

Because the claimant had a verbal agreement with the owner allowing the claimant to borrow cash from the weekend taxi receipts, as long as he left a note and paid it back, he reasonably believed that such behavior was not a violation of the employer's policy or wilful disregard of the employer's interest. He is eligible for unemployment benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0021 6180 53

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Marielle Abou-Mitri, 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 in April, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 9, 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 November 9, 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 obtain additional evidence from the employer. 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 is not disqualified under G.L. c. 151A, § 25(e)(2), because he had permission to borrow cash from the employer's taxi receipts 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 part-time as a dispatcher for the employer, a taxi service company, from March 1, 2016 through April 2, 2017.
2. The claimant worked 24 hours per week and earned \$11 per hour. The claimant worked the overnight weekend shift. The claimant worked on Friday, Saturday and Sunday from 8:00 p.m. to 4:00 a.m.
3. The claimant did not have any other employment at the time he was employed with the instant employer.
4. The claimant's direct supervisor was the Day Dispatcher.
5. The employer has a policy in its Employee Handbook which provides, "Although it is impossible to anticipate in advance every possible kind of misconduct that would be of concern to [Employer] and that could lead to corrective action, including dismissal, the following are examples:...4. Failure to be honest in your communications with [Employer]; falsifying records or other documents. 5. Theft or misappropriation of property owned by [Employer]..."
6. The consequences of violating the policy depend on the infraction that is committed.
7. The claimant had a commonsense awareness of the employer's policy prohibiting theft.
8. The purpose of the policy is to protect the employer's assets.
9. The claimant had a friendly relationship with the Owner for over 20 years.
10. The claimant and the Owner had a verbal agreement that if the claimant needed money before the issuance of his paycheck, the claimant could take cash from the driver bills. The Owner told the claimant to leave a note stating how much he had borrowed. The Owner expected the claimant to repay the money when he picked up his paycheck, following his weekend shift, on Monday.
11. During the course of the claimant's employment, the claimant borrowed money from the driver bills approximately twelve times.
12. After the claimant borrowed money from the driver bills on the fourth occasion, the Owner spoke to the claimant about his behavior. The Owner told the claimant that he should not borrow money unless he absolutely had to and that he wanted him to call and ask him for permission to borrow the

money before taking it. The Owner also told the claimant to make sure he kept a record of exactly what he took.

13. The Owner did not notify the claimant that if he continued to borrow money from the driver bills, he would be discharged from his employment.
14. The claimant continued to borrow money from the driver bills. The claimant attempted to call the Owner, during his overnight shift, on several occasions but the Owner did not answer the claimant's calls. After several failed attempts at contacting the Owner, the claimant continued to borrow money from the driver bills and stopped calling the Owner because he knew that the Owner would not answer during the middle of the night. The claimant always left a note stating how much money he borrowed.
15. In March of 2017, the claimant borrowed money from the driver bills and did not have enough money in his paycheck to pay the Owner back. The claimant had an outstanding balance of \$22.
16. During the weekend of April 1, 2017, the claimant borrowed \$100 from the driver bills. The claimant left the Owner a note stating he would repay the money on the following Monday. On Monday, April 3, 2017, the claimant repaid \$60. The claimant did not have enough money to repay the entire amount. The claimant still owed the Owner a total of \$62, due to the \$22 he owed from previous weeks.
17. The claimant reported to work for his scheduled shift on Friday, April 7, 2017. The Day Dispatcher sent the claimant home. The Day Dispatcher notified the claimant that he was suspended and he needed to speak to the Owner. The claimant called and texted the Owner but did not get a response.
18. On Monday, April 10, 2017, the claimant arrived to work to pick up his check. The claimant told the Owner's brother, the Operations Manager, that he did not have any cash to repay the Owner. The Operations Manager told the claimant that he would void out the current check from the employer and reissue the claimant a check, deducting the \$62 the claimant still owed the Owner.
19. The claimant agreed. The Operations Manager voided the claimant's April 10, 2017 paycheck and reissued the claimant another paycheck, deducting the money the claimant owed.
20. The Operations Manager issued the claimant a termination notice. The claimant was discharged for theft.
21. The claimant did not believe that he engaged in theft because he had a verbal agreement with the Owner that he was allowed to borrow money.

