

**Without permission, the claimant used another employee's code to make a sales transaction for his own personal use, falsified the employer's records by forcing the cashier drawer balance to appear as if there were a zero dollar balance instead of showing the outstanding purchase, and took the product home without paying for it. The mall closing before he could return with the cash to cover the transaction did not constitute mitigating circumstances.**

**Board of Review  
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**Issue ID: 0021 2597 58**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by Allison E. Williams, 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 reverse.

The claimant was discharged from his position with the employer on March 7, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 20, 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 June 13, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined 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 rule or policy of the employer 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 to afford the employer an opportunity to present evidence. 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 original conclusion that the claimant did not engage in deliberate misconduct, because he had his manager's permission to purchase product with another employee's company number and did not pay for it because he had forgotten his wallet, 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 a Store Manager Assistant for the employer, a vitamin and nutrition store. He was employed with this employer from 12/14/12 until he became separated on 3/7/17.
2. The claimant was working full time 40 hours a week earning an annual salary of \$40,000.
3. The claimant was discharged for forcing a balanced drawer and falsifying company documents by purchasing product using another employee's number and not paying for product but balancing the drawer. The employer has no uniformly enforced policy or rule, accompanied by the consequences for violation, which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of the Regional Director.
4. The employer expected employees not to use another employee's number or cashier code other than for sales recording, except when performing legitimate managerial functions and not to intentionally falsify any company required records including but not limited to cycle counts, HR records, Payroll records and all recap documentation.
5. The claimant was aware of the employer's expectations in this regard. He had received a copy of the policies in the handbook on 12/28/12. The claimant had also worked as a Store Manager for a period of time in 2013 teaching and coaching a team of associates on the employer's policies.
6. On 2/5/17, the claimant, while working the store alone, came to realize that a product he used was on sale. It was buy one get one free. There were 4 bottles left and the claimant wanted to buy the last 4 bottles. The claimant purchased the product using another employee's identification number since employees were not allowed to purchase more than \$13 of product for themselves at any one time.
7. The claimant rang up the transaction which came to \$50.37. He went to pay cash for the products and realized he had forgotten his wallet. The claimant forced balanced the drawer to bring the tally to \$0, leaving the drawer \$50 short.
8. The Store Manager came into the store the next morning and realized there was a forced balance on the drawer and that the drawer was \$50 short. He looked at the transactions from the night before and realized a transaction was processed under another employee's number.
9. The Store Manager notified the Regional Director that the claimant had closed the night before and the drawer was \$50 short. He also informed him of the

transaction that was processed under another employee's number. The Regional Director asked the Store Manager to look for the product in the store.

10. The Store Manager subsequently informed the Regional Director that the product purchased under the other employee's number was not in the store.
11. The Regional Director notified Loss Prevention to start an investigation and set up interviews. The Store Manager informed Loss Prevention that at no time had he told the claimant he could use another employee's number. He also told Loss Prevention that the claimant had told him he wanted to buy the product that day because he needed it for the issue with his joints.
12. Loss Prevention also interviewed the claimant on 3/2/17 and he admitted to forcing a drawer balance to bring it to \$0. He never indicated to the Loss Prevention in his interview that his Manager had allowed him to perform the transaction under another employee's number or to force balance the drawer.
13. The claimant was suspended pending further review of the incident.
14. On 3/7/17, the claimant received a call from the District Manager who informed him that he was being terminated.

#### Credibility Assessment:

After review of the record and both parties' testimony from the remand hearing, the weight of the evidence suggest[s] that the employer's testimony is deemed more credible. When the claimant was questioned about the testimony he provided at the original hearing, he was not sure of the answer to questions that were asked, specifically whether the Manager told the claimant to use the other employee's number in doing the transaction. In addition, his contention that he did not know that balancing the drawer at \$0 went against the employer's policy is not deemed credible given the positions he had held while employed and his testimony at the remand hearing that he believed the Manager would have had to report the shortage of the drawer.

#### 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 original 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 do not believe the consolidated findings support the review examiner's legal conclusion that the claimant is eligible 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 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 . . . .

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The review examiner reached her original decision after hearing only the claimant's testimony. She believed that the claimant had his manager's express permission to use another employee's number to purchase the particular product.<sup>1</sup> She also believed that he left the product at the store, and the only reason he could not pay for it that night was because he had forgotten his wallet and was unable to return to the store with the cash before the mall closed.<sup>2</sup> After hearing both parties testify at the remand hearing, the consolidated findings now reflect the employer's version of events. Specifically, the consolidated findings indicate that the store manager did not give the claimant permission to conduct the sales transaction with another employee's company number and that the claimant did not leave the product at the store that night. *See Consolidated Findings ## 10 and 11.*

“The review examiner bears ‘[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . . .’” Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting Trustees of Deerfield Academy v. Dir. of Division of Employment Security*, 382 Mass. 26, 31–32 (1980). 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). For the reasons set forth in her credibility assessment, we believe the review examiner's findings are reasonable in relation to the evidence presented during the remand hearing.

The review examiner found that claimant was familiar with the employer's policy not to use another employee's company number other than for sales recording or legitimate managerial functions. *See Consolidated Findings ## 4 and 5 and Remand Exhibit # 6.* Although not explicitly stated, we assume this means that employees are not to use another's cashier code to buy product for their own use. She further found that the claimant was familiar with the employer's policy prohibiting falsifying records. *See Consolidated Findings ## 4 and 5 and*

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<sup>1</sup> *See* Remand Exhibit # 1, Finding of Fact #6.

<sup>2</sup> *See* Remand Exhibit # 1, Findings of Fact ## 7 and 8.

Remand Exhibit # 6. The prohibition against theft also appears among the employer's policy prohibitions, of which she found the claimant was aware. *See Consolidated Finding # 5 and Remand Exhibit # 6.* Even without an express finding as to theft, it is self-evident that an employer does not condone stealing its inventory.

Because there is no evidence that the employer uniformly disciplined employees who violated these policies, it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2). However, the employer has met its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

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). 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. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

After remand, the review examiner rejected the claimant's assertion that he did not believe he did anything wrong. The consolidated findings now provide that, without permission, the claimant used another employee's code to make a sales transaction of \$50.37 for his own personal use, falsified the employer's records by forcing the cashier drawer balance to appear as if there were a zero dollar balance instead of showing the outstanding \$50.37 purchase, and took the product home without paying for it. *See Consolidated Finding # 7.* Had the claimant been able to return to the mall in time to pay for the purchase, the transaction may have gone unnoticed. That does not mean, however, that the mall closing constituted circumstances that mitigated his wilful disregard of the employer's interest. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987). By the time the mall closed, the claimant had already committed the misconduct for which he was fired.

We, therefore, conclude as a matter of law that the employer has shown that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning February 26, 2017, 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 - February 26, 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.

AB/rh