

Review examiner credited testimony of claimant pharmacy technician over employer hospital human resources vice president that claimant did not steal narcotics from a hospital dispensary, nor did she know who did.

**Board of Review
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Issue ID: 0020 1135 99

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Richard Conway, 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 her position with the employer on October 20, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 16, 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 February 4, 2017. 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, pursuant to 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 take the employer's testimony. Both parties 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 conclusion that the employer did not meet its burden to show the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule or for deliberate misconduct in wilful disregard of the employer's interest is supported by substantial and credible evidence and is free from error of law, where, after remand, the record does not establish that the claimant took the missing narcotics at issue.

Findings of Fact

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

1. The claimant worked full-time as a non-union Pharmacy Technician for this employer's hospital from 07/01/10 until she was suspended on 10/19/16 and then discharged on 10/20/16.
2. The claimant was told on 10/19/16 that she was being investigated because narcotics were missing from the Omni Machine used on the unit where the claimant worked. The claimant had no prior knowledge of what this meeting on the 19th was about and was taken off guard by the questioning and tone of the conversation.
3. The claimant denied any personal knowledge regarding these missing narcotics. The claimant did not take the missing narcotics and has no knowledge of who did.
4. Many people: [sic] technicians, pharmacy students, interns, and pharmacists have access to the Omni machine at issue. It is the [employer's] policy that pharmacy students assigned to work with the claimant are provided with the claimant's password to access the Omni machine.
5. On 10/20/16, the Vice President of Human Resources called the claimant and told her to come to work for a meeting regarding the missing narcotics. Unbeknownst to the claimant, the decision to discharge her had already been made and the meeting scheduled for the 20th was to inform her of the discharge. The claimant said in response to the invitation to meet on the 20th that she wanted time to seek legal counsel prior to attending the meeting with employer management and human resources.
6. On 10/20/16, the employer via letter discharged the claimant for allegedly stealing the missing narcotics.
7. The police were not involved.
8. The claimant's technician license was never investigated by the state. The state is investigating how the employer safeguards narcotics at the hospital.
9. The claimant filed a claim for unemployment benefits effective 11/06/16.

CREDIBILITY ASSESSMENT

The employer witness testified that the claimant stole the narcotics. This testimony was not persuasive due to the witness's lack of knowledge concerning key points. The witness did not know whether or how pharmacy students accessed drugs. Indeed, the witness had very limited knowledge of the drug handling procedures. In addition, the employer witness testified he had no knowledge of any state board or agency's investigation into the theft or into pharmacy (Omni Machine) policies. Since it would be expected that, as

the claimant testified, the theft was reported to and investigated by a regulatory entity, the employer witness's assertions of having no knowledge of any investigation seemed evasive.

Therefore, the claimant's testimony that the employer's practice was to have students use the claimant's identification number to obtain drugs from the pharmacy (Omni Machine) was credible and persuasive. Since many individuals had access to the missing drugs, and since many used the same identifier as the claimant to access drugs, the employer has failed to establish it was the claimant who took the missing narcotics.

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.

The review examiner initially awarded benefits after analyzing the claimant's separation 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 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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. Solely on the basis of the claimant's testimony at the initial hearing, the review examiner awarded benefits. We remanded the case to take the employer's testimony. After remand, we conclude that the employer has not met its evidentiary burden.

The review examiner initially found that the claimant was discharged for failing to attend a meeting to which the employer summoned her on October 20, 2016.

After remand, the review examiner found that the employer discharged the claimant for allegedly stealing narcotics. The employer told the claimant on October 19 that she was being investigated and suspended because narcotics were missing from the machine used on the unit where she worked. The review examiner found that the claimant did not take the missing narcotics, has no knowledge of who took them, and denied any knowledge of the missing narcotics to the employer.

The review examiner credited the claimant's testimony that many people — including other technicians, pharmacy students and interns, and pharmacists — have access to the same medication machine, and that pharmacy students assigned to work with the claimant had access to her password to use the medication machine. Since the review examiner found that the claimant did not steal the narcotics, the employer cannot establish that it discharged her for a knowing violation of a reasonable and uniformly enforced policy or rule or for deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's consolidated findings include a credibility assessment finding the claimant's testimony more credible than the employer's. 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). We see no reason to disturb his assessment.

While discharging the claimant may have been the appropriate decision for the employer to make after investigating her conduct, the review examiner's consolidated findings of fact lead us to conclude that the employer failed to meet its burden to show that the claimant engaged in misconduct. We, therefore, conclude as a matter of law that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interest or for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending October 22, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 27, 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.

JPC/rh