

0020 6164 99 (Jan. 7, 2019) – Employer retail store expected that its back door would only be used for trash removal and receiving deliveries. When the assistant store manager opened it to enable a customer to load a large purchase into his vehicle, she was acting in furtherance of customer service and not in wilful disregard of the employer's interest. At most, she used poor judgment. Therefore, her discharge is not disqualifying under G.L. c. 151A, § 25(e)(2).

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

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0020 6164 99

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 December 23, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 8, 2017. 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 February 15, 2018. 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, she 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 decision, which concluded that in allowing a customer to use the store's back door to pick up purchased merchandise, the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full time assistant store manager for the employer, a clothing retailer, between 07/16/2012 and 12/23/2016, when she separated.
2. The claimant worked at the employer's outlet location in [Town A], Massachusetts.
3. The claimant's direct supervisor was the store manager. The claimant's upper level manager was the district manager.
4. The employer maintained a "Keys, Locks and Doors" policy stating that the stockroom back door is to remain "closed and locked unless management is using it to receive a delivery or for trash removal."
5. The "Keys, Locks and Doors" policy does not identify what discipline, if any, will be imposed upon an employee who violates this provision.
6. The claimant viewed the "Keys, Locks and Doors" policy during her employment.
7. As an assistant store manager, the claimant had keys to the stockroom back door.
8. The employer expected the claimant to keep the stockroom back door closed and locked at all times unless receiving a delivery or for trash removal.
9. This expectation was reasonable to control keys within the store and ensure asset protection.
10. This expectation was communicated to the claimant upon hire when she received the keys to the store.
11. At times, the claimant opened the stockroom back door for customers to pick up their purchased items. The claimant was not previously disciplined for doing so because the store manager was unaware of this.
12. The employer maintained a "Bulk Merchandise Purchases" policy stating that the employer "reserves the right to limit quantities purchased in [its] store locations. [The employer] limits purchases to five (5) items per style, per color, per customer. Exceptions must be approved by the District/Area Manager, Store Operations, or Customer Service Department."
13. The "Bulk Merchandise Purchases" policy identifies that a violation of its terms "will result in disciplinary action up to and including termination."
14. The employer expected employees to inquire whether a customer intends on reselling product and, if so, limit the amount of product purchased by a customer.

15. The purpose of this expectation was to protect company assets.
16. Employees, including the claimant, regularly had questions about bulk buying. Bulk buying was a topic of discussion during management meetings, store meetings, and morning launch meetings.
17. The claimant was not aware of the extent to which she should limit a customer with a stated intention of not reselling product to purchase clearance items.
18. The employer maintained a "Personal Conduct" policy which prohibits dishonesty and "lying or falsification in any manner related to your employment, including misrepresentation, falsifications or material omissions on the employment application or any other data presented throughout the hiring process and during your employment."
19. The "Personal Conduct" policy states that a violation of its terms "may result in disciplinary action, up to and including termination of employment."
20. The employer maintained a "Code of Business Conduct and Ethics" policy requiring employees to maintain "high moral and ethical standards that reflect honesty, integrity and reliability in every situation."
21. The "Code of Business Conduct and Ethics" policy states that employees who violate its terms "will be subject to disciplinary action, up to and including termination of employment."
22. The claimant acknowledged reading and understanding the "Code of Business Conduct and Ethics" policy on 07/16/2012.
23. The employer expected employees to be honest, including when questioned during an investigation.
24. The purpose of this expectation was to ensure a timely investigation.
25. The claimant was admittedly aware of this expectation.
26. On 12/06/2016, a customer in the store inquired about purchasing clearance sweaters. The claimant asked the customer if he was going to resell the sweaters, to which the customer responded "No." The claimant authorized the customer to purchase the sweaters in the wall where she was working, which totaled approximately 40 sweaters (approximately \$800.00).
27. A lead associate and a key holder at the register processed the sale to the customer, ultimately totaling \$9,400.00 worth of product.

28. The claimant opened the stockroom back door and allowed the customer to load part of his purchase into his vehicle through this back door.
29. Another employee opened the stockroom back door and allowed the customer to load the remainder of his purchase into his vehicle through this back door.
30. The employer interviewed the claimant about the customer's purchase. The claimant did not initially disclose opening the stockroom back door for the customer. The claimant believed that the purchase itself was the focus of the investigation.
31. The employer interviewed other associates and employees in the store on 12/06/2016, and reviewed CCTV video footage from that day.
32. On 12/23/2016, the store manager terminated the claimant's employment for violating its policies by allowing a bulk purchase, opening the stockroom back door for an improper purpose, and being dishonest during the investigation by failing to initially disclose opening the stockroom back door for the customer.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's 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 is ineligible for benefits.

