

**The examiner reasonably accepted the claimant direct testimony that she did not interrupt a meeting, make derogatory remarks, or leave without permission. The employer failed to send any direct witnesses to the original or remand hearing, providing only hearsay statements. Finding no misconduct, the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).**

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

**Paul T. Fitzgerald, Esq.  
Chairman  
Judith M. Neumann, Esq.  
Member  
Charlene A. Stawicki, Esq.  
Member**

**Issue ID: 0019 4473 71**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Matthew Shortelle, 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 8, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 27, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on November 16, 2016. 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, 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 remanded the case to the review examiner to afford the claimant an opportunity to participate in the hearing and present evidence. Both parties attended the remand hearing.<sup>1</sup> Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's original conclusion, that the claimant was ineligible for benefits, because she deliberately left work without permission, is supported by substantial and credible evidence and is free from error of law, where, after remand, the consolidated findings now provide that the claimant did not leave work without permission or engage in any other misconduct.

---

<sup>1</sup> During both the initial and the remanding hearings, the employer's agent was the only person present on behalf of the employer.

## Findings of Fact

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

1. The claimant worked as the part time scheduling coordinator for the employer, a home care agency, from February 11, 2016 through August 8, 2016.
2. The employer's Office Manager (the Manager) supervised the claimant.
3. The employer's policy prohibits employees from leaving the employer's location for personal reasons. Violators of the policy are punished at the employer's discretion.
4. The employer expects employees to not leave the employer's location without permission. The expectation ensures a safe and comfortable work environment and that employees respect their supervisors.
5. The employer did not review the expectation or policy with the claimant.
6. During the claimant's employment, the claimant did not leave work unless she had permission to do so from the Manager or one of the employer's two owners (Owner 1, Owner 2) based on her own experience.
7. On August 8, 2016, the employer met with the claimant and other employees (the Meeting).
8. During the Meeting, Owner 1 told the claimant and other employees the employer had not received the income planned, an attempt had been made to secure a loan to ensure the claimant and other employees were paid, and pay could be delayed four (4) to six (6) weeks.
9. During the Meeting, the claimant did not raise her voice, interrupt the Meeting, or leave the Meeting without permission.
10. After the Meeting finished, the claimant, the Manager and the employer's Aide Supervisor (the Aide) took a break and discussed the Meeting. The claimant expressed concern about her income.
11. Owner 2 joined the claimant, the Manager and the Aide and told them their salaries could be paid from her own personal finances. The claimant said, "don't do it."
12. On August 8, 2016, the Manager and the employer's Human Resources personnel discharged the claimant for her negative attitude.

13. The claimant asked the Manager how she had acted negatively and the Manager did not indicate how she had.
14. The claimant did not leave work without permission on August 8, 2016.
15. The claimant did not make derogatory comments about the employer on August 8, 2016.
16. The claimant completed a Department of Unemployment Assistance (DUA) questionnaire indicating the employer discharged her in person on August 8, 2016 for her negative attitude on August 8, 2016 (the Questionnaire).

[CREDIBILITY ASSESSMENT:]

The claimant's testimony at the remand hearing was consistent with the Questionnaire. The claimant directly denied ever making derogatory comments, interrupting the Meeting, leaving the Meeting before it ended, or leaving the employer's workplace. The claimant testified she did not make any negative comments but instead expressed concern regarding her income and a potential delay of four (4) to six (6) weeks in receiving her pay. Based on the claimant's testimony being supported [sic] the Questionnaire and the employer's failure to prove any contradictory testimony at the remand hearing, it is concluded the claimant provided credible testimony and the claimant did not leave the Meeting, did not interrupt the Meeting, did not make negative or derogatory comments about the employer, and did not leave work without permission on August 8, 2016.

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 believe the consolidated findings no longer support the examiner's original decision to deny benefits, under G.L. c. 151A, § 25(e)(2).

Where, as here, the claimant has been discharged from her job, eligibility for unemployment benefits must be analyzed pursuant to 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 review examiner correctly concluded that the employer had not established that the claimant knowingly violated a uniformly enforced policy because the employer did not present evidence that its policies were uniformly enforced. Thus, we consider only whether the employer has shown that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold issue, the employer must show that the claimant engaged in misconduct. During the initial hearing, the claimant was not present. Consequently, the review examiner relied upon the employer's hearsay statements in finding that the claimant had raised her voice and interrupted the August 8, 2016, staff meeting, and that she had left the meeting and the employer's premises without permission.<sup>2</sup> At the remand hearing, the employer did not offer any new evidence and the claimant denied the allegations. Consolidated Finding # 9 shows that the review examiner accepted the claimant's version of events. Specifically, he found that the claimant did not raise her voice, interrupt, or leave the August 8, 2016 meeting. The review examiner further found that on August 8, 2016, the claimant did not leave the employer's premises without permission or make any derogatory comments. Consolidated Findings ## 6, 14, and 15.

“The review examiner bears ‘[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .’” Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31-32 (1980). The review examiner determined that the claimant's testimony was more credible. 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. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Here, the review examiner's credibility assessment weighed the employer's hearsay evidence against the claimant's direct testimony. The Supreme Judicial Court made it clear that in an administrative hearing, “Substantial evidence may be based on hearsay alone if that hearsay has ‘indicia of reliability.’” Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). However, we cannot say that the review examiner was unreasonable in finding the claimant's direct testimony to be more credible and reliable where it was consistent with her prior written statements to the DUA and the employer failed to send any direct witnesses to either hearing.

---

<sup>2</sup> See Finding of Fact # 7 in the original hearing decision, included in the record as Remand Exhibit 1.

Because the consolidated findings show that the claimant did not engage in any of the misconduct for which she was fired, she may not be disqualified from receiving benefits.

We, therefore, conclude as a matter of law that the claimant did not engage 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 entitled to receive benefits for the period beginning August 7, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – February 27, 2017**



Judith M. Neumann, Esq.  
Member



Charlene A. Stawicki, Esq.  
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](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.

AB/rh