0002 2966 80 (Mar. 19, 2014) – Board found the claimant's signed confession to stealing from the employer to be reliable evidence of misconduct in light of the totality of the circumstances, which showed that the written statement was not coerced. *[Note: The District Court affirmed the Board of Review.]*

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Stephen M. Linsky, Esq.
Member
Judith M. Neumann, Esq.
Member

Issue ID: 0002 2966 80

BOARD OF REVIEW DECISION

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 was discharged from his position with the employer on September 20, 2012. He filed a claim for unemployment benefits with the DUA, which was approved. On November 15, 2012, the agency sent the claimant a Notice of Redetermination and Overpayment, which informed him that he was not entitled to benefits, that he had been overpaid benefits for the two weeks ending October 13, 2012 and October 20, 2012, and that he was responsible for repaying $386.00 to the agency without interest. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's redetermination and denied benefits in a decision rendered on August 5, 2013.[1]

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). As a result, he was also responsible for repaying $386.00 in overpaid unemployment benefits to the agency, pursuant to G.L. c. 151A, § 69(a). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and conducted a hearing to take additional evidence. Only the claimant attended the hearing on November 25, 2013. Our decision is based upon our review of the entire record, which includes the documentary evidence submitted during the hearing before the review examiner as well as the testimony given at both that hearing and the Board hearing.

[1] The case was previously heard before a different review examiner, who also denied benefits. After that proceeding, the claimant appealed to the Board of Review, the Board denied review, and the claimant appealed to the district court. The court remanded the case for a *de novo* hearing. The result of the *de novo* hearing is what is now before the Board.

The issue on appeal is whether the claimant, who was discharged for theft of several DVDs from the employer's store, knowingly violated a reasonable and uniformly enforced rule or policy of the employer or engaged in deliberate misconduct in wilful disregard of the employing unit's interest.

Findings of Fact

After hearing and review of the record, the Board makes the following findings of fact, some of which are adopted from the findings of the review examiner:

1. The claimant worked as an overnight maintenance person at the employer's retail store from 2011, until September 20, 2012, when he was discharged.

2. The claimant worked full-time, Monday through Friday, from 10:00 p.m. until 6:00 a.m. the following morning.

3. The claimant was paid $13.00 per hour.

4. The employer expects that its employees will not steal products from its store. It has this expectation in place to protect the company's assets and prevent loss of revenue.

5. The claimant was aware that the employer prohibited theft of its merchandise.

6. On September 20, 2012, during the claimant's shift, an asset protection manager asked the claimant to meet with him and his supervisor. The meeting took place in a manager's office at the store in which the claimant worked.

7. During this meeting, the asset protection manager informed the claimant the employer believed that the claimant had taken DVDs from the employer's store without paying for them. The manager indicated that the employer had surveillance video of the claimant doing this. The manager showed the claimant a DVD case as an example of the type of DVD the claimant took.

8. The meeting lasted not more than one hour.

9. During the meeting, the claimant did not ask to see the video surveillance tape showing him taking the DVDs.

10. At no time during the meeting did the manager or his supervisor indicate that the claimant could only leave the room if he admitted to stealing the DVDs. The manager and the supervisor did not block or physically prevent the claimant from leaving. They did not tell the claimant that he could not leave the room.

11. During the meeting, the manager and his supervisor did not yell or verbally insult the claimant. They did not physically intimidate the claimant.

12. The manager and his supervisor did not prevent the claimant from speaking or explaining his side of what happened with the DVDs.

13. After questioning regarding the DVDs, the claimant wrote and signed a statement. The statement read: "I [claimant's name] admit to taking four DVDs from shelve [sic] in electronics and took them out of the store."

14. The claimant signed the statement referred to in Finding #13 because he had stolen the DVDs, and because he did not want to get the police involved in the employer's investigation into the DVDs.

15. The claimant also signed a Restitution Note which indicated that the claimant promised to pay the employer $57.00. The products listed in the Note included, "DVD x 1 New Release $20.00; DVD x 2 $15.00; DVD x 1 $7.00." The Restitution Note was a pre-printed form, which had been filled in by the employer with details specific to the claimant's situation.

