

The review examiner was reasonable in crediting the claimant's testimony that he committed the putative misconduct at the request of his supervisor, where the employer failed to produce the supervisor in question to testify, despite being aware of the claimant's explanation and an explicit request to produce the witness at the remand hearing.

**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**

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by John Cronin, 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 affirm.

The claimant was discharged from his position with the employer on September 1, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 30, 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 January 21, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced rule or policy, and, thus, he 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 in order to allow the employer another opportunity to participate in the hearing. Only the employer attended the remand hearing. 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 conclusion, that the claimant did not have the requisite state of mind because he was acting at the instruction of his supervisor, 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 assessments are set forth below in their entirety:

1. From October 23, 2015 until on or about August 31, 2016, the claimant worked full-time (40-60 hours per week) as an exterminator for the employer, a pest control company.
2. The employer maintains a set of "STANDARDS OF CONDUCT," which the claimant signed as having received and reviewed on December 9, 2015, and which stated, in pertinent part, "Some actions are subject to immediate termination. Any serious misconduct or failure to perform job duties may result in termination. They include, but are not limited to: [. . .] Misrepresenting or falsifying information about or to the Company or customer. (Financial reports, other reports, service tickets, re-inspection tickets, service contracts, deposits, etc.)"
3. On August 23, 2016, the claimant was assigned to perform various pest control services at the facility of a client, a local condominium complex.
4. On that date, the claimant, who suffers from PTSD, was not feeling well and reported to his supervisor, the employer's service manager (the SM), that he could not complete his assignment at the client's facility.
5. In response, the SM instructed the claimant to "kill the ticket," a practice occasionally engaged in by employees of the company in which services would not actually be performed, but a service report would, nevertheless, be generated, which incorrectly reported that services were performed.
6. Per the SM's instructions, the claimant submitted a "Service Inspection Report," falsely stating that, on August 23, 2016, he had completed various services at the client's facility when he had not, in fact, done so.
7. On September 1, 2016, the claimant spoke with the SM and learned that he was going to be discharged by the employer's operations manager for his filing of a false service report.
8. Subsequently, during a meeting with the operations manager, who had concluded that the claimant's actions had violated the policies and expectations of the employer, the claimant was informed that he was being discharged.
9. The claimant did not inform the operations manager that he had been ordered to "kill the ticket" by his SM because the claimant did not want to jeopardize the SM's employment and/or help bring negative consequences on the SM and his family.
10. The claimant filed a claim for unemployment insurance benefits on September 1, 2016. The effective date of the claim is the same date, August 21, 2016.

CREDIBILITY ASSESSMENT:

In declining to modify the findings of fact announced in the original decision in this matter (beyond accepting the employer's assertion that the claimant's supervisor's title was "service manager," and not "district manager,"), this Review Examiner accepts as credible the direct and consistent testimony of the claimant during the initial hearing over the hearsay testimony provided by the employer's director of operations during the remand hearing. In particular, I accept as credible the claimant's assertion that although he admittedly falsified an inspection report by indicating that he had performed work that he had not, in fact, completed, he had been directed to falsify the report by his supervisor. In so doing, I inherently reject the hearsay testimony of the claimant's supervisor — as presented by the director of operations during the remand hearing — that he had not directed the claimant to falsify the report. Although the director of operations credibly testified that he spoke to the service manager, who denied given such direction to the claimant, the service manager did not appear for either the initial or the remand hearing to be subject to examination as a witness, despite the Board of Review's clearly stated (and boldfaced) directive in its remand order, that, **"As the claimant testified that he was acting on the instructions of the [Service] Manager, it is recommended that the employer make this witness available to testify."** Despite this, the employer failed to inform the hearings department in advance that the service manager would be unavailable on the date of the hearing and declined to request a postponement of same. As a result, for all of the reasons stated above, the claimant's testimony is accepted as the substantial and credible evidence regarding all disputed facts in this matter.

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. As discussed more fully below, we believe these findings sustain the review examiner's initial decision to award benefits.

Because the claimant was terminated from his employment, his 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

Under this provision of the statute, the burden of proof is on the employer. Still v. Comm'r of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). While it was undisputed that the claimant committed the alleged misconduct of filing a "Service Inspection Report" for work that had not actually been performed, the claimant alleged that he did so at the instruction of his immediate supervisor.

The review examiner credited the claimant's explanation in his consolidated findings of fact. In his credibility assessment, the review examiner explained this by citing the hearsay nature of the employer's testimony and the employer's failure to produce the witness explicitly requested by the Board of Review. "The responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985) (citation omitted). Such credibility determinations 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. Even if we were to reach a different conclusion, we must accept the review examiner's findings, because they are reasonable in relation to the evidence presented at the hearing. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) ("[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence.").

Under G.L. c. 151A, § 25(e)(2), the employer must establish not only that the claimant engaged in the alleged conduct, but also that the claimant's actions were intentional, and that he was aware that he was acting in a manner contrary to the employer's wishes. In determining this, we "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). The proper factual inquiry is to ascertain the claimant's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In light of the review examiner's conclusion that the claimant was acting at the behest of his supervisor, his actions cannot be considered a knowing violation of a rule or in wilful disregard of the employer's interests, under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant's discharge was not 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, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending September 3, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 26, 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

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.

JRK/rh