

Claimant, who used a credit card that did not belong to her then gave conflicting responses when the employer investigated her involvement in the incident, was discharged for deliberate misconduct, violating the employer's policy & expectation requiring honesty. Where the review examiner rejected the claimant's assertion on remand that she could not recall the events on the night at issue due to alcoholism, there was no credible evidence of circumstances to mitigate the claimant's misconduct.

**Board of Review
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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 affirm.

The claimant was discharged from her position with the employer on April 14, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 16, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties on the first day, but only by the claimant on the second day, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on November 16, 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 additional testimony and evidence regarding the circumstances surrounding, and the reason(s) for the claimant's discharge, as well as assessments of the parties' credibility regarding key material facts. Both parties attended the two-day 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 decision, which concludes that the claimant's unlawful use of a coworker's credit card to purchase merchandise for her own personal use 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 assessment are set forth below in their entirety:

1. From September 23, 2016 until March 30, 2017, the claimant worked as a full-time (40 hours per week) floral supervisor for the employer, a supermarket.
2. The employer maintained a theft policy in order to protect its employees from being subjected to theft. The policy read, in relevant part, "[. . .] any action by a Team Member that results in the intentional and/or deliberate act to defraud and/or steal product, tender or property of [the employer] or any of its Team Members, Customers or vendors, will subject the individual(s) to immediate termination. [. . .] **Investigations** – [The employer] may occasionally find it necessary to investigate current Team Members where behavior or other relevant circumstances raise legitimate questions concerning work performance, reliability, honesty, trustworthiness, or potential threat to the safety of co-workers or others. Team Members are required to reasonably cooperate with [the employer]'s lawful efforts to obtain relevant information, and may be disciplined up to and including termination for failure to do so."
3. The employer has encountered approximately 17 employees who have engaged in theft and has terminated all of them as a result.
4. On September 23, 2016, at her time of hire, the claimant was given a copy of the employer's theft policy and signed an acknowledgment of having received it.
5. The employer maintained a corrective action policy, contained within its employee handbook, in order to ensure the fair treatment of its employees and to ensure the employees' honesty. The policy read, in relevant part, "**MAJOR INFRACTIONS** – Examples of conduct that may lead to discharge include, but are not limited to: [. . .] Lying or being dishonest in connection with the job [. . .]."
6. On December 16, 2016, the claimant electronically acknowledged that she had reviewed the most recent version of the employer's employee handbook.
7. The claimant was aware that the employer expected her to provide truthful answers during the course of any employer-led investigation.
8. The employer had approximately 180 employees in the supermarket where the claimant worked.
9. On March 18, 2017, while on her lunch break, the claimant found a credit card (the card) on the street, leaning on the sidewalk, across the street from the

employer's workplace. The claimant looked at the card but did not recognize the name. The claimant then put the card in her purse.

10. At the time she found the card, the claimant was not aware that it belonged to one of her co-workers (the co-worker).
11. On March 18, 2017, after the end of her shift (around 10 p.m.), the claimant walked over to a gas station convenience store (the gas station) located adjacent to the employer's supermarket. At 10:09pm, the claimant purchased \$57 worth of cigarettes and charged it on the card.
12. At the time she used the card, the claimant was caught on video by the gas station's surveillance cameras.
13. At the time that she used the card, although the claimant was not aware that the card belonged to the co-worker, she was aware that the card did not belong to her.
14. On March 20, 2017, the claimant, feeling remorseful about using the card, because it was "the wrong thing to do," went back to the gas station and asked its manager to reverse the charges. The gas station manager would not reverse the charges to the card.
15. On March 30, 2017, after the co-worker reported the card as being stolen and it was discovered that it had been used at the gas station, a police officer came to the employer's supermarket and showed the gas station's surveillance video to the employer's assistant store team leader (the ASTL) in the hopes that the claimant would be recognized.
16. On March 30, 2017, the ASTL recognized the claimant as the person who used the card on March 18, 2017.
17. On March 30, 2017, the police officer advised the employer not to inform the claimant that she was under police investigation until he could speak to her first.
18. On March 31, 2017, the employer's store team leader ("the team leader") placed the claimant on a suspension pending an investigation into the March 18, 2017 allegations. At the time, the team leader did not inform the claimant of the reason for her suspension.
19. At some point between March 31, 2017 and April 10, 2017, the police officer spoke with the claimant. The police officer informed the claimant that they had evidence of her using the card on March 18, 2017. The claimant told the police officer that she had found the card across the street from the employer's workplace, leaning on the sidewalk, and admitted to using the card on March

