

**Where employer restaurant did not appear for the remand hearing to present evidence it claimed it had at the initial hearing, and where criminal charges of larceny against the claimant restaurant manager were dismissed in court, the employer did not establish that the claimant violated its cash handling policies, stole money, or used its safe for personal reasons, failing to establish misconduct.**

**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  
Charlene A. Stawicki, Esq.  
Member**

**Issue ID: 0020 9682 39**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by 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 his position with the employer on September 16, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 4, 2017. The employer appealed the determination to the DUA hearings department. Both parties attended the first day of a hearing on the merits, but only the employer attended the second day of the continued hearing. Thereafter, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on October 26, 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 take testimony and evidence from the claimant, and to allow the employer an opportunity to provide specific evidence referenced during the initial hearing. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her 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 established that the claimant's discharge for violating the employer's cash handling policies and used the employer's safe for personal reasons constituted deliberate misconduct in wilful disregard of the employer's interest 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 full time as a restaurant manager [for] the employer, an outdoor retail business, from June 3, 2013, until September 16, 2016.
2. The claimant's immediate supervisor was the General Manager (the GM).
3. The employer maintained a Petty Cash policy that stated, "Complete petty cash slips when funds are handed out with the name, items, date, time, associate signature and manager signatures. Petty Cash is to be secured in the safe at all times, reconciled weekly and receipts submitted to the cash office. At no time is Petty Cash to be used for personal reasons and at no time should it be out of balance. Petty Cash is not handed out in form of cash as incentive to hourly associates." The employer punished violators of the Petty Cash policy at its discretion based upon the circumstances of the violation.
4. The employer maintained an expectation that the employees followed [sic] the employer's cash handling policies. The employer maintained this expectation to ensure employees were fiscally responsible. The employer informed the claimant of this expectation when it provided him with the handbook containing the expectation at the time he was hired.
5. Over the course of the claimant's employment, the management staff maintained three unused drawers and petty cash totaling \$1,100.00 in a safe in the manager's office.
6. Over the course of his employment, the claimant kept an envelope with \$350.00 of his own money in the safe, which he taped to the bottom of an unused drawer. The claimant used the \$350.00 to loan money to employees that needed assistance between paychecks.
7. On May 18, 2015, the claimant injured his back at work.
8. On May 20, 2015, the claimant called the employer's Human Resources Manager (the HR Manager) from the hospital and reported his back injury.
9. On May 22, 2015, the claimant began a leave of absence and received worker's compensation.
10. On August 28, 2015, the employer's Support Team issued a memo regarding "Change to Cash Handling SOP for Restaurants". The memo stated, "Petty Cash:
  - All Petty Cash funds are to be deposited as a separate deposit by Tuesday, September 8, 2015. A copy of the deposit slip with the amount clearly visible

as well as the note “Petty Cash” is to be scanned to [employer] upon completion.

- All restaurants will no longer have a Petty Cash amount in their safe.
- Any emergency purchases are to be made using the approved PCARD held in the safe at all times.”

11. On an unknown date prior to September 28, 2015, the GM deposited the Petty Cash into the bank as required by the memo.
12. On September 28, 2015, the claimant returned to work with light duty restrictions.
13. On September 28, 2015, the claimant looked in the safe and saw the cash drawers were empty and the petty cash was gone. When the claimant saw the money was missing, he asked GM what happened to it and the GM told him and a second manager (the 2nd Manager) that the money was deposited and showed them the deposit slip.
14. On November 5, 2015, the claimant was approved to begin a second worker’s compensation [claim] because of his previous back injury from May 2015.
15. After August 28, 2015, the GM did not tell the claimant he was no longer allowed to borrow money from Petty Cash.
16. After August 28, 2015, the GM did not seek to recover money from the claimant.
17. In the beginning of December 2015, the GM reported to the HR Manager that for approximately six months prior to May 2015, he allowed the claimant to borrow money from the Petty Cash for personal reasons. The GM told the HR Manager the claimant had not completely repaid the borrowed money and he was working with him to get the money back. The GM reported the claimant borrowed the money because he was aware the employer was going to audit the restaurant’s safe.
18. The claimant did not borrow money from the safe for personal reasons.
19. The HR Manager contacted the employer’s Operations Manager (the Operations Manager”, [and] the Asset Protection Manager (the AP Manager) to begin an investigation into the missing money. The Operations Manager and the AP Manager questioned the GM, the claimant and the 2nd Manager.
20. The employer determined during the investigation that \$1,100.00 in cash was missing from the safe.
21. On December 11, 2015, the claimant, while on his leave of absence, went to the employer’s location to complete healthcare paperwork. While at the

