The review examiner reasonably concluded that the claimant deliberately threatened to fight the Assistant Supervisor, where the claimant called the Assistant Supervisor evil, black-hearted, and the devil, and then repeatedly told the Assistant Supervisor that they should step outside to settle any personal problems. As the claimant confirmed she understood the employer expected her not to threaten other employees, she was aware her actions were contrary to the employer's expectations and she offered no mitigating circumstances. Held the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest and is ineligible for benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0082 8683 36

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 affirm.

The claimant separated from her position with the employer on May 24, 2024. She filed a claim for unemployment benefits with the DUA, effective May 26, 2024, which was approved in a determination issued on June 20, 2024. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on July 16, 2024. 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). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to 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 claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest because she threatened to fight her supervisor, 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 for the employer, a plastic manufacturer from 11/2/20 until 5/22/24.

2. The employer has policies prohibiting insubordination and violence in the workplace. The policies are in the employer handbook.

3. The employer maintained the policies to prevent chaos and provide a safe workplace.

4. The insubordination policy stated that violations can lead to discipline up to and including immediate termination depending on the circumstances of the event.

5. The violence policy indicates the employer has zero tolerance for violations.

6. The claimant received the employee handbook at the time of hire.

7. The claimant is aware from her own common sense that she should not be violent or threaten others in the workplace.

8. The employer has given the claimant numerous warnings for violations of safety procedures, including failing to wear safety glasses and using her cellphone in the workplace.

9. The claimant speaks Spanish.

10. The Assistant Supervisor speaks both English and Spanish. The Assistant Supervisor spoke to the claimant in Spanish when they discussed work matters.

11. On 5/17/24, the Assistant Supervisor asked the claimant to help on another machine since hers was not working.

12. It is common in the workplace to help on other machines if the one you are assigned to is not running.

13. The claimant was standing near a coworker, and they were talking while their machine was down.

14. The claimant complained to the Assistant Supervisor about having to help on the other machine because she felt the others never helped her when their machines were down.

15. The Assistant Supervisor again told her to help on the machine and then she walked away. She could tell the claimant was upset about having to help on a different machine.

16. The Assistant Supervisor talked to her supervisor about the claimant's response and the fact that she was standing around talking to the coworker when the machine was down.

17. On Monday, 5/20/24, the claimant called the Assistant Supervisor over and wanted to know why she reported her to her supervisor. The claimant called the Assistant Supervisor a "liar".

18. The claimant began recording the conversation without the Assistant Supervisor's permission.

19. The claimant asked the Assistant Supervisor why she told their supervisor that she was talking to a coworker on 5/17/24 when she asked her to help at the other machine.

20. The claimant asked the Assistant Supervisor if she had a personal problem with her.

21. The Assistant Supervisor replied, "No."

22. The claimant called her the devil and said she was evil and had a black heart. She also called the Assistant Supervisor "crazy".

23. The claimant told the Assistant Supervisor that if she had a personal problem with her, then they should settle things outside.

24. The claimant was pointing at the Assistant Supervisor with a metal hinge in a threatening manner.

25. The claimant repeated that they should settle any personal problems outside.

26. The Assistant Supervisor believed the claimant threatened her and wanted to fight her outside.

27. The Assistant Supervisor reported the claimant to management.

28. The claimant and the Assistant Supervisor had worked together for several weeks and had no prior issues.

29. An investigation was conducted. The claimant sent the employer the recording she made on 5/20/24.

30. The recording showed the claimant called her supervisor names on 5/20/24.

31. In a text message to the employer, the claimant admitted to calling the Assistant Supervisor names telling her they should settle personal problems outside.

32. On 5/24/24, the claimant was terminated for violating the employer's insubordination and violence in the workplace policies.

Credibility Assessment:

Although no copies of policies were entered into the record, the employer's Human Resource Director provided credible testimony relating to the employer's policies prohibiting insubordination and violence in the workplace. His testimony was straightforward and detailed and supported the fact the employer has zero tolerance for employees who threaten violence in the workplace and the claimant was terminated for violating the policy.

The Assistant Supervisor provided first-hand, credible testimony relating to the final incident where the claimant called her names, pointed at her menacingly with a metal part, and repeatedly told her to take the matter outside even after she told her she did not have any personal problems with her. She had a very good memory of the event and provided detailed and consistent responses to all questions asked during the hearing. The Assistant Supervisor's behavior was reasonable, including asking her to help on the other machine while her machine was down, and reporting her to management on 5/17/24 and after the claimant called her names and threatened her on 5/20/24.

The claimant admitted that she called the Assistant Supervisor the devil, black hearted, and a liar. She also recalled having a hinge in her hand at the time. She was upset because the Assistant Supervisor reported her to management. Her other testimony was not as credible as the employer's as she was often evasive. Her claim that she did not intend to threaten the Assistant Supervisor was also not credible because she repeatedly asked her to take the matter outside after the Assistant Supervisor told her that she had no personal problems with her. She was upset, calling her names, and pointing at her with a metal part in a threatening manner.

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 believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is not entitled to benefits.

Because the claimant was discharged from her 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. . . .

"[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).

While the employer maintains a zero-tolerance policy prohibiting employees from making threats of violence in the workplace, it did not show that it discharged all other employees who similarly threatened to fight their co-workers. *See* Findings of Fact ## 2 and 5. Absent such evidence, the employer has not met its burden 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 she was discharged.

In this case, the employer discharged the claimant for violating its insubordination and violence in the workplace policies when she threatened to fight the Assistant Supervisor. Findings of Fact ## 26 and 32. Following remand, the review examiner rejected the claimant's contention that she did not intend to threaten the Assistant Supervisor as not credible. 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 claimant confirmed that she repeatedly told the Assistant Supervisor that they should settle their personal problems outside, her behavior clearly demonstrated her intention to fight the Assistant Supervisor. *See* Findings of Fact ## 22–26. The review examiner's credibility assessment is thus supported by a reasonable view of the evidence.

Consistent with the review examiner's credibility assessment, the consolidated findings show that the claimant engaged in the misconduct for which she was discharged. Further, as the claimant re-stated her threat without provocation, it is self-evident that the claimant's actions were deliberate. Findings of Fact ## 21–25.

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).

The claimant conceded that she understood as a matter of common sense that the employer expected her not to threaten other employees. Finding of Fact # 7. Therefore, her own testimony confirms that she understood her actions on May 20, 2024, were inconsistent with the employer's expectations. Further, inasmuch as the claimant denied threatening the Assistant Supervisor, she has not shown mitigating circumstances for her wilful misconduct. *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* (the defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge).

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 affirmed. The claimant is denied benefits for the week ending May 26, 2024, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 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.

LSW/rh