

0014 2245 68 (June 30, 2015) – Absence in the record of the employer’s video evidence or other first-hand account of the claimant’s purported theft rendered the review examiner’s finding that the claimant removed money from the cash register and placed it in her pocket unsupported. Without evidence of misconduct, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review**  
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**Issue ID: 0014 2245 68**  
**Claimant ID: 158008**

## **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 reverse.

The claimant was discharged from her position with the employer on August 15, 2014. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 8, 2014. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on December 30, 2014. We accepted the claimant’s application for review.

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). After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 is disqualified, pursuant to G.L. c. 151A, § 25(e)(2), for knowingly violating a reasonable and uniformly enforced policy of the employer, is supported by substantial and credible evidence and is free from error of law, where the employer did not submit into the record video surveillance allegedly showing the claimant engaging in theft, but the review examiner nevertheless relied on such evidence when issuing her decision.

### Findings of Fact

The review examiner’s findings of fact are set forth below in their entirety:

1. The claimant worked full-time as a cashier for the employer's restaurant business from 5/28/14 until 8/15/14. The claimant worked a varied schedule, averaging 30-35 hour per week; she was paid \$9.50 per hour.
2. The employer maintains a workplace policy which prohibits theft. The policy is intended to protect the employer's assets. The employer has discharged all employees who it has found to have engaged in theft.
3. The claimant was provided a copy of the employer's policy at the time of hire. The claimant was aware that the employer prohibited theft and that she could be discharged if she engaged in theft.
4. The [claimant] was responsible for counting her cash drawer at the end of her shift. The cash drawers are stocked with \$400; the bills are in denominations of \$1, \$5, \$10, and \$20. Any larger bills taken in during the cashier's shift are kept on the left side of the cash drawer. At the end of the shift, any funds in excess of the original \$400 are forwarded to the shift manager for deposit. The manager is responsible for depositing the funds at the employer's bank.
5. On 8/15/14, the claimant was asked to work until the employer's business closed. The claimant stayed until closing and counted her cash drawer in the back room of the employer's business where a video surveillance camera recorded her actions. While counting the drawer, the claimant removed a \$100 bill and placed it in the back pocket of her slacks. The claimant produced a sheet showing that her cash draw had an overage of 91 cents; the shift manager signed off on the sheet. The shift manager did not count the money in the claimant's cash drawer.
6. On 8/16/14, the manager opened the business and counted the money in the cash drawer which the claimant used on the previous day. The manager found that the drawer was short \$100. The manager reviewed the video surveillance of the claimant performing her count on the previous evening. The manager observed the claimant remove a \$100 bill from the drawer and put it in her back pocket. The manager notified the general manager's supervisor of his observation.
7. The employer discharged the claimant for stealing a \$100 bill from the cash drawer on 8/15/14.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject, as unsupported by substantial and credible evidence, the third sentence of Finding of Fact # 5, which refers to the claimant removing a \$100 bill from the employer's cash register.

We also reject the third and fourth sentences of Finding of Fact # 6 for the same reason. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the employer has not carried its burden to show that the claimant is disqualified, under G.L. c. 151A, § 25(e)(2), because the key piece of evidence on which the review examiner relied, *i.e.*, the video surveillance footage, was not entered into the record and, therefore, cannot be reviewed by the Board. Thus, the Board cannot conclude that there is substantial and credible evidence showing that the claimant is subject to disqualification.

Since the claimant was discharged, her separation 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 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 . . . 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 . . . .

It is well established that, under this section of the law, the employer has the burden to show that the claimant is not entitled to unemployment benefits. The focus in discharge cases is on the employer's expectations and policies, whether the claimant has been notified of those policies, and whether the policies are reasonable. "Because evidence bearing on those factors is found in the employer's possession, the employer" bear[s] the burden of producing such evidence and persuading the [fact-finder] of its sufficiency." Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

The standard which we must apply is whether there is substantial and credible evidence to show that the review examiner's decision is correct. "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.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627–628 (1984), *quoting* New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981); G.L. c. 30A, § 1(6).

In this case, the employer alleged that the claimant stole \$100.00 from a cash register on August 15, 2014. To support its contention that the claimant stole the money, the employer showed the review examiner video surveillance of the claimant recorded on August 15. Although it is difficult to ascertain exactly what occurred during the hearing as to the videotape, it appears that the employer showed the video to the review examiner on a cell phone. The crux of the review examiner's findings and conclusion are based on this video evidence. Although the review examiner described the video evidence somewhat for the record, a copy of the video was not offered into evidence by the employer. Thus, the review examiner relied upon a piece of evidence, the video surveillance, which is not itself a part of the record. We think that, without the video itself in the record, the record does not contain substantial evidence to support the

review examiner's findings and conclusion.<sup>1</sup> Under G.L. c. 151A, § 25(e)(2), it was the responsibility of the employer, the keeper of the video surveillance and the party with the burden of production and persuasion, to bring evidence to the hearing in a form which was able to be viewed by all parties and capable of being entered into the record as an exhibit. It did not do so. Thus, the Board cannot review the video to ensure that the review examiner's interpretation is accurate, nor would a court be able to review that evidence if the case were to be appealed beyond the Board. The inability to review the video is especially serious where the claimant disputes what at least some of the video shows (that she took *money* out of the cash register).

Since the Board is unable to determine if the review examiner's conclusions are supported by the full weight of the evidence (including any video which was shown during the hearing), we have rejected those findings which indicate that the claimant engaged in any misconduct. Without the video evidence, without any first-hand account of what happened on the night in question, and without further evidence as to how the claimant allegedly stole the money, we conclude that the employer has not carried its burden, under G.L. c. 151A, § 25(e)(2), to show by substantial and credible evidence that the claimant did what the employer alleged that she did.

We, therefore, conclude as a matter of law that the review examiner's decision is not supported by substantial and credible evidence in the record, because the video evidence relied upon the review examiner to reach her decision was not entered into the record as an exhibit; and, thus, the Board cannot review it and conclude that there is sufficient evidence to support the review examiner's decision.

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<sup>1</sup> G.L. c. 30A, § 11 states, "[A]gencies shall conduct adjudicatory proceedings in compliance with the following requirements: — (4) All evidence, including any records, investigation reports, and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered . . . ."

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning August 16, 2014, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 30, 2015**



Judith M. Neumann, Esq.  
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR THE BOSTON MUNICIPAL 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](http://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.

SF/rh