- location, the employer's attorney called him and asked him questions about the \$1,100.00.
22. On December 11, 2015, the GM was discharged because of the investigation. The employer determined he had knowledge the cash handling policies were not being followed and he did not enforce the cash handling policies.
  23. In December 2015, the claimant and the 2nd Manager received written warnings from the employer because of their alleged involvement with the missing money while the employer completed the investigation.
  24. On December 17, 2015, the employer contacted the [Town A] Police and turned the investigation over to them.
  25. On February 10, 2016, the [Town A] Police filed charges against the claimant for the employer's financial loss.
  26. On March 4, 2016, the [Town A] Police applied for a warrant against the claimant for the employer's financial loss.
  27. On March 7, 2016, the [Town A] Police's application for a warrant against the claimant for the employer's financial loss was granted.
  28. The [Town A] Police did not arrest the claimant.
  29. On an unknown date, the claimant received a "Notice of Magistrate's Hearing on Complaint Application" with a date to appear before the magistrate of May 5, 2016.
  30. On April 15, 2016, the HR Manager sent the claimant a letter notifying him the employer received a report from an independent medical examiner with a transitional plan allowing him to return to work light duty. The letter stated the employer was willing to allow the claimant to return to work light duty in April, moderate activity in May and normal activity in June. The letter stated, "We would like to have you return on Monday, April 25, 2016 at 9:00am. On this day you will meet with me and Restaurant GM, [the 2nd Manager], to create a schedule for you that meets the light duty accommodations requested by the IME."
  31. [On] April 25, 2016, the claimant returned to work from his leave of absence, completed a training, and was suspended by the employer until the results of the pending court hearing were made.
  32. On May 5, 2016, the claimant appeared before the magistrate. The magistrate continued the hearing to a later date.

33. On July 28, 2016, the claimant appeared before the magistrate for the continued hearing. During the hearing, a [Town A] Police Officer read a statement from the employer that stated the claimant was an exemplary employee and the employer could not wait for him to return to work. The magistrate dismissed the charges against the claimant.
34. On September 16, 2016, the HR Manger [sic] discharged the claimant over the phone for not following the employer's cash handling policies and for using the employer's safe for personal reasons.
35. On August 10, 2017, the claimant and his sister drove from Rhode Island to [Town B], Georgia to care for their brother, who was receiving chemotherapy after being diagnosed with lung cancer.
36. On August 27, 2017, the claimant and his sister returned to Rhode Island from [Town B] Georgia.
37. Around August 27, 2017, when the claimant returned home from [Town B] Georgia, he received the "Notice of Hearing" dated August 7, 2017 for the telephone hearing scheduled for August 24, 2017 at 2:00 p.m.

#### Credibility Assessment:

It was undisputed by the HR Manager at the original hearing and by the claimant at the remand hearing that that charges against the claimant were dismissed at the second magistrate hearing.

At the original hearing, the HR Manager offered the GM's hearsay testimony that the claimant had used the employer's safe for personal reasons and borrowed money from the safe for approximately six months prior to his leave of absence. The HR Manager also testified that she viewed the claimant take money from the safe, count it and put it in an envelope, after he returned to work from his first leave of absence, before he started his second leave of absence. However, as a result of its failure to attend the remand hearing, the employer failed to offer any additional testimony or evidence, including video tapes and additional documentary evidence regarding the reason the claimant was discharged September 16, 2016.

The claimant offered unrefuted testimony at the remand hearing that he did not mishandle the employer's money and that he did not steal \$1,100.00 from the employer. The claimant further testified that he kept his own personal money in the safe, in an envelope, to provide his employees with money needed to get them to payday, of which the GM was aware. Further, the clamant provided a letter during the remand hearing from the employer welcoming him back to work after he was released to return to work in April 2016, after the [Town A] Police pressed charges against him. Based on the documentary evidence and the direct testimony

of the claimant, it is concluded the claimant did not steal \$1,100.00 from the employer.

As the claimant provided detailed, consistent testimony and documentary evidence consistent with his testimony, the totality of the claimant's testimony outweighs the employer's testimony given in the initial hearing. Therefore, the claimant is deemed more credible.

### 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

The review examiner initially denied 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 employer's testimony at the initial hearing, the review examiner denied benefits. We remanded the case to take the claimant's testimony, and to give the employer an opportunity to present evidence to which it referred to during the initial hearing, but did not produce. After remand, we conclude that the employer has not met its burden.

Initially, based solely on the employer's testimony, the review examiner found that the employer had an expectation that employees would follow its cash handling policies, and would not use its safe for personal reasons. The review examiner also found the claimant violated those policies, so she concluded the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest.

After remand, the review examiner found that while the employer's policy and expectation remained the same, as did its purported reason for discharging the claimant, the employer failed to establish that the claimant had, in fact, violated any policies or expectations.

The review examiner credited the claimant's testimony that he did not borrow money from the employer's safe for personal reasons, that the employer's general manager had not sought to recover money from him, that the employer's petty cash had been deposited in the bank as required by its then-new cash handling policy, and that, while the employer had sought to press criminal charges against the claimant for its financial loss, the charges against the claimant were dismissed in court on July 28, 2016. Since the review examiner found that the claimant did not violate the employer's cash handling policies, the employer cannot establish that it discharged him 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 detailed credibility assessment finding the claimant's testimony more credible than the employer's. The credibility assessment cited the employer's absence from the remand hearing and failure to produce evidence specifically requested by the Board as among the reasons she found the claimant 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).

While discharging the claimant may have been an appropriate decision for the employer to make, the review examiner's consolidated findings of fact lead us to conclude that the employer failed to meet its burden to support disqualification from 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 or knowingly violate a reasonable and uniformly enforced policy or rule of the employer 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 week ending September 17, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - April 25, 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](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.

JPC/rh