did not think the department handled his medical leave correctly.

29. The claimant made critical comments regarding the employer while he was on medical leave including, "the department owes me an apology" and that he "wasn't going to do shit for this department anymore."

30. The claimant talked to another police officer from a different town and told him that his medical leave was not handled correctly.

31. While on medical leave, the claimant's Sergeant heard that the claimant was telling other people that the Sergeant lied regarding the claimant's suicidal statements.

32. The claimant returned to work his regular job with the employer on May 24, 2023. For the month of June 2023, the claimant was required to work with a supervisor on shift.

33. When the claimant returned to work on May 24, 2023, he had a conversation with his Sergeant in the locker room. The claimant wanted to know who told the Sergeant that the claimant had called the Sergeant a liar. The claimant told the Sergeant, "You fucking owe me that." The Sergeant would not disclose this information to the claimant. The claimant told the Sergeant, "This is bullshit."

34. The claimant believed he was having a private conversation with the Sergeant as a friend.

35. On May 24, 2023, the claimant talked to the female officer and stated that the Sergeant was acting like an asshole.

36. The claimant believed he was having a private conversation with the female officer.

37. The claimant and the female officer continued to communicate with each other by text and phone calls from May 24, 2023, through June 4, 2023.

38. On or about May 28, 2023, the claimant asked the female officer if she still had feelings for him and she replied, "I don't think so."

39. On May 29, 2023, the claimant asked the female officer, "Do you still love me?" The female officer replied, "Of course."

40. On May 30, 2023, the claimant texted the female officer about why she had hit the "FU button." The female officer responded that it was "accidental."

41. On May 31, 2023, the claimant texted the female officer, "Do you still have feelings for me?", "Come here you know you want to.", and "When do I get the premium package back." The female officer was in the room with the claimant and responded to him verbally.

42. On June 1, 2023, the claimant texted the female officer and asked if she was going to come find him after the vest fitting. The claimant texted, "What do you have me blocked?" The female officer responded, "Sorry". The claimant sent messages to the female officer that he should not have been so pushy and "I hate when you get like that and block me out." The female officer replied, "I'm sorry." On June 1, 2023, the claimant and the female officer continued to text each other repeatedly regarding work, the female officer's purchases, and the female officer's mother's health. The female officer also texted the claimant on June 1, 2023, that she wished the claimant was there so "I knew I had someone to back me on stops."

43. On June 4, 2023, the female officer texted the claimant, “We have to find a time to talk.”

44. On June 4, 2023, the claimant and the female officer had several phone calls. During one of the phone calls, the female officer hung up on the claimant. The female officer then texted the claimant, “sorry I need a moment.”

45. The claimant sent text messages to the female officer on June 4, 2023. The female officer responded, “I don’t want a relationship.” The claimant responded, “Ok, fine.” The female officer responded, “I can’t take the pressure.” The claimant responded, “What pressure?” The female officer responded, “all I’m going to say is I’m trusting you (claimant).” The claimant responded, “With what?” the female officer responded, “our friendship and keeping our personal lives away from work.” The claimant responded, “work would not know. If work and your dad is the only thing holding us back from happening that’s completely ridiculous.” The female officer responded, “I cannot have this happen again.” The claimant responded, “I would move mountains to make us work and protect you,” “I would leave and get a new job before ruining yours.” The female officer responded, “I’m really sorry.” The claimant responded, “Your (sic) not sorry” and “What do I have to do to make us whole again?” “Let’s fix this.” The female officer responded, “I need some time I told you I don’t want pressure.” The claimant responded that he would not pressure her and states, “I just wish you knew what you wanted.” “I’m done putting in all of the effort if you want to fix us when ur (sic) ready im (sic) here to listen and figure it out im (sic) tired of being unhappy and at this whole situation whatever happens happens now.”

46. The claimant did not communicate with the female officer after June 4, 2023.

47. At some point, the female officer blocked the claimant from her social media sites. The female officer never blocked the claimant’s number in her phone.

48. On June 4, 2023, the claimant was working the 3:00 p.m.to 11:00 p.m. shift. The claimant returned to the employer’s station at approximately 10:45 p.m. after being out on patrol.

49. The female officer was working the 11:00 p.m. to 7:00 a.m. shift starting June 4, 2023, and was in the dispatch room with the Sergeant when the claimant came in at approximately 10:45 p.m. The female officer was doing paperwork and had not formally started her shift. The claimant put his keys and taser down and said, “I’m out of here.”