22. The claimant filed a claim for unemployment benefits effective April 16, 2017.

CREDIBILITY ASSESSMENT:

The Operations Manager attended the remand hearing and testified that the claimant was issued a verbal warning by the Owner two weeks before his termination. The Operations Manager provided that he heard the Owner speak to the claimant and told the claimant that he had to stop borrowing money from the employer and that the claimant needed to pay back the money he owed as soon as possible. The Operations Manager provided that the Owner said something “along those lines.” When asked by this Review Examiner if the claimant had a verbal agreement with the Owner that he could take cash if he needed the money, the Operations Manager testified that it “sounds like something that could have been done.” The Operations Manager stated that in previous years, the Owner may have allowed the claimant to borrow money and that the Owner had an “old school” mentality and dealt with many of his work issues with “just a handshake.” The Operations Manager argued that by the time of his separation, the claimant was notified that he needed to stop, based on advice the Operations Manager gave the Owner. When asked by this Review Examiner why the Owner did not personally attend the hearing, the Operations Manager stated that the Owner had a medical appointment.

The claimant refuted the Operations Manager’s testimony and provided that he was never issued a verbal warning. The claimant stated that he was spoken to by the Owner after the fourth time he borrowed money and that the Owner provided that the claimant should not borrow money unless he absolutely had to. The claimant testified that he was also told that he needed to call and ask for permission but that after several failed attempts at getting in contact with the Owner in the middle of the night, the claimant continued to borrow money and stopped calling.

Based on the totality of the testimony provided by both parties, the claimant’s testimony that he did not believe he was engaging in theft due to a prior agreement with the Owner, is credible. The Operations Manager did not refute the fact that the claimant may have had a prior agreement with the claimant. Further, the Operations Manager could not testify or recall the exact conversation between the claimant and the Owner that resulted in what the Operations Manager viewed as a “verbal warning.” The claimant explained that he was not told that his job was in jeopardy. Further, given the Owner’s “old school” mentality, it is likely that the claimant was allowed to continue behaving in this manner and was not notified that he was being issued a formal verbal warning or that his job was in jeopardy. For these reasons, the claimant’s testimony was accepted by this Review Examiner.

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 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 employer fired the claimant for theft. “The issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest.” Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.) Similarly, to be a knowing violation at the time of the act, the employee must have been “... consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy.” Still, 423 Mass. at 813.

Here, Consolidated Findings ## 10–14 provide that the employer's owner allowed the claimant to borrow cash if he needed it, provided the claimant called the owner to ask for permission, left a note, and repaid the money when he picked up his paycheck. The claimant did this about twelve times, and was not warned or disciplined, even after he stopped trying to reach the owner by telephone before taking the money. He always left a note and, apparently, until the last couple of times, always paid the employer back. *See* Consolidated Findings ## 14–16. In light of these facts, we agree that the claimant could reasonably believe that he was not doing anything wrong. *See* Consolidated Finding # 21. Because the claimant was not consciously aware that he was acting contrary to the employer's interest or in violation of an employer policy, he may not be disqualified under G.L. c. 151A, § 25(e)(2). *See Gold Medal Bakery, Inc. v. Comm'r of Division of Unemployment Assistance*, 74 Mass. App. Ct. 1105 (2009) *summary*

decision pursuant to rule 1:28 (holding that the employer's excusing past misconduct had led the claimant to "reasonably [believe] that [further misconduct] . . . would be excused as it had been before, and that [he] did not possess the requisite state of mind" to be disqualified for deliberate misconduct). *See also New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training*, 61 Mass. App. Ct. 532, 533–535 (2004) (holding that where the employer had overlooked the claimant's prior absences, and then discharged the claimant for excessive absences, the employer led the claimant "to believe that he would not lose his job for failing to adhere to the attendance policy's . . . requirements.")

Although the employer's operations manager testified that the employer wanted to put an end to this borrowing habit and had warned the claimant that he would be discharged if he continued, the review examiner did not find this testimony to be credible. Such assessments are within the scope of the fact finder's role, and, since it is reasonable in relation to the evidence presented, we decline to disturb it on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

We, therefore, conclude as a matter of law that because the employer has failed to show that the claimant knowingly violated the employer's policy or acted in wilful disregard of the employer's interest, it has not sustained its burden to disqualify the claimant 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 ending April 1, 2017, and for subsequent weeks if otherwise eligible.

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

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