- 18, 2017. The police officer informed the claimant that criminal charges may be brought against her.
20. Between March 31, 2017 and April 10, 2017, the claimant called the employer's workplace on 2 or 3 separate occasions, spoke with the team leader, and asked her about the status of her employment. The team leader told the claimant that they could not discuss her employment until the police concluded its investigation.
 21. At some point during the police investigation, the co-worker informed the police that, on March 18, 2017, she had not walked across the street or been near the area where the claimant stated that she had found the card.
 22. On or around April 10, 2017, the police officer informed the employer that he had spoken with the claimant and that she was aware that they were considering pressing criminal charges against her.
 23. On or around April 10, 2017, the team leader called the claimant and conducted a phone interview with her regarding the March 18, 2017 incident. The claimant told the team leader that she had found the card on March 18, 2017 during her afternoon break, next to the curb and directly across the street from the employer's workplace. The claimant told the team leader that she looked at the credit card, did not know it belonged to the co-worker, thought it was "dead," but used it to purchase gum at the gas station. The claimant told the team leader that she made the relevant purchase during her break on March 18, 2017. The claimant also told the team leader that, after finding out that the card belonged to the co-worker, she went back to the gas station in an attempt to have the charges reversed, but that the gas station manager would not reverse the charges.
 24. The team leader asked the claimant how she found out that the card belonged to the co-worker. The claimant initially told the team leader that she recognized the co-worker's first name and looked it up in the employer's email system. The claimant then told the team leader that she did not know who the co-worker was.
 25. By stating that she used the card during her afternoon break, that she had used it to purchase gum, and by initially stating that she recognized the co-worker's name on the card only to then state that she did not know the co-worker, the claimant was dishonest to the team leader during the investigation.
 26. On April 11, 2017, the team leader met with the employer's regional leadership team ("the team") to discuss the claimant's employment. The team decided that, by saying that she had purchased gum, used the card during her afternoon break, and by providing inconsistent statements about how she found out the card belonged to the co-worker, the claimant was dishonest during the investigation. The team also concluded that, because the co-worker

- had reported to the police that she was nowhere near the area where the claimant found the card, the claimant was dishonest as to where she had found the card.
27. On April 11, 2017, the team, concluding that the claimant had violated the employer's policies and expectations by lying in connection with the job, not being truthful during the employer's investigation, and by using a credit a credit card that did not belong to her on March 18, 2017, decided to discharge the claimant.
 28. On April 11, 2017, the team leader contacted the claimant. The claimant agreed to meet with the team leader on April 13, 2017.
 29. On April 13, 2017, the claimant called the team leader and told her that she needed to cancel because she was taking her mother to the hospital. The team leader and the claimant then agreed to meet on April 14, 2017.
 30. On April 14, 2017, the team leader met with the claimant and discharged her from her employment effective immediately.
 31. On April 18, 2017, the claimant called the team leader and told her that, on March 18, 2017, she had been drinking during her shift. The claimant further alleged to the team leader that by the time she used the card on March 18, 2017, she was "blackout drunk" and had no recollection of using it.
 32. On April 20, 2017, the claimant filed a claim for unemployment benefits with an effective date of April 16, 2017.
 33. On May 3, 2017, the claimant sent an email to the team leader. In the email, the claimant stated, "As you suggested and/or accused, I WAS NOT drinking on the job."
 34. On July 11, 2017, the [City A] District Court ("the court") issued a summons to the claimant ordering her to appear for a hearing, on August 17, 2017, to be arraigned on charges of: larceny from a building, credit card fraud, forgery of documents, and identity fraud. All charges stemmed from the incident on March 18, 2017.
 35. On August 17, 2017, the claimant was arraigned on the relevant criminal charges.
 36. On October 3, 2017, the day of the first unemployment hearing, the claimant asked the team leader, "Why wasn't I charged with this crime? This supposed crime?" After the team leader testified that she was not aware whether or not the claimant had been charged with a crime, the claimant responded by saying, "I wasn't."