16. After the claimant signed both documents, the employer discharged him. The claimant was discharged for stealing DVDs from the employer's store.

17. The claimant stole four DVDs from the employer's store, as charged by the employer.

18. The claimant filed a claim for unemployment benefits on September 25, 2012. The claim was determined to be effective on September 23, 2012.

19. After filing his claim, the claimant received benefits for the weeks ending October 6, 2012, and October 13, 2012. He received $193.00 in benefits each week.

20. On November 15, 2012, the agency sent the claimant a Notice of Redetermination and Overpayment. The Notice informed the claimant that he was disqualified, under G.L. c. 151A, § 25(e)(2), beginning the week ending September 29, 2012. It also informed him that he had been overpaid for the two weeks ending October 13, 2012, and October 20, 2012, and he was responsible for repaying $386.00 to the agency. The overpayment was determined to be due to an error without fraudulent intent, so that no interest was to be charged on the unpaid balance of the overpayment.

Ruling of the Board

G.L. c. 151A, § 25(e)(2), 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 . . . [T]he 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 this section of law, the employer has the burden to show that the claimant is not eligible for benefits. The review examiner concluded that the employer had carried its burden by showing that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer. Although we agree that the employer has carried its burden, we decide this case under the deliberate misconduct rationale.

In the proceeding before the review examiner, the employer did not enter into evidence any written rules or policies governing theft. The review examiner, nevertheless, concluded that the employer had carried its burden to show that the employer had a uniformly enforced rule or policy. To determine whether a policy is uniformly enforced, we analyze both whether the policy is uniformly enforced in practice and whether it is capable of uniform enforcement on its face. *See* New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 534-536 (2004). Since the employer failed to provide its policy, we cannot conclude that the policy was capable of uniform enforcement on its face. Therefore, the record lacks substantial and credible evidence that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer.

The question then becomes whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.[2] The employer must initially show that the claimant actually engaged in the alleged misconduct. Here, the employer has alleged that the claimant stole DVDs from its store.

During the hearing before the review examiner, the employer offered into evidence still images from its surveillance cameras purported to show the claimant's misbehavior. The employer also offered the Asset Protection Case Record, which included written statements by its security employees as to what was seen on the surveillance video and what happened in the September 20, 2012 meeting. The surveillance images were difficult to review, and it was unclear exactly what was depicted in them. The written statements in the Asset Protection Case Record constituted hearsay statements. Given the questionable reliability of this evidence, the Board invited the employer to present the video and live witnesses at a supplemental hearing before this Board. The employer did not attend the Board hearing that had been noticed and scheduled for November 25, 2013. We conclude that the documentary evidence, on its own, is insufficient to support a conclusion that the claimant engaged in the alleged misconduct.

However, the employer had also entered into evidence at the hearing before the examiner the claimant's signed statement admitting to the theft of four DVDs. The claimant testified during the Board hearing on November 25, 2013, that he repeatedly told the manager and his supervisor on September 20, 2012, that he did not steal the DVDs, and that he signed the statement to get

[2] We note that the employer did not need to have a written policy regarding theft in order for it to carry its burden under the deliberate misconduct standard. G.L. c. 151A, § 25(k), provides that "[t]he department of unemployment assistance shall promulgate regulations providing that any employee discharged for deliberate misconduct consisting of: (1) stealing from such employee's place of employment . . . shall be determined to be ineligible for benefits without regard to whether or not the employer had a written policy against such conduct." Although the agency has not yet promulgated such regulations, the clear import of this provision is to ensure that a claimant is not simply paid unemployment benefits where, as here, the employer does not have (or has not produced) a written policy against stealing.

out of the room. The claimant suggested in his testimony that he signed the statement, even though the claimant testified that it was not true, due to the pressures put on him by the asset protection employees.

