A claimant's comment to a co-worker that he would "kill" her if he was fired was deliberate misconduct in wilful disregard of the employer's interest. Although the claimant was upset that the co-worker reported his actions and would attempt to have him or another employee disciplined or fired over what he perceived to be a joke, his anger was not a mitigating circumstance. He is disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 334-FHJP-9DKR

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 was discharged from his position with the employer on December 11, 2024. He filed a claim for unemployment benefits with the DUA, effective December 15, 2024, which was denied in a determination issued on February 13, 2025. 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 April 11, 2025. 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 afford the employer an opportunity to testify and present additional evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 did not intend to cause harm to the employer's interest when he told a co-worker that he would kill her if she attempted to have him disciplined or fired, 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 for the instant employer as a materials handler from 12/18/[2016] until his last physical day of employment on 12/7/2024.

2. The claimant is aware that the employer has a handbook with a policy titled, "Professionalism and Code of Conduct," which prohibits threats or intimidating behavior directed at employees. Violation of this policy may result in disciplinary action, up to, and including, termination.

3. The employer has maintains [sic] a copy of the company handbook on the employer's payroll website for employees to access.

4. The claimant read the employees [sic] handbook at some point and was aware that the employer prohibited threats and intimidating behavior.

5. The employer never issued the claimant any warnings for threats or intimidating behavior directed at employees.

6. On 7/17/2024, the employer issued the claimant a written warning, which stated that he had approached his immediate supervisor, the group leader, loudly, banging on the desk and arguing that employees were not doing anything.

7. The group leader informed the claimant that his behavior was disrespectful and that any future behavior or conduct deemed as inappropriate and/or in violation with company values and policies may result in further disciplinary action, up to, and including, termination of employment.

8. A couple weeks prior to his separation, a co-worker informed the claimant that she was allergic to perfumes.

9. On 12/6/2024, the employer received a shipment of materials from another location that was addressed to the co-worker.

10. The materials did not contain any perfumes, and in an attempt to joke with the co-worker, the claimant placed a sticky note on the materials which said, "watch out for perfumes."

11. A short time later, the manager asked the claimant if he had placed the sticky note on the materials, and the claimant admitted to placing the sticky note on the materials, informing his manager that he was simply joking with the co-worker.

12. The manager told the claimant that the co-worker was upset by the note, and she complained that she felt bullied.

13. The claimant did not intend to upset the co-worker with the note and had never bullied the co-worker.

14. The manager directed the claimant to apologize to the co-worker, and the claimant went over and apologized to his co-worker for placing a note, which was meant as a joke.

15. The claimant asked the co-worker why she would report the incident, and she told the claimant that she reported the sticky note to have the person disciplined or fired because she felt bullied and others had been bullying her.

16. The claimant explained to the co-worker that he was unaware of the bullying, and the claimant returned to his work area.

17. The claimant became upset that the co-worker would attempt to have him disciplined or another employee terminated over a joke.

18. The claimant approached the co-worker again a few minutes later, because he was upset with her reporting the joke.

19. The claimant told the co-worker that she must be a Democrat, and to grow up and be an adult.

20. The claimant called the claimant [sic] a Democrat because she was young, and most Democrats appear to be younger individuals.

21. The claimant told the co-worker that he would "kill" her if he was fired for her reporting a joke.

22. The claimant used the word "kill" to describe that he would be upset, and he would protest if she attempted to have him fired over a joke.

23. The claimant did not intend to physically threaten, harm or kill the co-worker.

24. The co-worker told the claimant to get away from her, and the claimant immediately walked away.

25. The claimant realized at that point that his comments must have offended the co-worker, and he walked away.

26. On 12/6/2024, the senior human resources business partner approached the claimant, asking him to explain his interaction with his co-worker the day prior.

27. The claimant explained that his co-worker was acting stupid and like a child. The claimant admitted that [sic] made the comment about killing her if he was fired. The claimant stated he made the comment because he was upset, and she had got [sic] under his skin by reporting his action, which was intended as a joke.

28. The claimant told the senior human resources business partner that he did not intend to kill the co-worker.

29. The senior human resources manager told the claimant that the employer was taking his comment seriously and he would be suspended while the employer investigated the matter.

30. The employer decided to terminate the claimant for threatening and intimidating his co-worker, which is a violation of the policy titled, "Professionalism and Code of Conduct."

31. On 12/10/2024, the senior human resources business partner called the claimant and informed him that he was terminated, effective 12/11/2024.

