

The employer met its burden to show the claimant's discharge for swearing at and threatening a coworker was deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

**Board of Review
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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 separated from his position with the employer on August 31, 2023. He filed a claim for unemployment benefits with the DUA, effective August 20, 2023, which was denied in a determination issued on September 21, 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 in a decision rendered on November 25, 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 to obtain additional evidence about the reason for the claimant's separation. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 employer had not met its evidentiary burden to show that the claimant had threatened another employee, 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 worked part-time as a Security Officer (SO) for the employer, a company that contracts with various clients to provide security services, from 4/11/22 to 8/31/23.

2. The claimant was a 'flex' officer. He was assigned to work at different client sites on different days.
3. The employer handbook lists conduct which, depending on circumstances and severity, warrants involuntarily termination on the first occurrence. The list includes but is not limited to threatening or committing physical violence or intimidating behavior; illegal conduct, discrimination, or harassment; insubordination or derogatory behavior; and disruptive or inappropriate conversations at work.
4. The employer handbook also lists behavior that may result in a warning prior to termination of employment. Such behavior includes but is not limited to abusive, foul, or inappropriate language and discourtesy to employees, clients, or other individuals.
5. The above policies are in place to promote a safe, professional, and respectful work environment.
6. The claimant became aware of the employer handbook and the policies contained in the handbook when he was hired.
7. Employees who violate the above policies are disciplined at the employer's discretion.
8. On 12/28/22, SO "[A]" had a conversation with the claimant at work.
9. "[A]" told the claimant about issues she was having as a single mother. The claimant told "[A]" that women need to learn to keep their legs shut. He also insinuated that rape was due to women not learning how to say "no" and women who have kids they cannot afford should be sterilized.
10. "[A]" explained to the claimant that, in her case, she did not have a choice, as she was raped by her stepfather and gave birth to his child.
11. "[a]" subsequently informed the Human Resources Manager, (HRM) about her conversation with the claimant on 12/28/22. "[A]" provided the HRM with a written statement.
12. The HRM contacted the claimant to schedule a meeting for 1:00 p.m. on 1/6/23. He said he'd only come if the District Manager (DM) or Field Supervisor (FS) requested him.
13. The DM and FS are men. The HRM is a woman.
14. On 1/6/23, the HRM, DM, and the Human Resources Generalist (HRG) met with the claimant in the HRM's office. The claimant shook everyone's hand but

the HRM. He addressed the DM when answering questions, even when the HRM asked questions.

15. The HRM and HRG took notes during the meeting. The HRG is a man.
16. The claimant went off topic and when the HRM asked him to stay on topic and said that no one was questioning his work ethic, he said the HRM was calling him a bigot. The HRM never said this.
17. When asked about the comments made to “[A]” on 12/28/22, at first, the claimant said he didn’t remember making those comments. He later said he did not make those comments. After that, he said if he did make those comments, he didn’t intend to insult anyone.
18. When the HRM asked the claimant which one it was, as the claimant provided three different answers to the question, the claimant said, “I just told you.”
19. The claimant received a written warning on 1/9/23 for the statements he made to “[A]” on 12/28/22. The claimant wrote on the warning, “Conversations can be misconstrued, taken out of context, and are always open to interpretation. I agree that some conversations are inappropriate or better left to places outside of work. Constructive criticism is acceptable.”
20. The claimant received a second written warning on 4/11/23 for an email he sent to a supervisor on 4/3/23. The claimant told the supervisor that his demographic information was wrong on the employer’s system, as he was listed as Hispanic/Latino, and he is Caucasian. In the email, he wrote, “My heritage is responsible for sinking the Spanish Armada, not swimming to America.”
21. The claimant received the warning because his behavior violated the employer’s policy regarding harassment and discrimination. The warning said future failure to adhere to employer policy would result in termination.
22. On the warning, the claimant wrote, “The mentioned email was in bad taste. This constructive criticism is acknowledged, and I have taken diversity training which highlights race/gender bias...”
23. On 8/26/23, the claimant was scheduled to work a shift starting around 7 a.m. After the claimant arrived, SO “[B]” badged in a contractor while SO “[C]” signed into the guard house. “[B]” signed out and gave “[C]” the daily pass-down. “[B]” then left out of the side exit.
24. The claimant was outside of the guard house at that time, and “[B]” held the door open for the claimant to enter the guard house.
25. “[B]” drives a motorcycle and had a helmet with him.

