

The claimant was discharged because he purportedly threatened his manager. The review examiner reasonably rejected as not credible the employer's hearsay testimony about the claimant's actions because it did not contain sufficient indicia of reliability. Held the employer did not meet its burden to show the claimant engaged in conduct that violated an employer policy or expectation and he was, therefore, eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0082 3925 99

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 affirm.

The claimant separated from his position with the employer on March 8, 2024. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 13, 2024. 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 June 13, 2024. 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 relevant to 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 burden to show that the claimant had engaged in the misconduct for which he was discharged, 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 full-time as a shipping and receiving clerk for the employer, a stainless-steel manufacturer, from August 16, 2023, to March 8, 2024, when he separated.
2. The claimant's immediate supervisor was the supervisor. The claimant's upper-level supervisor was the shipping supervisor (manager).
3. The claimant's job duties included picking items for the order on his device from the warehouse floor. The claimant was supposed to have one order at a time appear on his device.
4. The claimant locates the items on the order in the warehouse and puts them on a dolly.
5. The claimant was not certified to operate a forklift and did not operate a forklift for the employer.
6. The employer maintains a "Workplace Violence" policy (the policy), which prohibits threatening to injure a person or damage property by any means, including verbal, written, direct, indirect, or electronic means and taking any action to place a person in reasonable fear of imminent harm or offensive contact.
7. The purpose of the policy is to ensure a work environment free from violence, intimidation, and other disruptive behavior.
8. A violation of the policy may subject the violator to criminal charges as well as discipline up to and including immediate termination.
9. The claimant was aware of the policy.
10. The employer expected the claimant to remain calm, act in a respectful manner, and not threaten employees.
11. The purpose of the expectation is to protect the safety of employees.
12. A violation of the expectation can result in termination.
13. The claimant was aware of the expectation.
14. In or around the week of February 11, 2024, the claimant applied for a position within the company for the quality control inspector.
15. The claimant spoke with his supervisor about applying for the position. The supervisor advised the claimant not to apply for the position because he would be fired if he did.

16. In March 2024, the employer asked the claimant and the staff in the warehouse to sign a paper indicating they did not steal drugs.
17. On March 5, 2024, the claimant interviewed for the quality control inspector position with human resources.
18. On or around March 8, 2024, the manager had assigned the claimant twenty (20) orders in his device for his workload at one (1) time. The claimant asked the manager for help from other employees because he was typically only to have one (1) order at a time until it was completed prior to being assigned the next order. The manager did not allow other employees to help the claimant.
19. On March 8, 2024, the claimant asked the manager to restock the items on the shelves the claimant needed to pick for his orders, which was a part of the manager's job. The claimant informed the manager he needed the material for his job. The manager replied to the claimant and told him to "mind his business and do his job."
20. The claimant responded to the manager stating he was too busy snitching to do his job referring to the fact the manager was in the human resources specialist (HR specialist) office talking about employees.
21. The manager told the supervisor, "I fucking hate [the claimant.]"
22. The supervisor then informed the claimant that the manager stated that he "fucking" hated him. The supervisor also informed the claimant the employer was going to try to make him quit because he applied for the quality control inspector's position.
23. Prior to lunch time, the manager approached the claimant when he was working in an aisle. The manager informed the claimant he could not speak to him the way he spoke with him earlier (when he stated he was too busy snitching to do his job) because he was a manager.
24. The claimant stated to the manager that what he was doing was wrong, assigning all the additional work to the claimant he was not supposed to be assigned at the same time and not letting anyone help him, and that he was creating a toxic work environment by doing so.
25. A verbal argument between the claimant and the manager ensued. The claimant did not tell the manager, "Swin[g] on me and I will end your life."
26. The claimant and the manager went to the HR specialist's office and spoke with her regarding the incident. While the claimant was in the office, the manager did not inform the HR specialist the claimant threatened him in any way during the argument.