37. On December 19, 2017, the court dismissed the larceny from a building and forgery of documents charges against the claimant.
38. On December 19, 2017, in regards to the charges on credit card fraud and identity fraud, the court ordered a Continued Without a Finding, to be entered on June 18, 2018, provided the claimant successfully complete a six-month probationary period, and pay a \$50 monthly probation fee and a one-time \$90 victim/witness assessment fee.
39. As of April 17, 2018, the date of the second remand hearing, the claimant has no pending court dates scheduled.

CREDIBILITY ASSESSMENT

During the initial hearings, the claimant gave specific testimony as to her actions on March 18, 2017, describing in detail as to how she found the card and later using it at the gas station. During the remand hearings, the claimant changed her story, and insisted that she had no recollection of using the card on that day as a result of being blackout drunk. The claimant also testified during the remand hearings that she may have been inebriated during her phone conversation with the team leader on or around April 10, 2017. Although the claimant maintains that she is an alcoholic (and documentation appears to substantiate that assertion), the fact that she mentioned nothing about her alcoholism during the initial hearings, and instead provided a detailed account of her actions, make her new, self-serving contentions not credible. This is further supported by her May 3, 2017 email to the team leader in which she wrote, "I WAS NOT drinking on the job." As such, I conclude that the claimant: was aware of her actions on March 18, 2017; intentionally used a card which she knew did not belong to her; and intentionally provided false statements to the team leader on or around April 10, 2017.

The team leader contended that the claimant knew who the co-worker was, and supported that allegation with a statement that she had seen the claimant and the co-worker talk to one another on approximately 2 to 3 occasions. However, given that the employer admits that it maintains approximately 180 employees in the store, and where the team leader could not say whether or not the claimant and the co-worker knew each other by name, it is concluded that the claimant, at the time she found and used the card on March 18, 2017, did not know that it belonged to the co-worker.

Although the claimant contended, during the second remand hearing, that she never lied about being charged criminally, the facts of the case show that the claimant was arraigned on August 17, 2017, and had been notified of such charges on July 11, 2017. During the initial unemployment hearing on October 3, 2017, however, the claimant contended that she had not been criminally charged. As such, and where the claimant had indeed already been arraigned and the criminal charges were still pending, it is concluded that the claimant was not truthful regarding her charges during the initial unemployment hearing.

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

The review examiner 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 either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or deliberate misconduct in wilful disregard of the employer's interest. The review examiner initially concluded the employer had met its burden. We remanded the case to clarify the record regarding the circumstances surrounding, and the reason(s) for, the claimant's discharge, and for the review examiner to weigh the parties' credibility. After remand, we also conclude that the employer has met its burden.

Initially, the review examiner concluded that the claimant was discharged for misuse of a co-worker's credit card, and that her actions constituted deliberate misconduct. After remand, the review examiner found that the employer discharged the claimant for lying in connection with the job, for not being truthful during the employer's investigation, and for using a credit a credit card that did not belong to her on March 18, 2017.

The review examiner found the employer had a policy prohibiting theft, as well as another policy indicating that lying or being dishonest in connection with the job could lead to discharge. *See* Hearings Exhibit # 15. Arising from these policies, the employer had expectations that its employees would not steal, and that they would respond truthfully during investigations. The claimant was aware of these policies and expectations, and that violation of these policies could lead to discharge. *See* Hearings Exhibit # 16.

The review examiner found that, on March 18, 2017, the claimant found a credit card on the street across from the employer's store during her lunch break. The claimant did not recognize the name on the card and put it in her purse. She did not realize that the card belonged to a co-worker. After the end of her shift, the claimant used that credit card to purchase \$57.00 worth of

cigarettes from a gas station across the street from the employer's store. At the time she used it, the claimant knew that the card did not belong to her.