50. The Sergeant told the claimant that he could not leave early on June 4, 2023. The Sergeant told the claimant he had 10 minutes left on his shift.

51. The claimant left his shift early on June 4, 2023.

52. The claimant did not believe that he would be discharged for leaving work ten minutes early on June 4, 2023.

53. After the claimant left his shift early, the Sergeant said to the female officer, "Is he fucking serious?"

54. The claimant had not previously arranged to have the female officer cover the remaining minutes of his shift.

55. A call for service requiring police response came into the employer on June 4, 2023, at 10:54 p.m. The claimant had already left for the day.

56. The female officer was required to put on her gear and respond to the 10:54 p.m. call on June 4, 2023, with the Sergeant.

57. On or about June 6, 2023, an internal investigation was opened on the claimant regarding leaving his shift early without supervisor authorization and before the shift relief was ready thereby missing a call for service that came in on the claimant's shift. The investigation was also regarding reports of verbal disrespect and harassment of members of the department, conduct unbecoming an officer, insubordination and neglect of duty.

58. On or about June 7, 2023, the claimant was placed on paid administrative leave pending the outcome of the internal investigation. The claimant was ordered not to discuss any matters related to the investigation with any other member of the police department other than his union representative.

59. On or about June 9, 2023, or June 10, 2023, the claimant visited the female officer's father while the father was at work in an area for employees only.

60. The claimant had visited the female officer's father at work in the past.

61. The female officer's father did not want to talk to the claimant and asked the claimant to leave. The claimant immediately left when requested.

62. On June 10, 2023, the claimant was ordered by the employer to cease contact with the female officer's father.

63. On June 12, 2023, the claimant was interviewed by the Internal Affairs investigating Lieutenant (IA LT). The claimant was represented by his union representative at the interview.

64. The IA LT wrote a report regarding the investigation.

65. The IA LT spoke to the Sergeant, the female officer, and other members of the department as part of the investigation.

66. The female officer did not provide the IA LT all of the text messages between herself and the claimant.

67. The claimant provided the IA LT all of the text messages between himself and the female officer.

68. The claimant found the IA report was accurate regarding the claimant's answers to the IA LT's questions but that some information had been edited.

69. The Town Administrator makes the ultimate decision regarding discharge of police officers.

70. The Town Administrator follows the recommendations of the police department regarding termination of employment.

71. The claimant was told that he should resign by one of his union representatives because the Town Administrator was going to discharge him.

72. On June 27, 2023, the claimant texted with the union representative. The claimant texted, "So just to be clear if I resign I will not be terminated" The union representative replied, "Correct. Send the letter this morning and you don't have to attend the 3pm meeting today to be terminated."

73. The claimant resigned from his job with the employer on June 27, 2023.

74. On June 27, 2023, the Chief of Police accepted the claimant's resignation.

75. The final event that triggered the recommendation for termination of employment was the claimant leaving his shift early on June 4, 2023, without prior agreement with the incoming officer or permission from his superior officer.

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 eligible to receive unemployment benefits.

There is no dispute that the claimant resigned on June 27, 2023. *See* Finding of Fact # 73. Therefore, we analyze the claimant's separation under G.L. c. 151A, § 25(e)(1), which provides, in relevant 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express language of these provisions assigns the burden of proof to the claimant.

However, the Supreme Judicial Court has held that, if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984), *citing* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-598 (1981). In such a case, the separation is treated as involuntary and the inquiry focuses on whether, if the impending discharge had occurred, it would have been for a disqualifying reason under G.L. c. 151A, § 25(e)(2).[1] For example, separations based on layoffs or poor job performance are not disqualifying under G.L. c. 151A, § 25(e)(2), and an employee who quits in reasonable anticipation of such would be eligible for benefits. *See* White, 382 Mass. at 597–599; Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion). On the other hand, if the impending separation would have been for deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy, the employee would not receive benefits.

