

**Board of Review
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**Issue ID: 0002 1755 35
Claimant ID: 2014809**

BOARD OF REVIEW DECISION

0002 1755 35 (Aug. 6, 2014) – A week after discharging the claimant property manager for poor job performance connected to unreconciled deficiencies in the accounts receivable, the employer uncovered an embezzlement scheme. In disqualifying the claimant for deliberate misconduct, the Board accepted the employer's "after acquired evidence," because it was linked substantively to the reason for the claimant's discharge.

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 her position with the employer on January 3, 2013. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 4, 2013. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on May 3, 2013. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated 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 take additional evidence regarding the employer's allegations that the claimant had engaged in embezzlement prior to her discharge. Only the employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant was discharged for poor job performance rather than intentional wrongdoing 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 co-manager for the employer, a senior housing community, from 05/01/11 until 01/03/13. The claimant's annual salary was approximately \$31,000.00.
2. The claimant and her husband were employed by the instant employer as live-in co-managers of the property.
3. The existence of any applicable policy is unknown.
4. The employer has an expectation that employees perform their job duties adequately.
5. Throughout her employment with the instant employer, the claimant's job performance was lagging.
6. On 08/20/12, the employer issued the claimant a written warning for unsatisfactory job performance; specifically her failure to settle open accounts receivable (A/R).
7. In January 2013, the instant employer discharged the claimant's husband for misconduct. Because the claimant's job performance was poor, the employer decided to terminate the claimant's employment at that time as well.
8. On 01/03/13, the employer discharged the claimant for poor job performance.
9. On 01/10/13, the employer received an email from the Accounting Manager that a separate bank account had been established in the community's name that the claimant and her husband managed absent authorization from the employer to do so.
10. Upon investigation, the employer ascertained that the claimant and her husband had deposited rent payments and other checks paid to the community and deposited them into the separate bank account for their own personal use.
11. The employer estimates that the claimant and her husband misappropriated over \$250,000.00.
12. The employer does not know what the respective roles of the claimant and her husband [were] in the scheme to divert employer funds.
13. The employer believes the claimant's failure to settle open A/R was due to her and her husband's misappropriation of employer funds. Specifically, that the open A/R was high because of the alleged embezzlement.

14. It is unknown whether indictments against the claimant and her husband have been issued.
15. It is unknown whether indictments against the claimant and her husband are anticipated.
16. If the employer had not discharged the claimant for inadequate job performance on 01/03/13, it would have discharged her thereafter for the accounting improprieties.
17. The claimant engaged in embezzlement of employer funds.
18. On 01/29/13, the claimant filed for unemployment benefits.

[CREDIBILITY ASSESSMENT:] The claimant did not participate in the remanded [sic] hearing and the consolidated findings of fact are based solely on the employer's testimony and additional evidence.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was merely discharged for poor job performance.

Since the claimant had been discharged, the review examiner properly considered her eligibility for benefits by analyzing her separation under 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 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....

Under the foregoing provision, it is the employer's burden to establish by substantial and credible evidence that the claimant engaged in the conduct for which she was discharged. The review examiner initially concluded that, although the employer learned after discharging the claimant that she had allegedly engaged in fraud and embezzlement while employed, the employer's decision to discharge the claimant was predicated upon her unsatisfactory job performance, which did not constitute deliberate misconduct in wilful disregard of the

employer's interest. We remanded the case to take additional evidence regarding the allegations of embezzlement as well as any nexus between the alleged embezzlement and the claimant's "poor performance" issues, most notably exemplified in a written warning issued to the claimant in August 2012 for unreconciled deficiencies in the employer's accounts receivable (A/R). Following remand, we conclude that the employer has met its burden.

There is no evidence in the record that the employer had any anti-theft policies, so we do not consider whether the claimant's actions were a knowing violation of a reasonable and uniformly enforced policy. However, it is commonly understood that employers have an expectation that employees will not steal from them.

The review examiner found that the claimant received a written warning for unsatisfactory job performance on August 20, 2012. *See* Hearings Exhibit # 16. Although technically correct, the review examiner's finding neglected to incorporate the substance of that warning into her finding of fact. The written warning reprimanded the claimant because she had not yet responded to the employer's previously-stated concerns about over \$400,000.00 in receipts (payments from the retirement community's clients), for which the claimant had not accounted.¹

The importance of the substance of the August, 2012, warning was underscored by evidence introduced at the initial hearing, where the employer testified to its belief, after an investigation, that the missing funds referenced in the warning had been misappropriated by the claimant and her husband. These allegations were set forth in correspondence from the employer's representative to the DUA (*see* Hearings Exhibits # 11 – # 12), as well as in correspondence from the employer's attorney to the attorney representing the claimant and her husband (*see* Hearings Exhibits # 19).

We have previously disqualified claimants from receiving benefits when, after their discharge for allegedly poor performance, the employer subsequently discovered that what appeared to be performance deficiencies actually masked deliberate wrongdoing. *See* BR-107947-A (March 29, 2010; claimant office manager who subsequently admitted embezzling almost \$16,000.00 through a scheme to secure and convert duplicate paychecks from the employer's payroll company was discharged for deliberate misappropriation of funds, which the employer had wrongly interpreted as incompetence)².

Here, the claimant was discharged for what seemed at the time to be performance deficiencies, relating to the unresolved A/R problems from the previous August. After remand, the review examiner found that, within a week of discharging the claimant, the employer discovered she had set up a separate bank account at a local bank using the name of the community she managed. *See* Remand Exhibit # 10. The claimant deposited rent payments and other checks from residents of the community she managed, deposited them into the separate bank account she had set up, and converted the employer's funds for personal use.

¹The review examiner's consolidated finding cured this defect somewhat, although by omitting the \$400,000.00 figure, the finding does not fully reflect the significance of the issue raised by the warning. *See* Consolidated Finding of Fact # 6.

² Board of Review Decision BR-107947-A is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

At the remand hearing, the employer produced bank statements from the illicit account, showing the deposits, withdrawals, and transfers made by the claimant from October, 2011, through December, 2012. *See* Remand Exhibit # 13. The employer produced receipts, billing invoices, and email receipts from the claimant's use of this illicit account. *See* Remand Exhibit # 14. Finally, the employer produced copies of checks which the claimant had taken and improperly converted. *See* Remand Exhibit # 14.

After remand, the review examiner found the employer estimated the claimant had misappropriated over \$250,000.00. The employer asserted that the accounts receivable issue raised in the August, 2012, warning was directly related to the claimant's misappropriation of funds, thus tying the prior warning and the ultimate discharge substantively to the claimant's embezzlement. The employer would have discharged the claimant for embezzlement if it had discovered her scheme prior to discharging her for alleged poor job performance a week before it realized her scheme. Most significantly for our purposes, the review examiner found that the claimant embezzled the employer's funds.

The employer believed the claimant's inadequate job performance warranted discharge at the time it discharged her. However, the employer's post-discharge investigation into its finances revealed that the claimant had been dishonest rather than incompetent. While we generally do not allow employers to justify disqualifying a claimant for reasons that are not discovered until after the discharge, we do permit such "after acquired evidence" where it is linked substantively to the issue for which the claimant was discharged. Here, the employer was able to establish that claimant's "poor performance" regarding management of the employer's accounts receivable was actually deliberate misconduct regarding the accounts receivable, specifically the embezzlement of over \$250,000.00. These facts support the conclusion that the claimant was discharged because of her deliberate misappropriation of funds, even though the employer initially misattributed the funds discrepancy to incompetence. We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 14, 2013, and for subsequent weeks, until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 6, 2014



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

JPC/rh