Because the claimant was terminated from her employment, her qualification 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).

The findings of fact provide that the employer fired the claimant for three policy violations: (1) allowing bulk purchases; (2) opening the back stockroom door for other than trash or deliveries;

and (3) dishonesty during its investigation. *See* Finding of Fact # 32. In her decision, the review examiner concluded that, because the respective written policies allowed for discretionary discipline up to and including discharge, the policy, on its face, was not uniformly enforced. We agree that, because of this, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, we consider whether the employer met its burden to show deliberate misconduct in wilful disregard of the employer's interest. In order to determine whether an employee's actions constitute deliberate misconduct, 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).

The Supreme Judicial Court (SJC) has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). For this reason, the review examiner concluded that when the claimant allowed the customer to buy approximately 40 sweaters, which were a clearance item, she was not engaging in deliberate misconduct. *See* Finding of Fact # 26. Specifically, the review examiner determined that the employer's bulk purchasing policy for clearance items was unclear and confusing, and she found that the claimant did not know the extent to which a customer should be limited in purchasing clearance items. *See* Finding of Fact # 17. Because the employer's expectation was unclear, the review examiner properly concluded that in selling the 40 sweaters, the claimant was not acting deliberately and in wilful disregard of the employer's interest.

With respect to the alleged dishonesty during an investigation, the review examiner found that when the employer interviewed the claimant about the customer's \$9,400.00 purchase, the claimant believed the investigation was focused on the bulk purchase. Finding of Fact # 30. Implicit in this finding is that, at the time, the claimant did not realize that the employer had any interest in the back stockroom door, and, therefore, her failure to mention it was not deliberate. Again, since the claimant was unaware of the employer's expectation to talk about using the back door at the time, the review examiner correctly concluded that her failure to talk about opening the door during this interview did not constitute deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner did, however, conclude that, in *opening* the back stockroom door for the customer, the claimant did so deliberately and in wilful disregard of the employer's interest. Based upon the findings that the Keys, Locks, and Doors policy to keep the stockroom back door closed and locked except for receiving delivery or trash removal had been given and communicated to the claimant, we assume that she was aware of the employer's expectation. *See* Findings of Fact ## 4, 6, and 10. When she opened the back door on December 6, 2016, for the customer, we agree that this was deliberate in the sense that she did not open the door by accident. However, we do not agree that the claimant acted in wilful disregard of the employer's interest.

In Goodridge v. Dir. of Division of Employment Security, the SJC stated, "The issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough.

Such misconduct must also be in ‘wilful disregard’ of the employer’s interest. Deliberate misconduct in wilful disregard of the employer’s interest suggests intentional conduct . . . which the employee knew was contrary to the employer’s interest.” 375 Mass. 434, 436 (1978) (citations omitted.) The SJC has also stated, “When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer’s interest is unintentional; a related discharge is not the worker’s intentional fault, and there is no basis under § 25(e)(2) for denying benefits.” Garfield, 377 Mass. at 97.

In Garfield, the employer discharged a retail health food store manager for rearranging a store schedule without notifying the district manager. 377 Mass. at 98. The Court further stated, “[c]onclusions of wilful misconduct must rest on findings of specific acts or omissions of the worker which adversely affect the employer’s interest.” Id. at 99. In that case, the store manager rearranged the schedule in order to ensure that the store had staff coverage while he attended a health food convention, and he did not notify the district manager because he believed she was out of town and unreachable. Id. at 95, 98. The Court held that the claimant acted responsibly in rearranging the schedule to accommodate his absence and that, at worst, his failure to call or leave a message for the district manager was a good faith error of judgment. Id. at 98. Thus, the store manager’s actions did not justify disqualification under G.L. c. 151A, § 25(e)(2). Id. at 100.

Here, the only reason for opening the back stockroom door for the customer on December 6, 2016, which is apparent from the findings, is that the claimant wanted to make it easier for the customer to place the large purchase into his vehicle. Finding of Fact # 28. In other words, her motive was helpful customer service in connection with a retail sale, which would seem to be in furtherance of the employer’s interest. At most, her failure to follow the employer’s stockroom door use policy in this situation constituted an error of judgment, not wilful disregard of the employer’s interest.

We, therefore, conclude as a matter of law that the employer has not met its burden to demonstrate that it discharged the claimant for a knowing violation of a uniformly enforced policy or for deliberate misconduct in wilful disregard of the employer’s interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 18, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – January 7, 2019



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 OR TO 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

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.

AB/rh