The findings show that the claimant resigned after talking with his union representative, who told him that he was going to be fired. *See* Findings of Fact ## 71–73. We have previously held that a claimant who quit on the advice of union representatives did not meet her burden to show that a discharge was imminent, because her employer had not yet completed its investigatory interview. *See* Board of Review Decision 0002 2960 41 (Jan. 17, 2014). In this case, the internal affairs investigation report regarding the claimant's conduct had been completed on June 19, 2023, eight days before the claimant resigned. *See* Exhibit 5.[2]

In the report, the investigating officer concluded that the claimant had committed the offences of neglect of duty, insubordination, conduct unbecoming an officer, and sexual harassment. Id. It is reasonable to infer that the contents of this report and its conclusions were conveyed to the claimant's union representative, who then told the claimant that the town administrator was going to discharge him. *See* Finding of Fact # 71. On the day that the claimant resigned, he was scheduled to meet with the town administrator, who had the authority to discharge him. *See* Findings of Fact ## 69, 72, and 73. Further, the town administrator follows the police department's recommendations regarding discharging officers. *See* Finding of Fact # 70. Under these circumstances, we agree that the claimant reasonably believed that his discharge was imminent.

---

[1] Although the inquiry touches on G.L. c. 151A, § 25(e)(2), because the claimant quit, he still has the burden to show that his separation is controlled by the holding and reasoning of Malone-Campagna.

[2] Exhibit 5 is the internal affairs investigation report involving the claimant. While not explicitly incorporated into the review examiner's findings, this report 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).

We next consider whether the claimant's discharge would have been disqualifying under G.L. c. 151A, § 25(e)(2), which provides, in relevant 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's investigation into the claimant's conduct covered multiple possible infractions of its code of conduct and sexual harassment policy. *See* Finding of Fact # 57. Findings of Fact ## 12 and 15 provide that the employer maintains discretion regarding the disciplinary consequences for violations of both policies. Since the employer has discretion over the disciplinary action that it may undertake, the employer has not met its burden to show that the claimant's discharge would have been for a knowing violation of a reasonable and *uniformly enforced* policy.

Alternatively, the employer may show that the claimant's discharge would have been due to deliberate misconduct in wilful disregard of the employer's interest. We concur with the review examiner's conclusion that the employer did not present substantial and credible evidence to show that the claimant engaged in sexual harassment. Further, we agree that the employer did not prove that the claimant's conduct during his medical leave or when he returned to work on May 24, 2023, constituted deliberate misconduct in wilful disregard of the employer's interest.

However, we disagree with the review examiner's analysis of the claimant's actions when he left his shift early on June 4, 2023. The claimant did not dispute that he left before his shift was over. However, he testified that the sergeant said, "Put a smile on your face, go ahead and get out of here," asserting that he left with the sergeant's permission. However, the review examiner credited the sergeant's direct testimony that he did not say this, and that the claimant walked out of the station after the sergeant told the claimant his shift was not over. Such credibility 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 review examiner's credibility assessment is reasonable in relation to the evidence presented, and we will not disturb it.

On the basis of her credibility assessment, the review examiner found that, prior to the claimant's departure from the police station, the sergeant informed the claimant that he could not leave early, and that the claimant still had ten minutes left on his shift. *See* Finding of Fact # 50. It is evident

from this finding that the claimant's decision to leave early was deliberate. Thus, the claimant committed deliberate misconduct when he left early on June 4, 2023, without approval from his supervisor.

However, deliberate misconduct alone is not enough. Such misconduct must also be 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).

The employer expected the claimant, a police officer, to follow orders from his superiors, not to leave a shift early without approval, and to arrange for an incoming officer to cover the remainder of his shift if he did leave early. *See* Findings of Fact ## 8–10. Moreover, the sergeant's statements show that the claimant knew that his employer expected him to stay until the end of his shift on June 4, 2023. *See* Finding of Fact # 50. These expectations are reasonable, as they ensure that the police department operates effectively, and that there are officers ready to respond to calls that come in. It may be that the claimant left his shift early on June 4, 2023, because he was upset about seeing the female officer with whom he had had a dating relationship, particularly given their communications earlier that day. *See* Findings of Fact ## 18, 43–45, and 49. While understandable, his distress about this relationship was not a mitigating circumstance for walking off the job. The claimant offered no other circumstances beyond his control that caused him to leave early.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits is based on an error of law. The claimant is disqualified pursuant to G.L. c. 151A, § 25(e)(1), because he resigned his job under the reasonable belief of imminent discharge for what would have been a disqualifying discharge under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 25, 2023, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 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.

REB/rh