

Review examiner reasonably found that the employer presented more credible evidence that the claimant supermarket team leader admitted she changed the expiration dates on sandwiches that should have been thrown out because she disagreed with the employer's policy and believed it was wasteful. Employer met its burden to show deliberate misconduct in wilful disregard of the employer's interest. The claimant is ineligible for benefits pursuant to G.L. c 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0079 3638 48

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 February 21, 2023. She filed a claim for unemployment benefits with the DUA, effective February 26, 2023, which was denied in a determination issued on March 14, 2023. 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 15, 2023. 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 entitled to benefits 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 allow the employer to present testimony and evidence. Only the employer attended the remand hearing. Thereafter, the review examiner issued his 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 decision, which concluded that the conduct for which the employer discharged the claimant was an "honest mistake and poor judgment" that constituted neither a knowing violation of a reasonable and uniformly enforced policy or rule, nor 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 consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant was employed at a supermarket, as a full-time team leader in the restaurant / prepared food department, from June 10, 2017, until February 21, 2023.
2. The employer maintains a food safety policy to ensure that prepared food sold meets hygiene and public health standards. The policy covers packaging, dating, and rotation practices. Violation of the policy can result in discretionary discipline up to and including termination. The specific written language of the policy is unknown.
3. The claimant was aware of the policy through orientation, trainings, reviews, and her leadership position in the food preparation department.
4. The claimant was aware that the employer expected her to refrain from selling expired foodstuffs or changing the expiration date of expired food items.
5. At no time did the claimant file a workers' compensation claim, or an injury report regarding any workplace incident or injury.
6. On December 27, 2021, the claimant received a conversation note from management reviewing the proper labelling of food products and the claimant's responsibilities as a team leader to ensure appropriate labelling.
7. On February 17, 2023, the claimant took three veggie sandwiches with an expiration date of February 17, 2023, off the shelves. The claimant prepared new labels with an expiration date of February 18, 2023, physically re-wrapped the sandwiches with the new labels, and put the sandwiches back on the shelves for sale to customers. The claimant did this because she disagreed with the employer's food safety policy. The incident was observed, reported to management, and the sandwiches removed from sale.
8. On February 18, 2023, the claimant was interviewed by management about the incident. The claimant admitted to changing the expiration date on the sandwiches and placing them back on sale. The claimant stated that she was tired of throwing away food that she thought was still okay, and that it was a waste of food. The claimant admitted to having done the same thing in the past and said that the employer was overly picky about food safety.
9. In a fact-finding questionnaire submitted to the Department of Unemployment Assistance (DUA), in response to a question asking her why she violated the policy the claimant wrote, "I changed the date on a veggie sandwich by one day, instead of throwing it out." And "I didn't want to waste food because we were throwing so many veggie sandwiches away every day, and I knew we were going to be throwing them out again that day."

10. On February 21, 2023, the employer discharged the claimant for re-wrapping three expired veggie sandwiches with new labels on February 17, 2023.
11. The claimant filed a claim for unemployment benefits effective February 26, 2023.

Credibility Assessment:

During the initial hearing, the claimant, who did not participate in the remand hearing, acknowledged that she had changed the labels on the sandwiches and placed them back on sale with changed expiration dates. The claimant contended that doing so was a mistake and error of judgement caused by stress of work. The claimant did not give specific examples of what was causing the stress but stated she had too much to do and had been having difficulties because of an injury at work, although the claimant did not provide any medical documentation or filed [sic] a workers compensation claim or injury report. During the remand hearing, however, the employer witness, a store manager, credibly testified that the claimant, when interviewed about the incident, admitted changing the packaging and expiration dates and placing the sandwiches back on sale, and further had done so on other occasions. During that same interview, the claimant further admitted that she engaged in this conduct because she thought the store was wasting food. Moreover, the claimant stated the same in a questionnaire submitted to DUA. In light of the comments made by the claimant at the time and shortly thereafter, it is concluded that the claimant's actions were not the result of a mistake but, instead, the result of her disagreement with the employer's policies because she perceived the food was being wasted.

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. 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's initial legal conclusion that the claimant is entitled to 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).

In this case, the employer discharged the claimant for changing the expiration dates on sandwiches from February 17, 2023, to February 18, 2023, and rewrapping the sandwiches and putting them onto shelves for sale with new labels. *See Consolidated Finding # 7*. After the claimant's actions were reported to management, she admitted to the conduct at issue, explained that she was tired of throwing food away that she thought was still acceptable to sell, claimed she thought it was a waste of food, and said she thought the employer was “overly picky about food safety.” *See Consolidated Finding # 8*.

It was not disputed that the claimant engaged in the conduct at issue, as she admitted that she changed the expiration dates on sandwiches which should have been discarded, putting new labels with new dates on the sandwiches and returning them to the sales shelf to be sold. The primary dispute in this case is whether the claimant engaged in this conduct due to “a mistake and error of judgment,” as she claimed at the initial hearing, or whether she engaged in this conduct intentionally because she disagreed with the employer food safety policy.

As noted in the review examiner's credibility assessment, the claimant initially contended that changing the labels on the sandwiches was “a mistake and an error of judgment cause by stress at work.” After remand, the review examiner rejected this testimony as not credible, instead accepting the employer's assertion that the claimant admitted during an interview that she had changed the dates on the sandwiches and put them back out for resale, and that she had done so on prior occasions because she thought the employer was wasting food. The review examiner further noted that, on a written questionnaire submitted to the DUA, the claimant had also admitted to changing the date on the sandwiches because she did not want to waste food. 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. 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). We believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

Where the employer did not produce a copy of food safety policy applicable to the claimant's separation, and admitted that it uses discretion when enforcing the policy, we are unable to conclude that the claimant knowingly violated a reasonable and uniformly enforced policy.

Alternatively, the employer may prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

While there is no dispute that the claimant engaged in the conduct for which she was discharged, we must consider whether her conduct was both deliberate as well as 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 Finding # 4 indicates that the claimant was aware that the employer expected her to refrain from selling expired food products and changing expiration dates on expired food items. The claimant was reminded of this expectation on December 27, 2021, when management reminded her about how to properly label food products and her role as a team leader in ensuring proper labeling. *See* Consolidated Finding # 6. As a matter of common sense, this expectation protects customers from becoming ill by eating food that is past its sale date, and it shields the employer from liability for such incidents. Such an expectation is self-evidently reasonable.

Here, the claimant's conduct was both deliberate and in wilful disregard of the employer's interest. She knew what the employer expected her to do (throw out the sandwiches on their expiration date), but she deliberately chose not to adhere to it. She willfully disregarded the expectation and the employer's interest in maintaining food safety because she believed it was wasteful and unnecessary.

Finally, we consider whether the claimant has shown mitigating circumstances for her decision to change the expiration dates on the sandwiches. 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). In the instant case, the review examiner found that the claimant engaged in the conduct for which she was discharged because she did not want to waste food, and because she disagreed with the employer's food safety policy. Disagreement with the employer's policies does not constitute a circumstance beyond the claimant's control. She has not demonstrated mitigating circumstances for her conduct.

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 ending February 25, 2023, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2024



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.

JPCA/rh