In assessing the probative value of the claimant's signed confession, we look to the nature and circumstances under which the confession was made. Our analysis in this regard is consistent with the approach adopted by the Massachusetts Supreme Judicial Court regarding the voluntariness of confessions in a criminal context. *See* Commonwealth v. Scoggins, 439 Mass. 571, 576 (2003) (voluntariness of a defendant's confessions is to be examined under the same "totality of the circumstances" test applied to a Miranda waiver.) *See also* Mark S. Brodin & Michael Avery, Handbook of Massachusetts Evidence 648 (8th ed. 2007) (the question of voluntariness is determined on a case-by-case basis in light of the "totality of the circumstnaces.")[3]

Applying the "totality of the circumstances" test to the confession at issue, we reject the claimant's testimony that the confession was involuntary or coerced. Our findings of fact, based on the record, indicate that there was nothing objectively coercive or intimidating about the meeting, which resulted in the claimant making the confession. The claimant acknowledged during his testimony that he was not physically intimidated into making the confession. The claimant further testified that he was never physically prevented from leaving the office where the meeting took place and thus could have left the room, if he wanted to do so. He was not verbally pressured into admitting to any misconduct.

We do not find credible the claimant's testimony that he was questioned for several hours, that he was told to admit to the theft, that he did not discuss with the asset protection manager the four DVDs in question as opposed to just one, and that he signed the statement and the Restitution Note just to get out of the room. It appears instead, and we have so found, that the claimant signed the note because he was sincerely admitting to taking the DVDs. He also did not want to get the police involved in the situation. The claimant offered no other credible reason for why he signed the paperwork. Based on the "totality of the circumstances" surrounding the making of the claimant's confession, we conclude that said confession constituted a freely given admission. We believe such an admission is competent evidence to support our findings. On the basis of this competent evidence, we find and conclude that the claimant did engage in the misconduct alleged by the employer.

However, a showing of misconduct alone will not disqualify the claimant from receiving unemployment benefits. In order for the claimant to be denied benefits, the employer must also show that the misconduct was deliberate and in wilful disregard of the employer's interest. *See* Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 779 (1982). The "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine the employee's state of mind, we "take into

[3] We further note our analysis in this regard is consistent with the approach taken by Boards of Review in other states. *See* Unemployment Compensation Board of Review v. Houp, 340 A.2d 588 (Pa Commw. Ct. 1975) (upholding the Pennsylvania Unemployment Compensation Board of Review's disqualification of a claimant, which relied solely upon the claimant's handwritten and signed confession to stealing merchandise from the employer, where the circumstances showed the document was voluntarily and knowingly written and signed).

account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

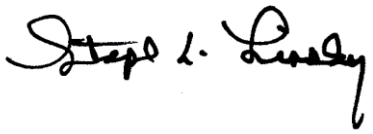
In this case, the employer expected that its employees, including the claimant, not steal from its stores. The claimant was admittedly aware of this expectation. The expectation is also entirely reasonable, as it is a sensible means by which the employer, a retail store, can prevent financial loss. Since the claimant denied that he took the DVDs, and we have not credited this assertion in light of his voluntary admission to taking them, there is nothing in the record which could support a conclusion that there were mitigating circumstances that may have affected the claimant's state of mind. The evidence does not suggest that the theft happened by accident or that the claimant unwittingly removed the DVDs from the employer's store. On the contrary, the claimant's admission to taking the DVDs, without elaboration or explanation, indicates that the conduct not only occurred, but that the claimant acted deliberately.

We, therefore, conclude as a matter of law that (1) the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest by stealing DVDs from the employer's store, which the claimant voluntarily admitted to in a written statement given on September 20, 2012, and (2) the claimant has been overpaid unemployment benefits.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 29, 2012, and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount. The claimant is responsible for repaying benefits received to the agency for the two weeks ending October 6 and October 13, 2012.[4] No interest shall be charged on the unpaid balance of the overpayment.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 19, 2014

Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

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.

SF/rh

[4] The redetermination in this case references the overpaid weeks as the weeks ending October 13, 2012, and October 20, 2012. This appears to be an error, as the agency's records indicate that the claimant received benefits for the weeks ending October 6, 2012, and October 13, 2012. *See* Exhibit #6A.