

The claimant was discharged for violating the employers Internal Theft policy after admitting in writing to her violations of the policy, and her awareness that what she did was wrong.

**Board of Review
19 Staniford St., 4th 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 4686 50

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by JoAnn Amico Gangi, 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 August 5, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 23, 2016. 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 November 8, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to provide the employer an opportunity to present evidence. Only the employer attended the remand hearing. Thereafter, the review examiner issued her 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 conclusion that the claimant neither knowingly violated a reasonable and uniformly enforced policy of the employer, nor deliberately and willfully failed to meet a reasonable employer expectation, is supported by substantial and credible evidence and is free from error of law, where, following remand, the consolidated findings establish that the claimant admitted in a written statement that she violated the employer's internal theft policy.

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 full-time as a Supervisor at the employer's [Town A] Mall location. The employer is a retail store. The claimant worked for the employer from 9/15/11 to 8/5/16. She was a Supervisor during the last year of her employment.
2. The employer has a written Internal Theft policy which prohibits theft of money or merchandise; credit card fraud; falsification of company documents; discount/coupon abuse; removal of company property for personal use, including damages and/or testers; returning gratis products; and intentional manipulation, such as offering unauthorized discounts or soliciting coupons to encourage customers to make a purchase.
3. The above policy is in place to protect employer assets. The claimant was aware of the policy.
4. All employees who violate the above policy are discharged from employment for an initial violation of the above policy.
5. The employer gives employee discounts to employees. Managers receive greater discounts as compared to their subordinates.
6. Employees are not permitted to allow other employees to use their discounts; for example, a Manager is not permitted to allow a subordinate to use that Manager's discount. The claimant was aware of this during the course of her employment.
7. Employees are permitted to allow customers to return items without receipts.
8. The employer's [Town A] location was on a program recommended by the Loss Prevention Department to improve shrink/financial loss to that location, during all of 2016.
9. The employer's Regional Loss Prevention Manager started reviewing the [Town A] location's 2016 fiscal season financial documents a few months before August of 2016 and started an investigation into that location to determine the cause of shrink/financial loss.
10. While viewing transactions at the claimant's location, the Regional Loss Prevention Manager discovered that on 5/15/16, a customer left behind a gift card with a \$.25 balance and the claimant used the rest of the customer's gift card balance toward a personal purchase.
11. While viewing transactions at the claimant's location, the Regional Loss Prevention Manager discovered that the claimant permitted a subordinate to

- return items without receipts on 6/29/16, 7/15/16, and 7/22/16. On 6/29/16, the subordinate returned four items totaling \$48.61; on 7/15/16, the subordinate returned eight items totaling \$101.20; and on 7/22/16, the subordinate returned eight items totaling \$113.90.
12. The Regional Loss Prevention Manager was suspicious about the legitimacy of the above returns without receipts. The frequency of the above returns without receipts and the monetary value of the returns seemed excessive to the Regional Loss Prevention Manager, and it seemed strange that the employee who purchased the items did not keep any of the receipts.
 13. While viewing transactions at the claimant's location, the Regional Loss Prevention Manager discovered that on 7/22/16, the claimant allowed a subordinate to use her Manager discount to purchase two items at a lingerie store that accepts employee discounts.
 14. The Regional Loss Prevention Manager interviewed the claimant on 8/5/16. A Store Manager who supervised another location witnessed the interview. The Regional Loss Prevention Manager asked the claimant if she stole money from the [Town A] location and the claimant stated that she did not.
 15. The claimant told the Regional Loss Prevention Manager that she took broken and tester merchandise home, on occasion, as the store usually throws these items away. She was asked if she stole any intact and non-tester merchandise and denied this.
 16. The claimant told the Regional Loss Prevention Manager that she took items from the store, such as paper towels and trash bags, when she was running out of those supplies at home. She also said that she let employees use free item coupons without questioning how or where they received the coupons.
 17. The claimant told the Regional Loss Prevention Manager that she allowed a subordinate employee to use her Manager discount at a lingerie store, and she used the \$.25 balance on a customer gift card that the customer left behind.
 18. The claimant stated during the interview that on or about 8/5/16, she allowed an employee to return store items without a receipt. She did this because the employer allows customers to return items without a receipt. She knew the policy applied to customers, and believed it also applied to employees.
 19. The claimant provided the Loss Prevention Manager with a written statement about what she told the Loss Prevention Manager during the interview. She stated that all of the above actions were against company policy and wrong, and, regarding taking the paper towels and trash bags, she understood stealing was wrong, but she felt like she could do it.

20. The Loss Prevention Manager told the claimant that a decision would be made regarding her employment status after the Human Resources Department received this information. On 8/6/16, the Store Manager who witnessed the 8/5/16 interview informed the claimant she was discharged from employment for violating the employer's Internal Theft policy.

Credibility Assessment: Only the claimant attended the original hearing and only the employer attended the remand hearing. The evidence presented by the employer was more credible. The employer presented more detailed information about the events leading to the claimant's separation from employment, and supplemented its testimony with an applicable written policy, transaction reports, and a written statement from the claimant about the behavior that caused her separation from employment.

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 conclude that these findings do not sustain the review examiner's initial decision to award the claimant benefits.

Since the claimant was discharged from her employment, we analyze her eligibility for benefits under 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 . . . 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 the law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. After the initial hearing, which only the claimant attended, the review examiner concluded that the employer had not carried its burden. However, after reviewing the testimony from all of the hearings, the documentary evidence, and the review examiner's consolidated findings of fact, we reach the opposite conclusion.

The review examiner found that the claimant was discharged for violating the employer's Internal Theft Policy. This policy prohibits, among other things, theft of money or merchandise, discount/coupon abuse and removal of company property for personal use. Finding of Fact # 2. Such a policy is clearly reasonable, as the employer has an important interest in making sure that it protects its assets. All employees who violate the policy are discharged for an initial violation and the claimant was aware of the policy. Findings of Fact ## 3 and 4. The review examiner's

consolidated findings establish that that the claimant admitted in writing to violating a number of provisions of the employer's internal theft policy. These violations included: allowing a subordinate employee to use the claimant's manager's discount; allowing a subordinate to frequently return numerous items without receipts; using a balance on a customer's gift card towards a personal purchase; taking broken and tester merchandise home; taking home employer supplies such as paper towels and trash bags; and allowing employees to use free item coupons without questioning how or where they received the coupons. In the claimant's written statement, which she provided to the Loss Prevention Manager, the claimant stated that she knew that all of this conduct was against company policy and was wrong, that she knew that stealing was wrong when she took paper towels and trash bags home, but she felt like she could do it. Finding of Fact # 19.

In addition, the review examiner rendered a detailed credibility assessment in favor of the employer. 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). Given the record before us, we see no reason to disturb the review examiner's credibility assessment in this case.

We, therefore, conclude as a matter of law that the claimant's discharge is attributable to a knowing violation of a reasonable and uniformly enforced policy of the employer. We further conclude that the claimant's intentional violation of the employer's internal theft policy constituted deliberate and wilful misconduct, within the meaning of G.L. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning July 31, 2016, 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 - February 16, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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.

SPE/rh