27. The claimant left and the manager stayed behind to speak with the HR specialist without the claimant.
28. After lunch, the claimant was called to the conference room and informed he was being terminated from his employment due to the allegation the claimant threatened the manager during their argument on the warehouse floor by stating, “Swing on me and I will end your life.”
29. The employer does not have a copy of the video of the incident. The video did not capture the claimant and the manager during the altercation because the camera is not angled to record down the aisle the interaction occurred. The audio is hard to hear on the video.

Credibility Assessment:

The employer alleged the claimant threatened the manager by standing close to him on the warehouse floor during an argument and stating, “swing on me and I will end your life.” The claimant denied making threatening statements during the argument. The HR specialist provided multi-level hearsay testimony regarding the statement alleged by the claimant, that she was informed of the incident by the manager in her office after the claimant left, and that another supervisor and three (3) employees witnessed the argument and reported to her the threat occurred right after the incident. However, the employer did not present any statements from the witnesses of the threat, and most importantly, did not present any testimony from the manager, who was scheduled to testify as a witness at the initial hearing, but did not participate in the continued portion of the hearing when his testimony was to be taken. The manager was also not present at the remand hearing to provide testimony. The fact-finding questionnaire submitted by the employer references a video record of the incident, and the HR specialist referenced reviewing the video during her testimony, however the employer does not have a copy of the video.

Additionally, the HR Specialist provided testimony that the video recording she viewed did not show the incident between the claimant and the manager because the angle did not record down the aisle the incident occurred in. The audio is also hard to hear because of the background noise of the warehouse, but, per her testimony, she could hear the claimant yell and the word “swing” multiple times.

The supervisor provided testimony he was not present during the incident with the manager and the claimant. When questioned by the claimant, the supervisor provided testimony he did not speak with the manager the day of the incident, that he never speaks to the manager or any of the other individuals at the employer and has no knowledge of the claimant applying for the quality control job. The supervisor also provided testimony he was asked to sign something, but that he didn’t read it, did not know what it was, and just signed in without reading it. Given the supervisor’s blank denial of knowledge of any questions asked to him by the claimant, the supervisor’s testimony is deemed to be not credible.

Given the claimant's denial of threatening the manager and his allegations the employer wanted to fire him for other reasons, weighed with the employer's aforementioned testimony and lack of evidence provided, it is concluded the claimant's testimony is deemed to be more credible.

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. As discussed more fully below, we agree with 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

“[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).

As a threshold matter, to meet its burden under G.L. c. 151A, § 25(e)(2), the employer must show that the claimant engaged in some misconduct which either violated an employer policy or expectation.

The employer's witness testified that the employer discharged the claimant for threatening his manager on March 8, 2024. Consolidated Finding # 27. Following remand, the review examiner rejected as not credible the employer's contention that the claimant had threatened the manager on that day. *See* Consolidated Finding # 25. 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 review examiner rejected the employer's contentions as not credible because the employer's witness, an HR specialist, was only able to provide hearsay evidence of the claimant's actions on

on March 8, 2024. Hearsay evidence is admissible in informal administrative proceedings, and can constitute substantial evidence on its own if it contains “indicia of reliability.” Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). As the employer was unable to present testimony from witnesses to the alleged incident or the video evidence it proffered at the initial hearing, we believe that the review examiner reasonably concluded that the employer did not present sufficient indicia of reliability to support the substance of its witness’ testimony. *See* Consolidated Finding # 29. We have, therefore, accepted the review examiner’s credibility assessment as being supported by a reasonable view of the evidence.

Consistent with the review examiner’s assessment, we conclude that the employer has not shown by substantial and credible evidence that the claimant acted contrary to an employer policy or expectation on March 8, 2024, by threatening his manager. Consolidated Finding # 25.

We, therefore, conclude as a matter of law that that the employer has failed to demonstrate that the claimant’s discharge was due 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. The claimant is not disqualified under G.L. c. 151A, § 25(e)(2).

The review examiner’s decision is affirmed. The claimant is entitled to receive benefits for the week of March 10, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 2024



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

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