Employer proved that the claimant stole time, by leaving its retail store and not working while still on the clock. Claimant's failure to appear for the hearing prevented him from rebutting the inference that this was deliberate and in wilful disregard of the employer's interest based upon employer evidence showing he had engaged in the same type of behavior weeks earlier.

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

Issue ID: 0019 7726 49

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Danielle Etienne, 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 affirm.

The claimant was discharged from his position with the employer on September 10, 2016. He filed a claim for unemployment benefits with the DUA, effective August 28, 2016, which was approved in a determination issued on June 8, 2017. 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 August 30, 2017. 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 make further subsidiary findings of fact in order to clarify the conduct that led to the claimant's discharge. 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 deliberately and in wilful disregard of the employer's interest failed to perform work while on the clock 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. The claimant worked as an associate for the employer, a store, from May 1, 2007 until September 10, 2016, when the employer discharged the claimant.

2. On or about August 6, 2016, the employer's Assistant Managers observed the claimant, while clocked in for work, leaving the employer's premises and walking around the store without working.

3. The employer's Assistant Manager and the Store Manager asked the Asset Protection Control Manager to review video surveillance of the claimant.

4. The employer's Asset Protection Control Manager reviewed the video surveillance for August 6, 2016. The video showed the claimant, while clocked in for work, walk out of the store, then place his vest in his car, then the claimant walked back in the store. While in the store, the claimant talked on his cell phone, walked around the store for a while, then punched out for work.

5. In the employer's response to Department of Unemployment Assistance's questionnaire, the employer indicates that the last incident of the claimant stealing time from the employer occurred on September 10, [2016].

6. The employer expects employees to be working while clocked in for work because the employer pays employees for the time they are clocked in for work.

7. The claimant was aware of the expectation given that the employer informed him of it at Orientation and meetings.

8. The employer discharged the claimant for stealing company time.

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 also agree with the review examiner's legal conclusion that the claimant is ineligible for 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 relevant 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 . . . .

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In the present case, the employer fired the claimant for stealing time. Consolidated Finding # 8. We remanded the case because the original findings of fact and Exhibit 3, an employer written statement, were confusing as to the incident which caused it to discharge the claimant on September 10, 2017. After remand, the consolidated findings clarify that there were several incidents involving the claimant allegedly not performing work while still clocked in during the weeks leading up to his termination. One took place on August 6, 2017, when an Assistant Manager observed the claimant leave the employer's retail store and return without performing work while still on the clock. *See* Consolidated Finding # 2. The Assistant Manager's observation was apparently confirmed by the employer's witness, who observed the same thing in a surveillance video. *See* Consolidated Finding # 4.

The second incident, although not explicitly set forth under the consolidated findings, refers to an incident that allegedly took place on September 10, 2016. Consolidated Finding # 5 refers to an employer written statement to the DUA about the claimant coming into work late in the evening on September 10, 2016, clocking in just to request time off, then leaving without clocking out. *See* Exhibit # 3.[1] However, the employer sent DUA time clock records from July 6 and 25, 2016 — not from September 10, 2016 — to illustrate this alleged behavior.[2] Given the fact that the dates do not match up, we are not surprised that the review examiner failed to include details of the alleged September misconduct in her findings. "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.) Because no witness appeared at the hearing to explain what happened on September 10, 2016, we conclude that any assertion of misconduct on September 10, 2016, is unsupported by substantial evidence.

Nonetheless, we believe the employer has met its burden of proof based upon the August 6, 2016, incident. 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). 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). The review examiner set forth the employer's expectation that employees will be paid only for time worked while on the clock in Consolidated

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[2] Exhibit # 2 includes weekly time records showing times clocked in and out for the weeks ending July 9, 2016, and July 29, 2016. These are also part of the unchallenged evidence at the hearing.

Finding # 6. We agree with her assessment that this expectation is reasonable. She also found that the claimant was made aware of this expectation. Consolidated Finding # 7.

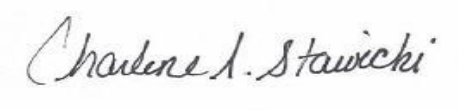
The claimant did not appear for the hearing to present his version of events for August 6, 2016. Consequently, we are left to draw a conclusion as to whether he deliberately left the store and willfully chose not to perform work while still on the clock based upon circumstantial evidence. *See* Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984) (a person's knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case). In light of the time records in Exhibit # 2 demonstrating that the claimant had clocked in and left without clocking out on at least two other recent occasions, it is reasonable to infer that the claimant's misconduct on August 6, 2016, was not accidental. Since nothing in the record suggests there were mitigating circumstances that would otherwise explain his behavior, we conclude that he acted in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has met its burden to show that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 10, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 19, 2018

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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