26. The claimant refused to enter and told "[B]", "I hope you get road rash on your head."
27. "[B]" asked the claimant to repeat himself as he walked to his motorcycle, and the claimant said, "I'll fuck you up if you walk closer" and "back the fuck up or I'll fuck you up".
28. "[B]" felt threatened by the claimant. "[B]" asked the claimant if he was joking and if he was ok.
29. The claimant said, "I got a bad attitude and I'll fuck you up."
30. "[B]" walked back to the guard house to speak with "[C]" about what happened and ask if there was a miscommunication somewhere or if something was wrong with the claimant. "[C]" confirmed to "[B]" that the claimant said, "I hope you get road rash on your head".
31. "DA" asked "[C]" to call their supervisor, "[D]," to see what the next steps would be due to the incident, while the claimant either sat in or was standing by his car in the parking lot. Supervisor "[D]" told "[B]" and "[C]" to write incident reports and he would try to get a new flex officer on site. The claimant left and another SO relieved "[B]" at 9:00 a.m.
32. "[B]" and "[C]" are men. None of the SOs present when the claimant arrived at work on 8/26/23 were women.
33. On 8/28/23, the HRM received an email from the Account Manager at the site the claimant worked at on 8/26/23 about the incident between the claimant and "[B]". The Account Manager sent over written statements from "[B]" and "[C]".
34. The HRM read the written statements and spoke with the DM and FS. She asked the FS to reach out to the claimant and inform him he was suspended pending investigation and request a written statement from the claimant.
35. In his written statement, the claimant stated that he arrived at the client site, entered the guard house, and greeted the SO at the front desk. He does not identify the SO by name. He stated that the SO at the front desk was a woman.
36. The claimant stated that he entered the guard house and after a contractor signed in and went through the gate, the woman SO was permitted to be relieved and leave.
37. The claimant stated that three contractors entered the guard house and the SO who was waiting to be relieved looked for contractor badges, and it took at least five minutes to find the badges. The claimant stated that one of the contractors, who was tall, got angry.

38. The claimant stated that he attempted to use humor to diffuse the situation and asked the tall contractor, "Don't you want that identification?" and the tall contractor said, "No, I have one of my own."
39. The claimant stated that the SO said, "This is the man who ordered the atomic bomb for Vietnam". He did not explain in his statement who the SO was speaking to.
40. The claimant stated that he walked out of the guard house and the SO grabbed a backpack and a helmet. He stated that he walked outside and wished the SO a safe trip home and told the SO that the tall contractor was angry and ready to kick his ass.
41. The claimant stated that the SO asked the claimant what his problem was, and the claimant stated, "I guess I have a bad attitude".
42. On 8/31/23 at 10:30 a.m., the HRM called the claimant. He did not answer. She left a voicemail asking him to return her call.
43. The HRM called the claimant again at 1:17 p.m. and the claimant did not answer. She left another voicemail for the claimant. She identified who she was and said this was her second attempt to reach the claimant that day. She said after reviewing all statements and speaking with the District Manager and Field Supervisor, the claimant's employment was terminated effective 8/31/23 and a termination letter, plus final paycheck and PTO payout will be sent to the claimant.
44. The termination letter explained that the claimant was discharged for his behavior toward another SO on 8/26/23 and that he received previous warnings on the dates listed above.

