

Where the employer offered hearsay evidence and inconsistent testimony, and the hearsay testimony had questionable veracity given that the hearsay assertions were made by employees who had been discharged by the claimant manager, there is no error in the review examiner's conclusion that the employer failed to present sufficient credible evidence to show that the claimant illegally paid people in cash to work for the employer.

**Board of Review
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Issue ID: 0021 2382 34

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Rachel Zwetchkenbaum, 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 March 1, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 4, 2017. 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 July 12, 2017.

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 accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide evidence and testimony regarding the claimant's separation. Both parties 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 is not subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the employer failed to present sufficient credible evidence that the claimant was improperly allowing people to work for the employer.

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 Area Manager, for the employer, a Cleaning Company, from January 1, 2016 until March 1, 2017, when his employment was terminated.
2. The claimant worked a full-time schedule of hours for the employer.
3. The employer has a written policy that prohibits employees from engaging in any type of falsification of company records. Violations of the policy could lead to disciplinary action, up to and including termination.
4. The claimant received a copy of the policy after hire.
5. During the claimant's tenure with the employer, the claimant performed his job to the best of his ability.
6. The claimant had the authority to hire and fire employees.
7. The claimant fired one of his subordinates ("employee X") on February 17, 2017.
8. Employee X was very angry with the claimant, so she called the employer and told the employer that the claimant had been paying her in cash and that the claimant had illegal people working for him.
9. The claimant never paid his employees in cash, including employee X.
10. The claimant never had illegal employees working for him.
11. On February 24, 2017, the claimant was questioned by human resources about the allegations brought by employee X. The claimant was asked if he allowed employee X or any other employees to work for him prior to officially becoming an employee and paid them in cash. The claimant adamantly denied all allegations.
12. The claimant worked on March 1, 2017.
13. While working on March 1, 2017, the claimant received a telephone call from the employer. The employer told the claimant that he was being terminated for allegedly violating a company policy. The claimant asked which policy they were talking about, but the employer refused to tell him more.
14. The claimant did not think he had done anything wrong.

15. The claimant had not violated any company policies.
16. The claimant filed for unemployment benefits and received an effective date of February 26, 2017.

CREDIBILITY ASSESSMENT

All of the employer's testimony, which alleged that the claimant had paid people cash (including employee X) before they had officially become company employees and therefore had engaged in falsification of employer records, was all based on hearsay. Furthermore, a lot of the hearsay testimony allegedly came from a former employee (employee X) who the claimant had terminated right before the employee made any allegations against the claimant. Given that the employer's hearsay testimony is rebutted by the direct testimony of the claimant that he never paid people in cash or falsified employer records and is not independently reliable, it is concluded that the claimant's testimony is more credible and that the employer's testimony is dismissed as not credible.

Even if the issue of hearsay is dismissed, the two employer witnesses presented conflicting and weak testimony. The employer witness from human resources testified that the initial allegation against the claimant came from an employee who no longer worked for the company when the complaint was made. The employee from human resources also testified that when the claimant returned his work laptop and cell phone to the employer upon termination that he had deleted all of the information off the computer and cell phone. After the employee from human resources was shown documentation showing that the claimant had been charged for not returning his work equipment, she testified that she did not know if the claimant had in fact returned his work equipment at any point.

The claimant's direct supervisor testified that the employee who made the initial complaint against the claimant still worked at the company. When questioned further, the claimant's supervisor testified that he had no recollection of [who] the person who made the allegations against the claimant actually was. The claimant's supervisor testified that he spoke [to] the employees involved in the allegations, but was unable to recall the identity of any of them. The claimant's supervisor answered most questions by stating that he has many employees, that this happened a long time ago, and [that] he does not remember what happened.

Given the weak and conflicting testimony provided by the employer, the employer's testimony is dismissed as not 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. As discussed more fully below, we conclude that the initial decision to award benefits is supported by substantial evidence and free from error of law.

It is undisputed that the claimant was discharged from his job with the employer. 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 section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. After the initial hearing, at which only the claimant offered testimony, the review examiner concluded that the employer had not carried its burden. Following our review of the entire record, including the consolidated findings of fact made after the remand hearing, we conclude that the review examiner's initial decision is correct as a matter of law.

The employer discharged the claimant on March 1, 2017, for allegedly allowing at least one person to work for the employer without being properly hired (filling out an application, obtaining an employee identification number, and being paid on the books). In order for the employer to carry its burden, it must first show that the claimant engaged in this misconduct. The review examiner concluded in her decision that the employer had not shown that the claimant improperly hired anyone or was paying anyone in cash off the books. Her consolidated findings of fact reflect the same. *See Consolidated Finding of Fact ## 9 and 10.*

Whether the claimant improperly hired and paid employees is a question and dispute of fact. At this stage of the administrative process, the "inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited . . . to determining whether the review examiner's findings are supported by substantial evidence." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979). "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.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627-628 (1984), *quoting* New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981); G.L. c. 30A, § 1(6). Since the Board did not hold a hearing in this matter, we cannot make findings of fact. We also cannot set aside the review examiner's credibility determination, unless it is unreasonable or unsupported by the evidence cited in the assessment. In unemployment proceedings, "[t]he 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).

As noted above, we have accepted the review examiner's consolidated findings of fact. We do so essentially for the reasons stated in the review examiner's credibility assessment, which accompanied her new findings. The employer's witnesses gave inconsistent testimony on the points referenced in the credibility assessment. The claimant's supervisor did not offer clear, specific, and convincing testimony. The human resources witness testified to the allegations of Employee X (as well as of a second employee, who made allegations similar to Employee X). The employer was not able to produce either former employee to testify or any evidence from those employees supporting what those employees alleged. The evidence, which was presented during the hearing as to what was told to the human resources witness from the former employees, constituted hearsay. In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 530 (1988). Here, the hearsay evidence was not shown to be reliable. Thus, it was reasonable for the review examiner to discount, or give little weight, to that evidence. In short, the review examiner's credibility assessment was reasonable and supported by the record.

We, therefore, conclude as a matter of law that the review examiner's initial decision to award benefits is supported by substantial and credible evidence and free from error of law, because her findings as to whether the claimant did anything wrong are supported by the record and result in a conclusion that the employer did not carry its burden to show that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning February 26, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 22, 2017



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.

SF/rh