On March 20, 2017, the claimant felt remorseful for using the card (it was "the wrong thing to do") and asked the gas station manager to reverse the charges from that card and charge her own card, but the manager declined to do so.

The co-worker reported her card had been stolen. On March 30, 2017, it was discovered that the card had been used at the gas station. A police officer showed the gas station's surveillance video to the employer's assistant team leader, who identified the claimant as the person who had used the card on March 18, 2017. On March 31, 2017, the employer's team leader suspended the claimant, pending investigation into the allegations regarding the credit card. The claimant was not told that the reason for her suspension was because the police officer asked the employer to wait until he could speak to her first.

The police officer spoke with the claimant, informing her that they had evidence that she had used the card on March 18, 2017, and that criminal charges may be filed against her. The co-worker told the police that she had not been anywhere near the area where the claimant claimed that she had found the card.

By April 10, 2017, the police officer told the employer that he had spoken to the claimant about the possible criminal charges against her. On April 10, 2017, the team leader called the claimant to ask about the March 18 incident. The claimant told the team leader she had found the card during her afternoon break, at which time she had looked at it, did not know who it belonged to, thought it was "dead," but used it anyway to purchase gum at the gas station during her break. When asked by the team leader how the claimant found out the card belonged to a co-worker, the claimant initially replied that she recognized the co-worker's first name and looked it up in the employer's email system but then told the team leader that she did not know who the co-worker was.

The review examiner found, by stating that she used the card during her afternoon break, that she had used it to purchase gum, and by initially stating she recognized the co-worker's name, then stating she did not know the co-worker, that the claimant was dishonest to the team leader during the investigation.

On April 14, 2017, the team leader met with the claimant and discharged her for violating the employer's policies and expectations by lying in connection with the job, by not being truthful during the investigation, and by using a credit card that did not belong to her.

The review examiner provided a detailed credibility assessment explaining that, although he credited the claimant's testimony that she did not know the credit card belonged to a co-worker, he nevertheless concluded that the claimant was aware of her actions on March 18, 2017, had intentionally used a credit card which she knew was not hers, and intentionally provided false statements to the team leader pursuant to the employer's investigation.

The credibility assessment noted the claimant gave specific testimony at the initial hearing regarding her actions of March 18, 2017. She then changed her story at the remand hearings and

claimed she had no recollection of using the card because she was “blackout drunk” at the end of her work day. Acknowledging the claimant presented documents substantiating her claim that she is an alcoholic, but noting she had not mentioned this during two initial hearing sessions and had specifically sent an email to the team leader claiming, “I WAS NOT drinking on the job” on May 3, 2017 (*see* Hearings Exhibit # 17), the review examiner rejected her “new, self-serving contentions” that she did not recall what she did because she had been drunk as not credible.¹ 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).

The claimant’s lack of candor was further underscored in the review examiner’s credibility assessment, when he recalled her claim at the initial hearing on October 3, 2017, that she had not been criminally charged for the March 18 incident. This claim was found to be untruthful on remand, where evidence was presented that the claimant was notified of criminal charges on July 11, 2017, and had been arraigned on August 17, 2017. *See* Remand Exhibit # 12.

The review examiner found that the claimant knew the employer expected her to be truthful when responding to inquiries, and found she intentionally used a credit card that did not belong to her, and intentionally provided false statements to the team leader when she was conducting her investigation. The review examiner’s findings show the claimant possessed the requisite state of mind to support disqualification from benefits. Where the review examiner found the employer established it fired the claimant for being untruthful in responding to its investigation, we need not examine whether the claimant’s fraudulent use of the credit card after she left work was sufficiently related to her employment to support disqualification. Moreover, there are no mitigating circumstances excusing the claimant’s misconduct, where the review examiner rejected as not credible her attempts on remand to claim that her alcoholism impeded her memory of the incidents at issue.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer’s interest under G.L. c. 151A, § 25(e)(2).

¹ We note that some of the claimant’s initial testimony regarding her actions of March 18, which she claimed she could not recall at the remand hearings, was also recapitulated by the employer in its May 23, 2017, “Response to Fair Hearing Request” which the claimant sought after her discharge. *See* Hearings Exhibit # 18.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning April 9, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 29, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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