Credibility Assessment:

Both parties provided conflicting evidence regarding the events leading to the claimant's separation from employment. The evidence provided by the employer was more credible than the evidence provided by the claimant as it was more consistent, detailed, and logical as compared to the evidence provided by the claimant, and the employer provided multiple documents to supplement its testimony, including written warnings, written witness statements, and notes from the January 2023 meeting. The claimant's testimony at the initial hearing and at the additional evidence remand hearing regarding his conversation with "[A]" was inconsistent and vague, similar to the way he answered the HRM's questions at the January 2023 meeting. Regarding the January 2023 meeting, the HRM and the HRG took notes in the meeting and their detailed notes describe what happened in the meeting in a similar manner. The HRM and HRG said that the claimant did not shake the HRM's hand but shook the DM's and the HRG's hand at the beginning

of the meeting. At the hearing, the claimant stated that he hesitated to shake the HRM's hand, because it was pandemic times, and he did not have hand sanitizer handy, and he would have to reach to shake her hand. He stated that he's an older person prone to other conditions. He stated he wasn't sure if he shook the HRG's hand and stated that he did shake the DM's hand. When asked why he shook the DM's hand at all, he stated that he was not clear if that happened. When asked if he agreed with the HRM's and the HRG's meeting notes, the claimant said they were 'simplistic'. Regarding the comment the claimant made about being of English heritage and not a descendent of a country with a primary language of Spanish, the claimant stated that this was ironic, and tongue in cheek. It is unclear how the comment is ironic, tongue in cheek, or humorous. He stated that he was afraid that his identity was compromised because his demographic was mislabeled. The evidence presented was insufficient to show that he communicated this concern to the HRM or a manager or that he contacted local law enforcement agencies to report possible identity theft. Regarding the final event that occurred prior to the claimant's separation from employment, "[B]" and "[C]" provided detailed corroborating written statements about what occurred on 8/26/23. The only aspects of the claimant's written statement that were similar to "[B]" and "[C]'s" statements were that the claimant was scheduled to work a morning shift, he was outside when he spoke with "[B]" prior to leaving, "[B]" had a motorcycle helmet and drove a motorcycle, and the claimant admitted to saying he had a bad attitude. The claimant demonstrated a pattern of conduct that led to each of the above warnings and his eventual termination and the statements from "[B]" and "[C]" are in line with that pattern of conduct.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to benefits.

Because the claimant was discharged from his employment, his 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).

While the employer maintains policies prohibiting employees from engaging in unprofessional behavior such as threatening, intimidating, or harassing other employees, it retains discretion over how to discipline employees who violate these policies. Consolidated Findings ## 3 and 4. As the employer did not provide any evidence showing that it discharged all other employees who threatened, intimidated, or harassed other employees, the evidence presented is insufficient to show a knowing violation of a reasonable and *uniformly enforced* policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged.

The employer discharged the claimant because he had used obscene language and threatened another employee on August 26, 2023. Consolidated Findings ## 27–29, and 44. Following remand, the review examiner rejected as not credible the claimant’s testimony that he had not threatened a co-worker on that date. 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). As the employer presented contemporaneous documentary evidence verifying its contentions about the claimant’s actions, we have accepted the review examiner’s credibility assessment as being supported by a reasonable view of the evidence.

Consistent with her credibility assessment, the review examiner found that the claimant swore at and threatened another security officer on August 26, 2023. Consolidated Findings ## 26–29. Thus, the consolidated findings confirm that the claimant engaged in the misconduct for which he was discharged. Inasmuch as the claimant repeated this threat multiple times during his short interaction with the other security officer, it is self-evident that his decision to threaten the other security officer was deliberate. See Consolidated Findings ## 27 and 29.

However, the Supreme Judicial Court (SJC) has stated, “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). 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).

In this case, the claimant had received two previous written warnings for making inappropriate comments to other employees. Consolidated Findings ## 9, 10, and 20. Upon receiving the warnings and reviewing the previous incidents with the employer, the claimant acknowledged the

impropriety of his comments and behaviors. Consolidated Findings ## 17, 21, and 22. Accordingly, the claimant's receipt of and response to these warnings confirms that he understood the employer expected him to refrain from making inappropriate and unprofessional comments.

Finally, we need not consider whether the claimant showed mitigating circumstances for his misconduct, because he maintained that he was not there, alleging that he had been given permission to leave his shift early on July 22, 2023. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See Lagosh v. Comm'r of Division of Unemployment Assistance*, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found).

We, therefore, conclude as a matter of law that the employer has met its burden to show the claimant was discharged for 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 reversed. The claimant is denied benefits for the week of August 27, 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.



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 30, 2024

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.

LSW/rh