Credibility Assessment:

The claimant's testimony about his final interaction and conversation with his co-worker is accepted as credible since the claimant was forthright in giving firsthand detailed testimony regarding the interaction. The testimony of the sole employer witness, the senior human resources business partner, was hearsay, relying on an email written by the co-worker, which caused the claimant's testimony to be considered more credible in this contested area.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Finding of Fact # 5 because it is unsupported by the record and inconsistent with Finding of Fact # 6, which is supported by the record.[1] We also reject that portion of Finding of Fact # 23 which states that the claimant did not intend to threaten the co-worker, because this finding is not reasonable in relation to the evidence presented. In adopting the remaining findings, we deem 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 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:

[1] When asked by the review examiner if the claimant had ever received a warning for threatening behavior, the employer expressly testified that the claimant had received a written warning in July, 2024, regarding "this behavior during a different incident between him and his supervisor." The claimant did not refute the employer's testimony. In addition, the July 19, 2024, written warning was read into the record by the employer's witness, and the document itself was entered into the record as Remand Exhibit 6. Finding of Fact # 6 accurately reflects the contents of the warning and demonstrates that the claimant engaged in behavior that could reasonably be viewed as threatening or intimidating. Therefore, because the record establishes that the claimant had, in fact, been previously warned for engaging in threatening and intimidating behavior at work, we reject Finding of Fact # 5.

> [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 policy prohibiting employees from engaging in unprofessional behavior, such as threatening or intimidating other employees, it retains discretion over how to discipline employees who violate this policy. Consolidated Finding # 2. Because the employer did not provide any evidence showing that it discharged all other employees who threatened or intimidated other employees, the evidence presented fails to show a knowing violation of a reasonable and *uniformly enforced* policy. We, therefore, consider only whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

In this case, the employer fired the claimant for threatening and intimidating his co-worker by telling her that he would kill her if he was fired over a joke, in violation of its policies prohibiting threats and intimidating behavior. Consolidated Findings ## 2, 4, 21, and 30. Where it is undisputed the claimant made this statement to the co-worker, the employer established that claimant engaged in the misconduct for which he was discharged. *See* Consolidated Finding # 27.

However, the parties disagreed about whether the claimant's statement constituted a threat and whether the claimant intended it as a threat. The review examiner determined that the claimant was credible when he found that he did not intend to threaten his coworker. *See* Consolidated Finding # 23. We disagree.

Ordinarily, 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 test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

In our view, the weight of the evidence demonstrates that, at the time that the claimant told the co-worker that he would kill her if he was fired over a joke, he was aware that it was a threatening

statement that went against the employer's expectation that he refrain from engaging in this conduct.

During the initial and remand hearings, the claimant made much of the generational differences that he perceived to have existed between himself and the co-worker, whom he believed was much younger. *See* Consolidated Finding # 20. The claimant testified that the phrase, "I'll kill you," was often stated in jest amongst those in his generation.[2] However, there is no indication in the record that, when the claimant told the co-worker that he would kill her if he was fired over a joke, he also informed her that he was joking or offered any explanation or assurance that he would not act on his statement. Consolidated Finding # 21. Further, there is no indication in the record that the claimant failed to understand, as a matter of common sense, that saying he would kill the coworker could be interpreted as a threat of physical harm.

Even if the claimant did not intend to *actually* follow through with the threat, he nonetheless intended to verbally communicate the statement to the co-worker. *See* Consolidated Findings ## 23 and 28. Nothing in the record suggests that the claimant made this statement accidentally, inadvertently, or that he blurted it out without thinking. Rather, the record supports a conclusion that the claimant deliberately acted, particularly where the findings show that the claimant had returned to his work area but returned a few minutes later to engage with her further. *See* Consolidated Findings ## 16 and 18.

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." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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).

Consolidated Findings ## 2 and 4 provide that the claimant was aware of the employer's prohibition against making threats and engaging in intimidating behavior. In addition, the claimant had previously received a written warning for disrespectful and inappropriate behavior towards his immediate supervisor. Consolidated Findings ## 6 and 7. During the remand hearing, the claimant confirmed that, after receiving the written warning, he had understood that the employer expected him to refrain from engaging in inappropriate behavior towards other employees.[3] Therefore, it is reasonable to conclude that the claimant understood that, by telling the co-worker that he would kill her if he was fired, he acted in a manner that was contrary to the employer's expectations. We believe that the employer's policy is facially reasonable, where its purpose to ensure a safe working environment for all employees is self-evident.

[2] This aspect of the claimant's testimony, while not explicitly incorporated into the review examiner's findings, 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).

[3] The claimant's testimony in this regard is also part of the unchallenged evidence in the record.

Finally, we must consider whether the record showed that mitigating circumstances prevented the claimant from adhering to the employer's expectations. 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).

With respect to telling the co-worker that he would kill her if he was fired over a joke, Consolidated Findings ## 17, 18, and 27 indicate that the claimant was upset that the co-worker reported the note on the package, and that she would attempt to have him or another employee disciplined or fired over a joke. However, being upset or angry is not a mitigating circumstance. *See* Board of Review Decision 0023 4501 01 (June 27, 2018) (although claimant threatened to injure the business owner because he was angered by a comment the owner directed towards him, Board held anger was not a mitigating circumstance). The claimant offered nothing else that could be construed as a mitigating circumstance. Absent mitigating circumstances to excuse the claimant's misconduct, the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28.*

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant engaged in 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 beginning December 15, 2024, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 30, 2025

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.

JMO/rh